

SUBJECT: Continuing the TCEQ, abolishing wastewater treatment research council

COMMITTEE: Environmental Regulation — committee substitute recommended

VOTE: 6 ayes — W. Smith, Aliseda, Chisum, Hancock, Legler, Lyne,
2 nays — Farrar, Burnam
1 absent — Reynolds

WITNESSES: For — Eric Allmon, Texas Center for Policy Studies; Carol Batterton, Water Environment Association of Texas; Walt Baum, Association of Electric Companies of Texas; Elton Bomer; David Cortez, Ex-ASARCO workers - Carlos Rodriguez, Patrick Garza, Danny Arellano, Efrain Martinez, and the Get the Lead Out Coalition in El Paso, TX.; Joseph Ely, Rev. Dr. Jim Ely; Stephen Minick, Texas Association of Business; Chris Newton, Texas Petroleum Marketers and Convenience Store Association; Cyrus Reed, Lone Star Chapter, Sierra Club; Dean Robbins, Texas Water Conservation Association; Robin Schneider, Texas Campaign for the Environment; Matthew Tejada, Air Alliance Houston; Allison Sliva; Ralph Duggins; (*Registered, but did not testify:* Laura Blackburn, League of Women Voters of Texas; Thure Cannon, Celina Romero, Texas Pipeline Association; Ceil Price, City of Houston; William Stout, Greater Edwards Aquifer Alliance; Luke Metzger, Environment Texas; Mari Ruckel, Texas Oil and Gas Association; Mary Schultz; Madeleine Crozat-Williams)

Against — Christine Wilson

On — Joe B. Allen, Association of Water Board Directors; Mel Caraway, Texas Impact; Robert L. Cervenka; Lauren Crawford, Texas Municipal League; Karen Hadden, Sustainable Energy and Economic Development Coalition; Donna Hoffman; Margaret Keliher, Texas Business for Clean Air; Melanie Lantrip; Paul Rolke, Robertson County: Our Land, Our Lives; John Sadlier, Texas Commission on Environmental Quality; Tom “Smitty” Smith, Public Citizen; Joseph Tucker, Linda Tucker, East Texas Coalition for Clean Air; Mark Vickery, Texas Commission on Environmental Quality; Christina Wisdom, Texas Chemical Council; Bob Thompson; (*Registered, but did not testify:* Whitney Bodman and Randall

Smith, Texas Impact; Ilan Levin, Environmental Integrity Project; Vicki Wolf; Jo Cervenka)

BACKGROUND: The Texas Commission on Environmental Quality (TCEQ) was created in 1993 by consolidating regulatory programs for air, water, and waste disposal and cleanup into the Texas Natural Resource Conservation Commission. The Legislature renamed the agency the Texas Commission on Environmental Quality (TCEQ) in 2001.

TCEQ serves as the state's umbrella agency to regulate environmental quality. TCEQ has regulatory oversight of air emissions, water use, wastewater discharges, and radioactive and solid waste disposal. The agency issues permits or other authorizations for activities that have actual or potential environmental or human health impacts, such as air emissions, wastewater discharges, and waste disposal. It also has programs affecting water quantity and water rights. TCEQ conducts monitoring for air and water quality and develops plans to maintain and improve quality, inspects facilities, investigates complaints, and ensures compliance with state and federal laws and regulations voluntarily and through enforcement action. The agency also provides technical and financial assistance through grants and oversees the remediation of contaminated sites.

TCEQ has three full-time commission members who are appointed by the governor and serve staggered, six-year terms.

TCEQ's executive director oversees agency operations. The agency had a total of 2,935 employees in 2009, with 843 located in field offices around the state. TCEQ has 16 regional offices, two satellite offices, and one field lab.

In fiscal 2009, the TCEQ spent about \$659 million. About 90 percent of that revenue was derived from 99 fees deposited into 14 general revenue-dedicated accounts. About 56 percent of the money appropriated to TCEQ in the last biennium was pass-through funding, including grants to other agencies, entities, or the public.

