

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

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Summary

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 may affect the environment or human health; monitors and assesses air and water in Texas; develops plans to maintain and improve air and water quality; 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.

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 and other forms of information dissemination. Although the Council receives administrative support from the Texas Commission on Environmental Quality, it operates as an independent entity and has a separate Sunset date.

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

Sunset Provisions

1. Continue the Texas Commission on Environmental Quality and transfer certain oil- and gas-related regulatory activities to the Railroad Commission.

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

The bill transfers from TCEQ to the Railroad Commission the authority for making groundwater protection recommendations regarding oil and gas activities relating to three types of wells: oil and gas

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

The bill removes the existing fee provision in TCEQ's statute regarding surface casing recommendations and authorizes the Railroad Commission to charge a fee for groundwater protection determinations for oil and gas wells. In addition to this basic authority, the bill provides for the same expedited letter process at the Railroad Commission as currently exists at TCEQ, subject to the same expedited letter fee not to exceed \$75. As part of this provision, responsibility for digitizing drilling well maps will transfer from TCEQ to the Railroad Commission with clear authority added to the Railroad Commission's statute for this activity.

2. Coordinate and focus TCEQ's public assistance efforts.

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

House Bill 2694 requires the Commission, after considering recommendations from OPIC, to adopt rules that include factors to determine the nature and extent of the public's interest, and factors to consider in prioritizing OPIC's workload. The bill also provides for OPIC to formally report to the Commission, in time for the Commission to include in its own reports, information about the Office's performance in representing the public interest, its budget needs including the need to contract for outside expertise, and any legislative and regulatory recommendations. OPIC and the Commission must work cooperatively to identify internal performance measures to best assess the Office's effectiveness.

3. Revamp TCEQ's approach to compliance history to ensure it fairly and accurately measures entities' performance.

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

The Legislature modified the Sunset Commission provision relating to the factors that TCEQ uses in compliance history and added several new provisions to the bill related to TCEQ's use of compliance history. House Bill 2694 removes the requirement for components of compliance history to include consent decrees and criminal convictions under federal law related to compliance with legal requirements of the Environmental Protection Agency (EPA), and instead provides for consent

decrees and criminal convictions relating to violations of EPA rules to be included as components of compliance history to the extent they are readily available. In addition, the bill removes the requirement to include criminal convictions relating to violations of laws of other states. The bill requires TCEQ, in evaluating compliance history, to take into account both positive and negative factors related to the operation, size, and complexity of the site, including whether the site is subject to federal Title V requirements.

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

The Legislature added language requiring TCEQ to establish a set of standards for classification of compliance history in rule as a means of evaluating compliance history and authorizing TCEQ to consider the person's classification when using compliance history in regulatory actions. House Bill 2694 changes the classification category of "poor" performers to "unsatisfactory" performers, and defines "unsatisfactory" as performing below minimal acceptable performance standards established by TCEQ. The bill also changes the classification of "average" performers to "satisfactory" performers, and defines "high" performers as regulated entities that have an above-satisfactory compliance record. In setting standards for the classification of compliance history, TCEQ may establish a category of unclassified performers or regulated entities for which it does not have adequate information. The bill removes language that prohibited the Commission from performing announced inspections for persons whose compliance history is classified as the lowest classification.

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

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

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

4. Improve TCEQ’s ability to take appropriate enforcement actions, and bring predictability and transparency to TCEQ’s enforcement process.

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

Penalty Cap Level

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

The bill authorizes TCEQ to consider Supplemental Environmental Projects for local governments that would improve the environment, including bringing the respondent into compliance or remediating harm. The bill requires TCEQ to develop a policy to prevent regulated entities from systematically avoiding compliance. This policy will include an assessment of the entity’s financial ability to pay administrative penalties, the ability to come into compliance or remediate harm, and the need for corrective action.

5. Provide TCEQ with tools to effectively protect surface water availability during drought or emergency conditions.

House Bill 2694 authorizes the Executive Director to temporarily suspend a water rights holder’s water use or otherwise temporarily adjust the diversion of water to water rights holders, during a water shortage or other emergency. Legislative modifications to the Sunset provision clarify that such a suspension or adjustment will be in accordance with the first in time, first in right doctrine for surface water that is in current law. Specifically, the bill provides that in suspending or adjusting water rights, the Executive Director will ensure that the action taken will minimize the impact on water rights holders; maximize the beneficial use of water; prevent waste; consider the rights holder’s use of water conservation and

drought contingency plans required by law; conform with preferences of uses of surface water in current law; and not require the release of water that has already been diverted and stored according to a water rights permit. TCEQ must adopt rules, including defining a drought or other emergency shortage of water; and specifying the conditions under which the Executive Director may issue an order, the terms of the order including the maximum duration, and procedures for appealing an order.

The bill requires water rights permit holders to maintain water-use data on a monthly basis during the months the permittee uses water, and to make that information available to TCEQ staff upon request. TCEQ will be able to request this information as needed in drought or other emergencies, and the Legislature modified the Sunset Commission provision to allow TCEQ to ask for the information in response to a complaint. The Legislature also modified the provision to clarify that the water-use reporting provisions do not apply to the authority of watermasters, who have reporting authority elsewhere in statute.

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

6. Provide TCEQ with tools to prevent and remediate groundwater contamination from leaking petroleum storage tanks.

House Bill 2694 prohibits common fuel carriers from delivering regulated substances to tanks unless the tank has been issued a valid and current registration and certification from TCEQ, as provided for in other law. TCEQ may assess administrative penalties for violations, and the Commission must adopt rules to enforce this provision. The Legislature modified the Sunset Commission provision by creating an affirmative defense if the person delivering the fuel relied on a valid, paper certificate shown or displayed by the owner/operator; a temporary delivery authorization; or information obtained from TCEQ's website not more than 30 days before the delivery.

