

---

**HOUSE COMMITTEE ON ENVIRONMENTAL REGULATION  
TEXAS HOUSE OF REPRESENTATIVES  
INTERIM REPORT 2004**

**A REPORT TO THE  
HOUSE OF REPRESENTATIVES  
79TH TEXAS LEGISLATURE**

**DENNIS BONNEN  
CHAIRMAN**

**COMMITTEE CLERK  
ZAK COVAR**

---



Committee On  
Environmental Regulation

December 29, 2004

Dennis Bonnen  
Chairman

P.O. Box 2910  
Austin, Texas 78768-2910

The Honorable Tom Craddick  
Speaker, Texas House of Representatives  
Members of the Texas House of Representatives  
Texas State Capitol, Rm. 2W.13  
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:

The Committee on Environmental Regulation of the Seventy-Eighth Legislature hereby submits its interim report including recommendations and drafted legislation for consideration by the Seventy-ninth Legislature.

Respectfully submitted,

*Dennis Bonnen*

Dennis Bonnen, Chairman

*Edmund Kuempel*

Edmund Kuempel, Vice Chairman

*Myra Crownover*

Myra Crownover, CBO

*Warren Chisum*

Warren Chisum

*Ismael "Kino" Flores*

Ismael "Kino" Flores

*Wayne Smith*

Wayne Smith

*G.E. "Buddy" West*

G.E. "Buddy" West

Edmund Kuempel  
Vice-Chairman

---

**TABLE OF CONTENTS**

<b>INTRODUCTION.....</b>	<b>1</b>
<b>INTERIM STUDY CHARGES AND SUBCOMMITTEE ASSIGNMENTS .....</b>	<b>2</b>
<b>ON-SITE SEWAGE DISPOSAL SYSTEMS.....</b>	<b>3</b>
<b>SPEAKER’S CHARGE TO THE COMMITTEE.....</b>	<b>4</b>
<b>OVERVIEW .....</b>	<b>4</b>
<b>COMMITTEE HEARING.....</b>	<b>6</b>
<b>FINDINGS AND RECOMMENDATIONS .....</b>	<b>6</b>
<b>APPENDIX 1.....</b>	<b>8</b>
<b>SUMMARY OF TESTIMONY GIVEN AT PUBLIC HEARING .....</b>	<b>8</b>
<b>COMPLIANCE HISTORY .....</b>	<b>14</b>
<b>SPEAKER’S CHARGE TO THE COMMITTEE.....</b>	<b>15</b>
<b>COMPLIANCE HISTORY BACKGROUND .....</b>	<b>15</b>
<b>LEGISLATIVE ACTION ALREADY TAKEN .....</b>	<b>18</b>
<b>COMMITTEE HEARING.....</b>	<b>18</b>
<b>APPENDIX 2.....</b>	<b>21</b>
<b>Summary of Testimony Given at Public Hearing.....</b>	<b>21</b>
<b>TEXAS EMISSION REDUCTION PLAN.....</b>	<b>24</b>
<b>SPEAKER’S CHARGE TO THE COMMITTEE.....</b>	<b>25</b>
<b>TERP BACKGROUND.....</b>	<b>25</b>
<b>FY02/03 TERP Revenue Sources .....</b>	<b>26</b>
<b>FY04 TERP Revenue Sources.....</b>	<b>28</b>
<b>EMISSIONS REDUCTION INCENTIVE GRANTS.....</b>	<b>29</b>
<b>PROGRAM IMPLEMENTATION .....</b>	<b>29</b>
<b>Projects Funded to Date (September 1, 2001 through August 24, 2004 .....</b>	<b>29</b>
<b>Project Selection Summary FY04 - 2nd Round (as of July 26, 2004) .....</b>	<b>30</b>
<b>SMALL BUSINESS GRANTS PROGRAM IMPLEMENTATION .....</b>	<b>31</b>
<b>Small Business Funded Projects as of June 30, 2004.....</b>	<b>31</b>
<b>FISCAL YEAR 2005 CONSIDERATIONS .....</b>	<b>32</b>
<b>FOR THE TCEQ PROGRAMS.....</b>	<b>32</b>
<b>ATTACHMENT 1 .....</b>	<b>32</b>
<b>TERP ELIGIBLE COUNTIES .....</b>	<b>32</b>
<b>SUMMARY OF TESTIMONY GIVEN AT PUBLIC HEARING ON TERP AND     OTHER AGENCY PROGRAMS .....</b>	<b>33</b>
<b>TEXAS HOUSE COMMITTEE ON ENVIRONMENTAL REGULATION.....</b>	<b>33</b>
<b>SEPTEMBER 8, 2004.....</b>	<b>33</b>
<b>OVERSIGHT .....</b>	<b>40</b>
<b>SPEAKER’S CHARGE TO THE COMMITTEE.....</b>	<b>41</b>
<b>IMPLEMENTATION OF HB 1567 .....</b>	<b>41</b>
<b>SUMMARY OF IMPLEMENTATION .....</b>	<b>41</b>
<b>BACKGROUND OF LOW-LEVEL RADIOACTIVE WASTE .....</b>	<b>42</b>
<b>CURRENT STATUS OF THE TEXAS COMPACT .....</b>	<b>42</b>
<b>TCEQ .....</b>	<b>44</b>
<b>ENFORCEMENT PROCESS REVIEW .....</b>	<b>44</b>

