

Texas Commission on Environmental Quality On-site Wastewater Treatment Research Council

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Agency at a Glance

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

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

*Amid ongoing challenges,
TCEQ needs additional
structure and tools to better
oversee Texas' environment.*

Council at a Glance

In 1987, the Legislature established the On-site Wastewater Treatment Research Council (Council) to award competitive research grants to:

- improve the quality and affordability of on-site wastewater treatment systems; and
- enhance technology transfer of on-site wastewater treatment through educational courses, seminars, symposia, publications, and other forms of information dissemination.

The Council also hosts an on-site sewage conference to present its research and help educate industry participants. Although the Council receives administrative support from the Texas Commission on Environmental Quality, it operates as an independent entity and has a separate 2011 Sunset date.

Summary

TCEQ has a large, complex, and difficult job and is no stranger to controversy. TCEQ must implement state environmental law while satisfying federal requirements in all major program areas, including air, water, and waste. At the time of the Sunset review of the agency, TCEQ was facing several challenges in implementing its many programs. The most serious of these challenges involve issues with the Environmental Protection Agency's (EPA) requirements for approval of federal programs, most notably TCEQ's air permitting program. Another challenge for TCEQ is the changing landscape of the industries that affect the environment, as seen in technological advances making natural gas drilling so widespread in the urban areas of North Central Texas in developing the Barnett Shale.

Amid these ongoing and substantial challenges to overseeing Texas' environment, the Sunset Commission's recommendations for TCEQ put structures in place to focus the agency on more effectively performing its core duties. The recommendations seek to ensure TCEQ has a more robust and focused public assistance function, can effectively identify and take action against regulated entities as appropriate, be better able to address water quantity issues as they become increasingly critical to the State, and has proper funding mechanisms to meet its regulatory responsibilities and be compliant with federal law.

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

Issue 1

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

The State needs regulation to protect Texas' environment. Texas' citizens and the economy benefit from having a state agency working to protect air and water quality, manage water quantity, ensure proper disposal of waste, and clean up contaminated sites. Moreover, although the federal government requires states to regulate the environment according to federal standards, Texas' state-specific approach to regulation – through TCEQ – allows it to tailor its efforts to the State's specific circumstances. The Sunset Commission examined whether structural changes could help focus TCEQ's work.

Recommendations

Change in Statute

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

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

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

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

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

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

Management Action

1.4 Direct TCEQ to amend its mission statement to include the concept of protecting public health.

This recommendation would direct TCEQ to amend its mission statement to read: "The Texas Commission on Environmental Quality strives to protect our state's public health and natural resources consistent with sustainable economic development. Our goal is clean air, clean water, and the safe management of waste." In effect, this change would replace the language in the agency's current mission statement relating to protecting the state's "human resources" with protecting the "public health."

Issue 2

TCEQ's Public Assistance Efforts Lack Coordination and Focus.

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

Recommendations

Change in Statute

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

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

TCEQ would assess the public assistance functions that currently exist within the Office of Public Assistance, OPIC, and other programs within the agency, and reorganize as appropriate. However, any coordinated effort would include initiatives related to all of the agency's responsibilities, not just to matters before the Commission. The agency would, at a minimum, create a structure to provide the public a centralized access point to the agency, and to ensure that the agency is able to strategically assess the public's concerns, and respond as necessary. Any centralized assistance program would not prevent public assistance from continuing to occur throughout agency programs, such as regional offices or specific programs, as is currently the case. This centralized effort also would not include that agency's process for investigating environmental complaints, which is appropriately centralized in the Office of Compliance and Enforcement.

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

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

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

2.3 Require the Commission to generally define, by rule, factors OPIC will consider in representing the public interest and establish OPIC's priorities in case involvement.

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

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

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

Management Action

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

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

Issue 3

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

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

However, this rigid, one-size-fits-all approach has resulted in a system that does not accurately measure performance, stripping compliance history classifications of meaning. Without a good, working standard that can truly identify good and bad actors, TCEQ cannot use compliance history to effectively target regulation.

Recommendations

Change in Statute

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

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

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

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

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

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

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

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

Management Action

3.4 Direct TCEQ to revise its rules on compliance history.

This recommendation directs TCEQ to develop a new compliance history method by rule and make necessary changes to the current points system and formula. TCEQ should redefine the poor, average, and high classifications in such a way as to be responsive to changes in entities' actual performance.

TCEQ should continue to assess compliance history annually. Also, TCEQ would be directed to reassess the effectiveness of the compliance history method on a regular basis, and within the parameters of statute, make changes to the rules as appropriate.