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

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

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

7. Create a structure to fund the Texas Low-Level Radioactive Waste Disposal Compact Commission.

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

8. Eliminate three existing water and wastewater utility application fees, and make rate case information electronically available.

House Bill 2694 contains part of the Sunset Commission provision related to funding utility regulation at TCEQ, but does not include any adjustment in the regulatory assessment fee level. The bill repeals filing fees for applications for rate change; Certificates of Convenience and Necessity (CCNs); and the sale, transfer, or merger of a CCN. The Legislature added language to provide that assessments collected may be appropriated by rider to an agency with duties related to water and sewer utility regulation or to an agency with a duty to represent residential and small commercial consumers.

The Legislature modified a Sunset Commission provision to require the regulatory agency overseeing water and wastewater utility rates to provide electronic copies of all water rate case information obtained from the utility upon request and at a reasonable cost, to the extent that the information is electronically available and not confidential. The bill also requires information provided to the regulatory agency to be provided to the Office of Public Utility Counsel, upon request, at no cost. However, separate legislation giving the Office responsibility for representing consumers in water utility matters did not pass.

9. Focus TCEQ's dam safety program on high-hazard dams, and exempt certain low- and significant- hazard dams from regulation.

House Bill 2694 provides that in implementing its dam safety regulations, TCEQ focus its efforts on the most hazardous dams in the state. The Legislature added to the Sunset Commission provision to exempt from safety requirements dams that are on private property, not located within a municipality, have a maximum capacity of less than 500 acre feet, are classified as low or significant hazard, and are in a county with population of less than 215,000. Dam owners will still have to comply with maintenance and operation requirements. These exemption provisions expire in four years.

The bill also authorizes TCEQ to enter into a compliance agreement with a dam owner who is required to reevaluate the adequacy of an existing dam because of a hazard reclassification by TCEQ. The compliance agreement may include timeframes to bring the dam into compliance with TCEQ's criteria and could include compliance deferral, if the Commission determines that it is appropriate.

10. Require members of the TCEQ Commission to resign from office if running for elected office.

House Bill 2694 requires a member of the Texas Commission on Environmental Quality running for elected office to resign from office before accepting any campaign contributions.

11. Abolish the On-site Wastewater Treatment Research Council, and transfer the authority to award grants for on-site sewage research to TCEQ.

House Bill 2694 removes the On-site Wastewater Treatment Research Council and its Sunset date from statute, and transfers its grantmaking functions to TCEQ. The bill authorizes TCEQ to administer and award grants for the same purposes currently allowed under the Council, and assume all existing Council grants, contracts, and projects. TCEQ must seek input from stakeholder experts when choosing research topics, awarding grants, and holding the educational conference. The bill moves the Council's future fee revenue from undedicated General Revenue to the Water Resource Management Account.

Provisions Added by the Legislature

12. Amend the process for contested case hearings for permits, including party status.

House Bill 2694 requires the Executive Director to participate as a party in contested case hearings at the State Office of Administrative Hearings. The Executive Director's role in a contested case hearing is to provide information to complete the administrative record and to support the Executive Director's position developed in the proceeding. A state agency, not including a river authority, may not contest the issuance of a permit, but may submit comments. Finally, the bill requires all discovery to be completed before the prefiled testimony deadline in a contested case hearing at the State Office of Administrative Hearings, with the exception of water and wastewater utility ratemaking hearings.

13. Create an expedited public hearing process for permit amendment applications for electric generating facilities to comply with Maximum Achievable Control Technology standards.

The bill requires TCEQ to provide an opportunity for public hearing and comment, in accordance with current law for federal operating permits, for permit amendment applications to allow electric generating facilities to comply with Maximum Achievable Control Technology (MACT) standards. The bill requires TCEQ to issue a draft permit within 45 days of receiving the application; requires submission of requests for a contested case hearing within 30 days of the draft permit's issuance; and provides that if a hearing is requested, TCEQ must issue or deny a permit within 120 days of the draft permit's issuance. The bill provides for notice, motions for rehearing, and judicial review in accordance with current law. The Commission must adopt rules for this process within 180 days of the effective date of the bill. These provisions expire on the sixth anniversary of the date the Environmental Protection Agency approves MACT standards.

14. Create timelines for TCEQ to review and approve amendments to certain water management plans.

The bill addresses TCEQ's review of certain applications to amend water management plans. The provision applies to an application consisting of a reservoir operation plan for the operation of two water supply reservoirs, for a plan that was originally required by court order adjudicating the water rights for those reservoirs. The bill requires the Executive Director to complete a technical review

within one year of the application's administrative completion. The bill allows the applicant 30 days to provide additional information to TCEQ and provides for a tolling period. House Bill 2694 provides for public comment opportunities, and requires the Commission to act on a hearing request and the application within 60 days.

15. Expand the Water Code's definition of agriculture to include aquaculture.

House Bill 2694 expands the definition of agriculture to include aquaculture, defined as the business of producing and selling cultured species raised in private facilities, for the purposes of TCEQ's water rights regulation.

16. Change the requirements for water district financial reporting to TCEQ.

The bill changes the threshold, from \$100,000 to \$250,000, in gross receipts collected by a water district for it to be able to elect to file an annual financial report with TCEQ instead of a full financial audit.

17. Amend rate change notification requirements for certain utilities.

House Bill 2694 extends time for notification of a rate change to rate payers for a municipally owned utility or political subdivision to 60 days, instead of the 30 required by current law. The bill also authorizes municipally owned utilities or political subdivisions to provide the notice electronically.

Fiscal Implication Summary

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

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

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

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

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

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

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

