

EXECUTIVE SUMMARY OF SUNSET STAFF REPORT

Texas Commission on
Environmental Quality
Texas Low-Level
Radioactive Waste Disposal
Compact Commission

Project Manager: Robert Romig

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

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

Confronted with conflicting viewpoints and demands, TCEQ's commissioners have in some ways become reluctant regulators. The commission often acts more as a final arbiter, delegating much of the initial decision making to staff and, to a certain extent, encouraging industry members to self-govern and self-police. TCEQ, though, is the entity designated by the

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Examples of What TCEQ Does and Does Not Regulate

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

Legislature, with its commissioners appointed by the governor, to make the hard policy choices directly impacting the environment. The commissioners’ lack of visibility in and ownership of TCEQ decision making has only inspired further frustration and distrust among both the regulated community and environmental advocates. To better address these frustrations, help improve transparency, and restore trust, the commission should adopt key policy decisions, such as what risks to public health are acceptable when granting permits, in a public setting. The agency also needs to reform its processes to provide a more meaningful opportunity for public input in its permitting and rulemaking decisions, and enhance its public information practices to improve transparency of its operations.

Notwithstanding the limitations in TCEQ’s authority, as the state has experienced growth in development that has stretched outward from urban centers to more rural areas, local governments and members of the public place increasing demands upon TCEQ as the most visible state entity protecting the environment. Agency staff are spread thin responding to anything from overturned tanker

trucks and smoking gas flares to dust and bad smells in the air — whether or not a potential source of contamination exists or is under TCEQ’s jurisdiction, as reflected in the textbox. To that end, the review focused on reducing the time TCEQ investigators spend on nuisance complaints with no threat to public safety and improving enforcement policies to better focus on the riskiest actors. In addition, given how Texas’ unprecedented growth and susceptibility to drought have intensified pressure on water availability, the review also studied shortcomings in TCEQ’s regulation of the state’s water. Accordingly, the review recommends statutory changes to improve the process for setting environmental flow standards, and directs TCEQ to take more transparent and decisive action to address chronic nonuse of surface water.

Sunset staff also reviewed the Texas Low-Level Radioactive Waste Disposal Compact Commission, which is subject to review but not abolishment under the Sunset Act. Under the terms of a compact between Vermont and Texas, the compact commission approves and monitors the importation and exportation of low-level radioactive waste in these two states and the disposal of the waste at a facility in Andrews County licensed by TCEQ and operated by a private company. Considering the importance of monitoring such a hazardous material and the interest of the state in overseeing the compact’s implementation, Sunset staff recommends extending the compact commission’s Sunset date for 12 years.

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

Sunset Staff Issues and Recommendations

ISSUE 1

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

As the primary environmental regulator in Texas, people rely on TCEQ to protect their health and the environment, but shortcomings in transparency and meaningful public participation contribute to public distrust of the agency. By delegating the setting of environmental standards and other key policy decisions to staff, TCEQ's commission makes it harder for the public to understand and engage in the agency's regulatory functions. During permitting of industrial facilities and other activities that may impact neighboring communities, the timing of public meetings further inhibits the public's opportunity for meaningful input. Also, unclear rules as to who is eligible to contest a permit confuse and frustrate those trying to participate. Finally, improvements to TCEQ's public engagement practices, including its rulemaking process, website, and use of advisory committees would increase the effectiveness of public engagement in its regulatory processes and help bolster the relationship between TCEQ and the general public.

Key Recommendations

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

ISSUE 2

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

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

administrative processes and the increasing strain of nuisance-based complaint investigations further diminish TCEQ's ability to effectively monitor compliance and initiate necessary enforcement processes.

Key Recommendations

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

ISSUE 3

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

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

Key Recommendations

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

ISSUE 4

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

Statute creates the Office of Public Interest Counsel (OPIC) within TCEQ to promote the general public interest in proceedings before the commission. While OPIC has the authority to hire outside

expert consultants to assist on complex, highly technical contested cases before the commission, an inefficient procurement process prevents OPIC from using this resource. Additionally, the commission does not take formal action on OPIC's annually-reported rule change recommendations, missing an opportunity to ensure additional transparency and promote public trust. Improving these two processes would increase OPIC's effectiveness overall.

Key Recommendations

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

ISSUE 5

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

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

Key Recommendations

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

ISSUE 6

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

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

Key Recommendation

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

Fiscal Implication Summary

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

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

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

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