Issue 4

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

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

Recommendations

Change in Statute

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

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

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

4.2 Increase TCEQ's administrative penalty caps.

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

Recommended Penalty Cap Level

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

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

This recommendation would remove statutory provisions that prohibit TCEQ from approving Supplemental Environmental Projects (SEPs) that will bring a facility into compliance with law or remediate harm from violations. These statutory prohibitions would only be removed for local governments, which have limited resources and can put penalty dollars to better use in correcting the potential or actual environmental harm resulting from violations. In implementing this change, TCEQ would formulate a policy to clearly define when it would allow the use of SEPs for this purpose, to prevent regulated entities from systematically avoiding compliance. This policy would include an assessment of the entity’s financial ability to pay administrative penalties and the ability to come into compliance or remediate harm, and the need for corrective action.

Issue 5

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

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

In addition, while statute provides TCEQ with other water management tools, such as requiring water use data recordkeeping by water rights holders, the law stops short of allowing TCEQ to meaningfully

use this tool before requiring more drastic and disruptive restrictions that come with severe droughts or other emergencies. Statute also gives the agency authority to create waterwaster programs for managing water rights in river basins. The agency, however, has not regularly assessed the need for such programs, which could benefit additional river basins that may be susceptible to water shortages.

Recommendations

Change in Statute

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

This recommendation would clarify that, only during a water shortage or other emergency, the Executive Director may curtail a water right holder's water use or otherwise allocate water to maximize the beneficial use of state water. In allocating state water during an emergency, the Executive Director would minimize impacts to water rights holders and prevent waste or use in excess of a water right holder's permitted water amount. Under the recommendation, TCEQ would be required to adopt rules outlining how it will use the Executive Director's authority to curtail water usage during a water shortage, including criteria that would trigger curtailment.

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

This recommendation would require water rights permit holders to maintain water-use data on at least a monthly basis, and to make that information available to TCEQ staff upon request. Under the recommendation, water rights holders would not be required to submit monthly water-use reports to TCEQ, but only to maintain the information for the months that the water rights holder actually uses water under the permit. TCEQ would be able to request this information as needed in drought or other emergencies, but the water rights holder would not be required to regularly submit it any more frequently than annually, as is currently required by statute.

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

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

Issue 6

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

Leaking underground petroleum storage tanks (PSTs) are the biggest source of groundwater contamination in the state. TCEQ regulates and remediates PSTs, holding owners and operators responsible for proper installation and financial assurance, overseeing the cleanup of contaminated

sites, and administering the PST remediation trust fund to clean up PST sites in situations in which the owner or operator cannot be found or is unwilling or unable to pay.

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

Recommendations

Change in Statute

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

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

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

This recommendation would remove the expiration date for the PST fee from statute and change the current fixed fee levels to caps. The recommendation would require TCEQ to set the fee levels by rule, up to the cap in statute, at a level necessary to cover PST regulation and remediation costs as appropriated by the Legislature. In setting the fee in rule, the recommendation requires TCEQ to reduce the fee levels as appropriate to cover the costs of the program as appropriated by the Legislature, and as the cost of the PST program declines over time.

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

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

Issue 7

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

TCEQ is involved in funding the Low-Level Radioactive Waste Disposal Compact Commission, which is a separate legal entity from the State. The Compact Commission is responsible for establishing the

volume of compact waste to be disposed of in the low-level radioactive waste compact facility licensed by TCEQ to be built in Andrews County. Once this disposal facility is operating, as is expected within the next biennium, statute provides that the Compact Commission is funded by a portion of a disposal fee, to be adopted by TCEQ rule.

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

Recommendation

Change in Statute

7.1 Clarify the Compact Commission's funding mechanism.

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

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

Issue 8

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

While TCEQ's regulation of water and wastewater utilities is working in its current structure, the Sunset Commission found that significant opportunities could be realized from realigning the regulation of these utilities at the Public Utility Commission (PUC). Such a change would offer benefits from PUC's expertise in utility regulation and allow TCEQ to focus on its core mission of environmental regulation. Additional opportunities exist for improving consumer assistance and funding utility regulation at PUC.

Recommendations

Change in Statute

8.1 Transfer responsibility for regulating water and wastewater rates and services from TCEQ to PUC.

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

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

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

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

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

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

Under this recommendation, filing fees that currently reside at TCEQ for applications for rate changes, CCNs, and the sale, transfer, or merger of a CCN would be repealed. These fees cannot adequately cover the costs associated with these regulatory actions, and statute provides that the Utility Regulatory Assessment Fee cover regulatory costs associated with utilities and districts. To ensure the fee covers all regulatory costs, the recommendation would equalize the 0.5 percent customer assessment for

nonprofit utilities and utility districts at 1 percent – the same level as for public utilities. The increased revenue would cover the cost of utility rate regulation at PUC while also paying TCEQ's ongoing costs associated with its water resource management responsibilities.