TCEQ last underwent Sunset review in 2001 and was continued by the 77th Legislature. The agency is subject to the Texas Sunset Act and is scheduled to expire September 1, 2011, unless continued by the Legislature.

On-site Wastewater Treatment Research Council. The On-site Wastewater Treatment Research Council was established by the Legislature in 1987 to award competitive research grants to improve the quality and affordability of on-site wastewater treatment systems and to 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.

The council has 11 members who are appointed by the governor and serve staggered, two-year terms. The members meet once a quarter, and their main duties include prioritizing research topics and awarding grants.

The council receives funding from a \$10 fee on permits to construct on-site sewage facilities. The fee is charged by TCEQ or local governments with TCEQ-delegated on-site sewage programs. TCEQ collects the fee and deposits it into general revenue. The Legislature appropriates funding to the council through a rider under TCEQ's appropriation in the general appropriations act. In fiscal year 2009, the council spent \$333,484 on research grants, technology transfer, and administrative costs.

The council has no staff but pays about \$54,000 each year to contract with TCEQ for administrative support, including two administrative staff who provide services equivalent to one full-time employee. The council operates as an independent entity.

The On-site Wastewater Treatment Research Council last underwent Sunset review in 1989 and was continued by the 71st Legislature. The council is subject to the Texas Sunset Act and is scheduled to expire September 1, 2011, unless continued by the Legislature.

DIGEST:

CSHB 2694 would continue the TCEQ until September 1, 2023. The On-site Wastewater Treatment Research Council would be abolished and its authority and duties transferred to TCEQ.

The bill would make adjustments to the operations of the TCEQ by:

- adding standard Sunset provisions governing negotiated rulemaking and alternative dispute resolution;
- requiring a member of the commission to resign from appointed office before accepting a campaign contribution for elected office;

- requiring TCEQ to focus its efforts on the most hazardous dams in the state when implementing its dam safety regulations;
- transferring groundwater protections regarding oil and gas activities to the Railroad Commission;
- establishing a program to provide assistance and education to the public and focusing the duties of the Office of Public Interest Counsel;
- amending current standards in evaluating compliance history;
- revising the Regulatory Flexibility Program;
- requiring adoption of a general enforcement policy
- increasing administrative penalties for regulatory violations;
- authorizing use of supplemental environmental projects;
- increasing TCEQ's authority in regulating petroleum storage tanks;
- defining instances when TCEQ could curtail water rights,
- requiring evaluation of the need for additional watermaster programs in the state;
- requiring water use reporting;
- revising the Texas Low-Level Radioactive Waste Disposal Compact Commission's funding mechanism;
- adjusting the water utility regulatory assessment fee for all utilities;
- requiring that water rates cases be available electronically to rate payers; and
- repealing certain utility fees.

Resign to run. CSHB 2694 would prohibit a member of the commission from accepting a contribution for a campaign for elected office. A member who did so would be considered to have resigned from office and the office would immediately become vacant.

Petroleum storage tank program. The bill would allow TCEQ to award direct contracts for petroleum storage tank remediation projects, under certain circumstances, if a person was performing related work at the site on or before July 1, 2011.

Dam safety. CSHB 2694 would require TCEQ to focus its efforts on the most hazardous dams in the state when implementing its dam safety regulations.

Transfer of certain groundwater protections to Railroad Commission (RRC). The bill would transfer authority for making groundwater

protection recommendations for oil and gas activities, including requirements for the depth of surface casing for wells, from TCEQ to the Railroad Commission (RRC).

The RRC would be required to issue, on request of a permit applicant, a letter determining the total depth of surface casing required for the well to protect groundwater. It could charge a fee for a letter of determination and an additional fee up to \$75 to expedite the letter.

The RRC would be required to work with other state agencies to study and evaluate electronic access to geologic data and surface casing depths necessary to protect usable groundwater. Money collected from fees on expedited determination letters could be used for these studies.

The RRC would be required to adopt rules by March 1, 2012.

Public education and assistance. CSHB 2694 would remove the charge of ensuring that TCEQ was responsive to environmental and citizens' concerns, including environmental quality and consumer protection, from the Office of Public Interest Counsel and instead charge the TCEQ executive director with the duty. The executive director would be required to develop and implement a program to:

- provide a centralized point for the public to access information about TCEQ and matters regulated by TCEQ;
- identify and assess concerns of the public; and
- respond to the concerns.

Office of Public Interest Counsel. The bill would focus the Office of Public Interest Counsel's (OPIC) efforts on representing the public interest in matters before the TCEQ.

OPIC would be required annually to report to the TCEQ on OPIC's performance in representing the public interest, budget needs, and legislative and regulatory recommendations for inclusion in the TCEQ's legislative appropriations request, and other relevant reports. TCEQ and OPIC would be required to work together to identify performance measures for OPIC.

TCEQ would be required to define, by rule, factors the public interest counsel would have to consider in representing the public interest,

including the nature and extent of the public interest and the prioritization of OPIC's workload.

Compliance history. CSHB 2694 would remove the single uniform standard in statute for determining compliance history and would specify that TCEQ would be required, by rule, to develop new standards for evaluating and using compliance history.

TCEQ would be required to establish the new standard for evaluating compliance history by September 1, 2012. Until TCEQ adopted that method, the current standard for evaluating compliance history would be used.

The bill would allow the owner or operator of a site 30 days to review and comment on compliance history before compliance performance information about a site would become public.

Using classification as a means for evaluating compliance history. CSHB 2694 would require TCEQ to establish, by rule, a set of standards for the classification of a person's compliance history as a means of evaluating compliance history. The bill would allow TCEQ to consider a person's classification when using compliance history in decisions regarding permits, enforcement, use of announced inspections, and participation in innovative programs.

In using a person's compliance history classification for enforcement purposes, the components used to determine that classification could not be used individually for penalty enhancement or escalation.

The bill would remove some components of compliance history and add other factors, including operations, size, and complexity.

The bill would change the classification categories from "poor," "average," and "above-average" to "unsatisfactory," "satisfactory," and "above-satisfactory." "Unsatisfactory" would be below the minimally acceptable performance standards

Lack of compliance information. HB 2694 would remove the requirement that TCEQ assess the compliance history of entities for which TCEQ did not have adequate compliance information, but would continue to authorize TCEQ to require a compliance inspection.

TCEQ would be allowed to establish a category of unclassified performers, which would be regulated entities for which the TCEQ did not have adequate compliance information about a site. The rules would have to take into account positive and negative factors related to the operation, size, and complexity of the site, including whether the site was subject to Title V federal air permits.

Repeat violators. The bill would change the way a repeat violator was classified for the purposes of compliance history by giving consideration to size as well as complexity of the site where the violations occurred and by limiting consideration to violations of the same nature and environmental media that occurred in the preceding five years.

Regulatory flexibility program. The bill would allow TCEQ to exempt an applicant from rules for the control or abatement of pollution if the applicant proposed an alternative method that was *as* protective, rather than *more* protective, of the environment and public health as the standard method. The applicant would have to present TCEQ with evidence to this effect before being exempted.

Enforcement policies. TCEQ would be required to adopt a general enforcement policy, by rule, and regularly to assess, update, and publicly adopt specific enforcement policies, including the calculation of penalties. TCEQ would be required to make policies public, including posting the policies on the TCEQ website.

Use of violation notices to enhance penalties. In using compliance history to enhance penalties, TCEQ would be prohibited from using notices of violation unless TCEQ took subsequent action or the person was a repeat violator.

Self-reported deviations or violations could not be included as notices of violations in compliance history unless the TCEQ issued an actual written notice of violation. Final orders or judgments resulting from self-reported violations could be considered in compliance history.