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

8.3 Require the Office of Public Utility Counsel to represent residential and small commercial interests relating to water and wastewater utilities.

This recommendation would expand the role of the Office of Public Utility Counsel to represent the interests of residential and small commercial consumers in water and wastewater utilities matters. Under this recommendation, the Office of Public Interest Counsel at TCEQ would not be involved in water and wastewater utility matters at PUC.

8.4 Require PUC to make a comparative analysis of statutory ratemaking provisions under its authority to determine opportunities for standardization.

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

8.5 Require PUC to analyze the staffing requirements and report potential changes in staffing needs to the Legislative Budget Board and the Governor's budget office.

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

8.6 Require the regulatory agency overseeing water and wastewater utility rates to provide certain information about rate cases to rate payers.

This recommendation would require the regulatory agency with jurisdiction over water and wastewater utility rates to provide electronic copies, when available, of water rate cases obtained from the utility, and make them available at a reasonable cost to rate payers. This recommendation would be effective whether or not the Legislature ultimately decides to transfer water and wastewater utility regulation to PUC as envisioned in the recommendations above. If utility regulation were to remain at TCEQ, then TCEQ would be responsible for providing this information.

Issue 9

TCEQ's Dam Safety Program Focuses Too Much Effort and Resources on Oversight of Low-hazard Dams.

State law requires TCEQ to provide for the safe construction, maintenance, repair, and removal of dams. To do this, TCEQ has created a regulatory system in rule that classifies dams as low-, significant-, or high-hazard, which are measures of the potential for loss of life, property damage, or economic impact in the area downstream of the dam in the event of a failure. By definition, dams that are classified as low-hazard are dams in which no loss of life and minimal economic loss is expected in the event of failure, while dams that are classified as significant- or high-hazard have a greater impact on public safety or the economy. However, TCEQ requires low-hazard dams to adhere to regulatory requirements even though they pose little threat. Focusing TCEQ's regulation of dam safety on dams that have hazard level of significant and high, which are the dams that are of public safety concern, and whose failure could result in loss of life, would provide a more strategic approach to dam regulation.

Recommendations

Change in Statute

9.1 Provide that in implementing its dam safety regulations, TCEQ focus its efforts on the most hazardous dams in the state.

This recommendation would instruct TCEQ, in implementing its statutory duty to regulate dams, to focus its regulatory efforts on the most hazardous dams in the state, which pose public safety and economic threats. This recommendation would not remove dams that are classified as low-hazard from TCEQ's jurisdiction, rather it would focus the agency's efforts on the more significant dams.

Management Action

9.2 Direct TCEQ to exempt dams that are classified as low-hazard by TCEQ from adhering to TCEQ's hydrologic and hydraulic criteria.

This recommendation instructs TCEQ to exempt dams that it has classified as low-hazard from adhering to technical requirements as laid out in current TCEQ rule. This recommendation would not affect the technical criteria significant- or high-hazard dams are required to meet. The recommendation would not prevent TCEQ from reclassifying dams' hazard levels if necessary and requiring dams that were previously classified as low-hazard to meet technical criteria if they have been reclassified.

Issue 10

TCEQ Commission Members May Create an Appearance of Conflict if They Run for Elected Office While Sitting on the Commission.

The Texas Commission on Environmental Quality comprises three full-time Governor-appointed Commission members, who serve staggered, six-year terms. The Commission sets policy and adopts rules for the agency; and makes final decisions on permitting, enforcement, and other regulatory matters. Currently, if members of the Commission were to decide to run for elected offices, they would be able to maintain their position on the Commission. This would enable the member to make regulatory decisions related to Texas industry, and accept campaign contributions from persons with an interest in these decisions at the same time, creating the appearance of conflict.

Recommendation

Change in Statute

- 10.1 Require appointed officials serving as a member of the Texas Commission on Environmental Quality to resign from office before accepting any campaign contributions if running for elected office.**

This recommendation would require a member of the Texas Commission on Environmental Quality running for elected office to resign from office before accepting any campaign contributions.