If TCEQ included a notice of violation in a compliance history, the listing would have to be preceded with the qualifying statement stated in the bill.

Increased administrative penalties. The bill would increase the administrative penalties for violations under the jurisdiction of TCEQ that had a cap of \$10,000 a day for each violation to between \$50 and \$25,000 a day for each violation.

The bill specifically would increase the occupational licensing, plumbing fixtures, and used oil-related penalties from a cap of \$2,500 a day for each violation to between \$50 and \$5,000 a day for each violation.

The administrative penalty for water rates violations would increase from a cap of \$500 a day to a range of \$100 to \$5,000 a day.

These penalties would apply only to violations that occurred on or after September 1, 2011.

Supplemental environmental projects to offset penalties. TCEQ could approve supplemental environmental projects for local governments that would improve the environment, including bringing the respondent into compliance or remediating harm.

TCEQ would be required to develop a policy to prevent regulated entities from avoiding compliance through the use of supplemental environmental projects, including an assessment of the respondent's ability to pay penalties, ability to remediate harm or come into compliance, and the need for corrective action.

Regulation of petroleum storage tanks.

Delivery to uncertified tanks. CSHB 2694 would prohibit the delivery of any regulated substance into an underground storage tank unless the tank had been issued a valid, current registration and certificate of compliance. TCEQ could impose a penalty for violations and would be required to adopt enforcement rules.

This change would apply only to a delivery to a storage tank made on or after September 1, 2011.

Removal of storage tanks. TCEQ would be authorized to undertake corrective action to remove a storage tank that was not in compliance, was out of service, presented a contamination risk, and was owned or operated by a person who was financially unable to remove the tank. TCEQ would

adopt rules for tank removal, including rules on financial ability to pay and assessment of potential contamination risk. The bill would expand the use of the petroleum storage tank remediation account for associated expenses.

Petroleum storage tank remediation fee. CSHB 2694 would reauthorize the fee on the delivery of certain petroleum products and would change the current fee levels to caps.

TCEQ would be required, by rule, to set the amount of the fee at no more than the amount necessary to cover the agency's cost to administer the program, as indicated by the amount appropriated by the Legislature from the petroleum storage tank remediation account for that purpose.

The current fees relating to the delivery of petroleum products would remain in effect until TCEQ adopted rules.

Water use reporting. CSHB 2694 would require a water rights holder to maintain monthly water-use information. TCEQ would be allowed to access the information on request, but only during a drought or other emergency shortage of water. A water rights holder would not be required to submit monthly reports with the required annual report. This requirement would not affect the authority of a watermaster to obtain water use information under other law.

Curtailement of water use. During a period of drought or other emergency shortage of water, TCEQ could temporarily suspend the right of any person who held water rights and adjust the allocation between water rights holders. In ordering a suspension or reallocation, TCEQ would have to ensure that the action taken maximized the beneficial use of water, minimized the impact on water rights holders, and prevented the waste of water. TCEQ would be required to adopt rules to implement these actions, including rules determining the conditions under which these actions could be taken.

Additional watermaster programs. TCEQ would be required to evaluate the need for additional watermaster programs at least every five years and make recommendations. TCEQ would be required to determine factors to be considered in this evaluation and to include findings and recommendations in its biennial report to the Legislature.

Funding Texas Low-Level Radioactive Waste Disposal Compact

Commission. CSHB 2694 would amend the Health and Safety Code by adding that the compact waste disposal fees adopted by TCEQ be sufficient to provide an amount necessary to support the activities of the Texas Low-Level Radioactive Waste Disposal Compact Commission. The bill would create a Low-Level Radioactive Waste Disposal Compact Commission general revenue account. TCEQ would deposit into the account the portion of the compact waste disposal fee that was calculated to support the activities of the compact commission. Money in the account could be appropriated only to support the operations of the compact commission.

Increased water utility regulatory assessment fees. CSHB 2694 would increase the regulatory assessment fee required to be collected from retail customers by their water and sewer utilities from 0.5 percent of the charge for service to a full one percent of the charge for service. These assessments could be appropriated by rider in the general appropriations act to an agency with water and sewer utility regulation duties to be used for costs and expenses incurred in the regulation.

These changes would only apply to a fee assessed on or after January 1, 2012.

Repeal of certain utility fees. The bill would eliminate three existing water and wastewater utility application fees relating to applications for rate changes, certificates of convenience and necessity (CCNs), and the sale, transfer, or merger of a CCN.

Abolition of the On-site Wastewater Treatment Research Council.

CSHB 2694 would abolish the On-site Wastewater Treatment Research Council and transfer its authority to award grants, the administration of all existing grants, and other associated activities and contracts to TCEQ. TCEQ would be required to seek the advice of relevant experts when choosing research topics, awarding grants, and holding educational conferences. The bill would move the council's fee revenue to the water resources management account.

Electronic copies of water and sewer rate information. Upon request, the TCEQ would be required to provide electronic copies of all non-confidential information provided to the agency regarding water and sewer rates.

Effective date. The bill would take effect September 1, 2011.

SUPPORTERS
SAY:

Transfer of certain groundwater protections to RRC. CSHB 2694 would transfer certain groundwater protections to the Railroad Commission (RRC). Currently, TCEQ's role in making groundwater protection recommendations for oil and gas drilling activities creates confusion regarding the RRC's ultimate oversight responsibility.

TCEQ provides recommendations to RRC on the production of oil and gas and the injection of oil and gas waste. Letters on surface casing recommendations for oil and gas drilling from TCEQ do not have the force of law and are not enforceable by TCEQ. Further, the responsibility for controlling groundwater pollution associated with oil and gas production as well as the authority for enforcing surface casing requirements on producers is the responsibility of the RRC, not TCEQ. TCEQ's middleman role in making surface casing recommendations is unnecessary and should be transferred to the RRC.

Also, TCEQ does not have statutory authority to digitize well drilling maps. TCEQ's role in these tasks is unnecessary and drains resources to provide a product for use by the RRC and not TCEQ. This duty should also be transferred to the RRC.

Public education and assistance. TCEQ's public assistance functions currently are divided 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 TCEQ 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.

CSHB 2694 would focus and strengthen both the agency's public assistance function and OPIC's duties. Creating a centralized structure for public assistance would allow TCEQ to be more responsive to the public's questions and proactively identify environmental concerns. Also, focusing OPIC's work on representing the public interest in TCEQ proceedings

would allow OPIC more effectively to use its resources to provide the public interest perspective to TCEQ when it is making decisions.

Compliance history. TCEQ's rigid, one-size-fits-all approach to measuring regulated entities' compliance history 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 target regulation effectively. CSHB 2496 would be an attempt to remove some of the statutory roadblocks that have negated the practical use of this important regulatory tool and would allow TCEQ to revamp its approach to compliance history.

Enforcement policies. TCEQ's enforcement policies are unclear, limiting regulated entities' and the public's ability to understand enforcement decisions. Very little of TCEQ's general approach to enforcement is in agency rule, including when and how it applies enforcement sanctions. Without a clear, updated penalty policy, people cannot know how the agency calculates penalties. In addition, without a clear penalty policy, TCEQ or the State Office of Administrative Hearings, which conducts hearings on TCEQ enforcement cases, risk applying penalties inconsistently in the future. CSHB 2694 would require TCEQ to lay out its approach to enforcement and adopt it in rule. TCEQ would be required regularly to assess, update, and adopt its enforcement policies, including its penalty policy.

Increased administrative penalties. CSHB 2694 would increase 20 of TCEQ's administrative penalty caps to match the cap levels in statute for civil penalties for the individual programs. Increasing the penalties to exceed the economic benefits for permit violations would aid in deterring violations.