Issue 11

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

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

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

Recommendations

Change in Statute

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

This recommendation would remove the On-site Wastewater Treatment Research Council and its Sunset date from statute, and transfer its grantmaking functions to TCEQ. The statute would authorize the Commission to administer and award grants for the same purposes currently allowed under the Council, and assume all existing Council grants, contracts, and projects. TCEQ would choose research topics, request and evaluate applications, and approve grant awards. To maintain the expertise currently provided by the Council, this recommendation would require TCEQ to seek input from stakeholder experts when choosing research topics, awarding grants, and holding the conference. The recommendation would move the Council's future fee revenue from undedicated general revenue to the Water Resource Management Account, a dedicated account within general revenue, to be appropriated by the Legislature. This would allow funding for the grant program to come out of the same account as TCEQ's other water quality programs, ensuring consistency and clarity in how the agency funds this function.

Management Action

11.2 Direct TCEQ to evaluate the benefits of on-site sewage research and clearly communicate them to the public.

This recommendation directs TCEQ to conduct evaluations of past or current projects routinely to determine if the results of that research have been useful to the public and the State's on-site sewage industry. The agency should also write brief descriptions of the purpose and potential benefits of the research projects it funds and post this and other information about the program on its website.

11.3 Direct TCEQ to form a working group to consider stakeholder input when issuing grants.

Under this recommendation, TCEQ should form a working group that would be active when the agency is performing this grantmaking function and needs technical expertise on the subject of on-site sewage facilities. The working group should be composed of a diverse group of stakeholders representing different geographical areas and technical expertise.

Fiscal Implication Summary

These recommendations will result in an overall revenue gain to the State of approximately \$35 million annually. Specifically, they result in a gain to general revenue of about \$560,000 per year, a gain to General Revenue Dedicated Account 153 – Water Resource Management Account – of about \$5.6 million per year, and a gain to General Revenue Dedicated Account 655 – the Petroleum Storage Tank Remediation Account – of about \$29 million per year. Other recommendations increase fee revenue or transfer funds, but will ultimately result in no net fiscal impact, based on expected appropriations to cover operational costs contemplated in the recommendations. The overall fiscal impact of these recommendations are summarized below.

- **Issue 1** – The recommendation to transfer responsibility for groundwater protection recommendations for oil and gas drilling from TCEQ to the Railroad Commission would require the transfer of approximately \$765,000 to the Railroad Commission to cover the costs of making these recommendations and to pay for the digital mapping project. In addition, nine full-time equivalent employees would need to transfer from TCEQ to the Railroad Commission.
- **Issue 4** – The recommendations regarding TCEQ enforcement tools will likely result in a small revenue gain to the State, but a precise estimate cannot be determined. While the recommendation to increase administrative penalty caps could increase penalties assessed and deposited into General Revenue, the amount would depend on specific violations and actual enforcement orders, which fluctuate from year to year and could not be estimated. The recommendation to allow TCEQ to approve Supplemental Environmental Projects for local governments to correct or remediate environmental harm may result in fewer administrative penalties deposited into General Revenue, but this reduction would be minimal.
- **Issue 6** – Overall, these recommendations pertaining to Petroleum Storage Tank regulations would have a positive fiscal impact to the State. Reinstating common carrier liability would add an estimated \$560,000 annually to General Revenue from administrative penalties for violating the law. Extending the PST remediation fee would add an estimated \$28.8 million to the PST

Remediation Fund in fiscal year 2012, up to \$29.5 million in fiscal year 2016, assuming the fees were charged at the current statutory caps. This change would prevent the Legislature from having to deplete the current fund balance of \$140 million.

- **Issue 8** – The recommendation transferring regulation of water and wastewater utilities from TCEQ to PUC would require the transfer of about \$1.5 million and 20 employees from TCEQ to PUC to conduct rate and CCN regulation and to provide needed consumer assistance. To cover these costs at PUC without relying on general revenue funding, a separate recommendation provides for equalizing the utility regulatory assessment for water supply corporations and districts at 1 percent. Beyond covering the costs of utility regulation at both TCEQ and PUC, ensuring all water and wastewater utilities pay the same assessment rate would increase revenue by about \$5.6 million annually.

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

- **Issue 11** – This recommendation would not have a fiscal impact to the State, but assumes that TCEQ would receive the current level of appropriations of \$330,000 annually for on-site sewage research, and would use a portion of appropriations for administrative costs as is current practice.

Fiscal Year	Gain to the General Revenue Fund	Gain to General Revenue Dedicated – Water Resource Management Account No. 153	Gain to General Revenue Dedicated – PST Remediation Fund No. 655
2012	\$560,000	\$5,600,000	\$28,827,000
2013	\$560,000	\$5,600,000	\$28,975,000
2014	\$560,000	\$5,600,000	\$29,152,000
2015	\$560,000	\$5,600,000	\$29,310,000
2016	\$560,000	\$5,600,000	\$29,486,000