The bill would not intend for TCEQ automatically to assess the maximum penalty for violations simply because the cap would be higher. Instead, TCEQ should revise its penalty policy to include the higher caps, but only assess penalties at the higher level if the calculation warranted such an increase. Given that TCEQ has encountered problems with hitting the penalty cap only in the most severe violation categories, with the proposed penalty cap of \$25,000, under current policy TCEQ would see a change only with the most serious violations.

Water rights. Current statute does not expressly articulate TCEQ's duties to enforce the allocation of water to permit holders in areas without a watermaster program. There currently are only two watermaster programs in the state.

Current law also does not expressly state under what circumstances TCEQ may curtail the right to divert state water under a water right to ensure senior rights are protected and adequate water supplies are available for domestic and municipal needs. TCEQ's express statutory authority to suspend permit conditions in times of drought or other emergency is limited to permit conditions relating to instream uses or beneficial flows to bays and estuaries. A suspension under this authority makes the water temporarily available for other essential beneficial uses.

Because time is critical during a water shortage or drought emergency, statutory authority related to water diversions does not allow for TCEQ to efficiently address water rights issues that arise during a water shortage in those areas where a watermaster has not been created.

CSHB 2694 would clarify current law concerning TCEQ's authority to curtail water rights during a period of drought or other emergency shortage of water. It also would require TCEQ to evaluate the need for additional watermaster programs at least every five years. The bill would require water use reporting by water right holders during a drought or other emergency shortage of water to more adequately manage the inventory of water resources.

Funding Texas Low-Level Radioactive Waste Disposal Compact

Commission. The Texas Low-Level Radioactive Waste Disposal Compact Commission employs an executive director, and its members are entitled to reimbursement for expenses in performing their duties.

However, the compact commission currently has no appropriations pattern or full-time equivalent positions. The compact commission currently is funded by a pro rata share between Texas and Vermont, the member states, with Texas providing 75 percent of funding. In Texas, the Compact Commission is funded through a rider in TCEQ's appropriation pattern, which provides for \$100,000 for each of fiscal years 2010 and 2011. Under this arrangement TCEQ provides expense reimbursements to the compact commission under a contract.

CSHB 2694 would clarify the compact commission's funding mechanism by allocating a portion of the compact waste disposal fee that is calculated to support the costs and operations of the compact commission.

Abolition of On-site Wastewater Treatment Research Council. The On-site Wastewater Treatment Research Council has provided a valuable service to Texas in volunteering its time and expertise in guiding the grant process for on-site sewage research in Texas. While the state continues to benefit from this research, Texas does not need a separate, stand-alone council to fund on-site sewage research. The council, without a staff of its own, receives all of its administrative support from TCEQ through interagency contract. Also, TCEQ administers other, similar, grant programs and has structures in place to assume this grant program with appropriate stakeholder input. Given this, it is appropriate to abolish the council and transfer its authority to award grants for on-site sewage research to TCEQ.

OPPONENTS
SAY:

Transfer of certain groundwater protections to RRC. The protection of groundwater is a direct responsibility of TCEQ, and the responsibility of protecting groundwater during oil and gas activities should remain within its authority.

It is not clear or certain that the RRC, which currently is underfunded and overloaded with existing duties, would provide a thorough oversight of this issue. The RRC also has had a history of being unresponsive to interested parties and is three or four years behind on the investigation of some complaints filed with the agency. Transferring the oversight of groundwater protection to the RRC could compromise groundwater protections and make it more difficult for interested parties to participate in the process.

Public assistance and education. The Legislature should ensure that the Office of Public Interest Counsel (OPIC) within TCEQ is able to fully represent the public interest and that OPIC's ability to present an independent perspective on issues that come before TCEQ is protected. CSHB 2694 would remove from OPIC the duty of being responsive to environmental and citizens' concerns, including environmental quality and consumer protection, and give it to the executive director of TCEQ. This could be a barrier to the public because TCEQ historically has been unresponsive to citizens' concerns.

Also, under CSHB 2694, OPIC no longer would be able to offer general information and assistance to the public, but instead would be able to represent the public interest only after considering factors determined by TCEQ. Requiring OPIC to consider factors before being able to represent the public interest could limit OPIC's performance of its duties. The purpose of OPIC is to ensure that TCEQ promotes the public interest, and CSHB 2694 would stifle this purpose.

Compliance history. The original version of the bill would have put enforcement in rule and removed the single uniform standard currently in statute for determining compliance history. These simple changes were all that was needed to allow TCEQ to have a workable compliance history equation. CSHB 2694 would make further changes that would limit TCEQ's compliance history options in statute by not allowing TCEQ to look at notices of violation when escalating a penalty unless TCEQ took subsequent action or if the person was a repeat violator. This could adversely affect TCEQ's enforcement division's ability to come up with a workable equation for compliance history and could severely affect the resulting penalties.

Also under CSHB 2694, if a repeat violation was figured into compliance history, that violation could not be considered in any other enforcement capacity. This also would severely limit the resulting penalties. TCEQ should be able to have all enforcement data at its disposal when determining compliance history and should look at overall compliance as well as individual violations when considering penalty enhancements.

CSHB 2694 would allow companies to have 30 days to review their compliance history before it became public. This additional allowance would be unnecessary since there is already a chance for review with an initial enforcement action.

Regulatory flexibility. Under current law, industry may undertake a measure if it is more protective of public health and the environment and must provide documented evidence. CSHB 2694 would allow too much flexibility to industry if the measure was *as* protective of public health and the environment. If the state is going to allow flexibility outside of the standard regulations, it needs to be more protective.

Increased administrative penalties. CSHB 2694 would create a minimum penalty per day for a violation. However, an environmental

violation may go undetected for many days. A violation that goes undetected for several days could amount to a large sum of money to be paid in penalties when that money could instead be used to correct the violation. A minimum penalty per day could place a strain on those that are working to be in compliance and would offer no flexibility.

Water rights. The provision in CSHB 2694 on curtailment of water during a period of drought or other emergency shortage of water rights may be unnecessary because TCEQ already has this authority. Addressing the issue again in this bill would leave too many open-ended questions. Also, the bill could provide TCEQ authority to curtail water usage in a way that was inconsistent with the prior appropriations doctrine.

Funding Texas Low-Level Radioactive Waste Disposal Compact Commission. There should be a cap on the funding that would go to the compact commission, as well as some guidance on spending.

Abolition of the On-site Wastewater Treatment Research Council. The On-site Wastewater Treatment Research Council has provided a valuable service to Texas in volunteering its time and expertise in guiding the grant process for on-site sewage research in Texas. There is a continuing need in Texas for a separate, stand-alone council to fund on-site research.

The council has a diverse makeup of the volunteers that give a public face to and provide public input on the grant award process. In place of the council, TCEQ would be required to seek the advice of relevant experts when choosing research topics, awarding grants, and holding educational conferences. The advice of relevant experts is no match to the council's highly skilled, experienced members from all regions of the state. Council members collectively represent more than 200 years of experience in their respective fields. The council provides transparency, breadth of knowledge, experience, and independence.

The council's annual on-site wastewater conference has grown to be one of the largest on-site gatherings in the nation, bringing together installers, engineers, academics, regulatory agencies, associations, non-profits, manufacturers – in short, everyone related to the on-site industry to study, discuss and debate sewage. TCEQ has reported that it does not have the time or resources to hold the annual conference.

TCEQ's oversight of the on-site wastewater research grant award process could be a conflict of interest, as the process has the potential to change the rules and regulations enforced by TCEQ.

OTHER
OPPONENTS
SAY:

Although this bill would take some steps toward improving the efficiency and transparency of the operation of TCEQ, there are some other issues that the bill should address.

For instance, the Legislature should clarify TCEQ's authority to deny permits and to broadly consider the cumulative impact of emissions in proposed plants and the past compliance history of applicants in all agency decisions. While a single permit may not pose an emissions risk, the cumulative impact of several permits might. The increase in new oil and gas drilling in urban areas along the Barnett Shale is a prime example of why this matters.

The Legislature needs to make sure TCEQ follows federal EPA mandates. Texas' ongoing legal battle to avoid implementing EPA's proposed greenhouse gas permitting requirements leaves unanswered how the state's permitting program will operate next year.

Although the bill would prohibit commission members from accepting campaign contributions for an elected office while serving on the appointed commission, there also needs to be tougher rules against revolving door lobbying practices by former TCEQ members and staff seeking to influence commission decisions.

CSHB 2694 would provide for increased penalties, but penalties should be large enough to deter behavior. Current statute allows, but does not require, TCEQ to consider the economic benefit a company gains from not complying with the law. TCEQ considers the economic benefit of non-compliance only when the amount of that benefit is more than \$15,000 and the only action taken is to increase the base penalty by 50 percent. This increase does not necessarily compel the violator to stop breaking the law. An auditor's report found that companies gain eight times what they were being penalized. The penalties either need to be significantly increased from what CSHB 2694 would offer or have a specific nominal amount like a multiplier, similar to that under the Deceptive Trade Practices Act, which is three times the economic benefit of violating the law.

CSHB 2694 should require previous petroleum storage tank owners or operators to be responsible for cleaning up contamination that occurred when they controlled the tank. Current law does not hold previous owners or operators responsible for these harmful releases. Instead, current tank owners or operators who discovered leaking tanks are responsible for the leak, even if the leak occurred before they took control. TCEQ should be able to go after prior owners of leaking underground storage tanks.

The bill should transfer uranium in-situ exploratory mining from the Railroad Commission to TCEQ. Currently, uranium mining companies have to obtain an exploratory permit from the Railroad Commission, then if the resource recovery is determined to be justified, they obtain a permit from TCEQ. This is a time-consuming process that creates confusion for the public concerned about uranium mining.

When enforcing dam safety regulation, TCEQ should exempt small dams of 1,000 acre-feet or less from having to be upgraded or modified to meet revised flood criteria or other criteria based on downstream development that occurred after completion of the dam. Some private landowners who built small lake dams on their property years ago are now running into costly regulatory changes. When their dams were built, they were in compliance, but now the rules have changed.

While this Sunset review process has been a step toward better regulation from the agency, it would be beneficial for the next Sunset review to take place in six years rather than 12 years.

NOTES:

The companion bill, SB 657 by Huffman, was referred to the Senate Natural Resources Committee and is scheduled for a public hearing today.

According to the fiscal note, CSHB 2694 would have a positive fiscal impact to the state of about \$1.1 million in fiscal 2012-13.

Local governments operating a water supply corporation or a water district would experience an increase of fee payments for the adjustment of the Water Utility Regulatory Assessment fee proposed by the bill. The additional costs to each local government statewide would be \$5.6 million per fiscal year. It is estimated that the cost per customer would range from \$0.50 to \$1.18 per year.

The committee substitute made several changes to the original versions of the bill. The original bill would have put enforcement policies in rule and removed the single uniform standard currently in statute for determining compliance history. The committee substitute would:

- remove some required components of compliance history and add some other factors, including size, operations, and complexity;
- change the classification categories from “low” and “average” to “unsatisfactory” and “satisfactory”;
- allow TCEQ to establish a category of unclassified performers or regulated entities in compliance history for entities for which the commission did not have adequate compliance information about the site;
- change the way TCEQ uses notices of violation in compliance history;
- change how a repeat violator would be determined for the purposes of compliance history;
- amend the way compliance history can be used to enhance penalties;
- allow entities to review and comment on compliance history before it becomes public; and
- make changes to the Regulatory Flexibility program.