---

---

<b>BACKGROUND</b> .....	44
<b>SUMMARY OF PROCESS</b> .....	44
<b>PUBLIC PARTICIPATION</b> .....	44
<b>SIGNIFICANT RECOMMENDATIONS</b> .....	45
<b>IMPLEMENTATION</b> .....	46
<b>TIMELINE</b> .....	46
<b>ENFORCEMENT REVIEW TIMELINE</b> .....	47
<b>Enforcement Review Final Report</b> .....	48
<b>AIR QUALITY ISSUES</b> .....	<b>58</b>
<b>REPORT OF ACTIVITIES RELATED TO THE 8-HOUR OZONE STANDARD</b> .....	<b>59</b>
<b>EPA'S BOUNDARY GUIDANCE ON AIR QUALITY DESIGNATIONS</b> .....	<b>61</b>
<b>FOR THE 8-HOUR OZONE NATIONAL AMBIENT AIR QUALITY STANDARDS</b>	
<b>(NAAQS)</b> .....	<b>61</b>
<b>Comparison EPA's Final 8-hour Designation - Texas' Recommendations</b> .....	62
<b>Summary of EPA's 8-hour Ozone Implementation Rule - Phase 1</b> .....	<b>63</b>
<b>Houston-Galveston, Beaumont-Port Arthur &amp; Dallas-Fort Worth</b> .....	63
<b>1-hour Nonattainment/8-hour Nonattainment</b> .....	63
<b>El Paso County (1-hour Nonattainment/8-hour Attainment)</b> .....	64
<b>Victoria County (1-hour maintenance plan/8-hour Attainment)</b> .....	64
<b>What is No Longer Required upon 1-hour Revocation</b> .....	65
<b>When 8-hour Emissions Reductions Required</b> .....	65
<b>8-hour Nonattainment only (Additional DFW counties and San Antonio)</b> .....	65

---

---

## INTRODUCTION

At the beginning of the 78th Legislature, the Honorable Tom Craddick, Speaker of the Texas House of Representatives, appointed seven members to the House Committee on Environmental Regulation: Dennis Bonnen, Chair; Edmund Kuempel, Vice-Chair; Warren Chisum; Myra Crownover; Ismael "Kino" Flores; Wayne Smith; and George E. "Buddy" West.

During the interim, the Speaker assigned charges to the committee. The Committee on Environmental Regulation has completed its hearings and investigations, and has adopted the following report.

---

**HOUSE COMMITTEE ON ENVIRONMENTAL REGULATION**

**INTERIM STUDY CHARGES AND SUBCOMMITTEE ASSIGNMENTS**

1. Conduct a study on the regulation, design, planning, construction, installation, operation, licensing, maintenance, and inspection of on-site sewage disposal systems.
2. Examine compliance histories and incentives to reward compliance by entities regulated by the Texas Commission on Environmental Quality.
3. Monitor the implementation of HB 1365 (78th Legislature), Texas Emission Reduction Plan, to ensure compliance with federal Clean Air Act standards and deadlines.
4. Monitor the agencies under the committee's jurisdiction.

---

## **ON-SITE SEWAGE DISPOSAL SYSTEMS**

---

## **SPEAKER'S CHARGE TO THE COMMITTEE**

On November 4, 2003, Texas House Speaker Tom Craddick issued four (4) charges to the House Committee on Environmental Regulation, including instructions to:

1. Conduct a study on the regulation, design, planning, construction, installation, operation, licensing, maintenance and inspection of on-site sewage disposal systems.

### **ON-SITE SEWAGE DISPOSAL SYSTEMS OVERVIEW**

Pursuant to Chapter 366, Health and Safety Code, it is the public policy of this state to eliminate and prevent health hazards by regulating and properly planning the location, design, construction, installation, operation, and maintenance of on-site sewage disposal systems. A person may not construct, alter, repair, or extend, or cause to be constructed, altered, repaired, or extended, an on-site sewage disposal system that does not comply with the provisions of Chapter 366 and applicable rules adopted by the Texas Commission on Environmental Quality (*TCEQ*). The rules adopted by TCEQ which provide a comprehensive regulatory program for the management of on-site sewage facilities (*OSSFs*), as prescribed by Chapter 366, Health and Safety Code, are included in Title 30, Chapter 285, Texas Administrative Code. Chapter 285 establishes minimum standards for planning materials, construction, installation, alteration, repair, extension, operation, maintenance, permitting, and inspection of *OSSFs*. This Chapter also provides the procedures for the designation of local governmental entities as authorized agents and the licensing of installers, designated representatives, and site evaluators. Unauthorized discharge of effluent into or adjacent to the waters in the state is prohibited.

For daily flows of greater than 5,000 gallons, a wastewater permit under Chapter 26 of the Water Code is required. An EPA Report to Congress in 1997 stated that an estimated 25% of all households in the United States were served by *OSSFs*. An estimated 40% of all new households make use of an *OSSF*. Today, TCEQ estimates that approximately 5 million Texans are using *OSSFs*. An important component of the *OSSF* Program is the Authorized Agent (*AA*).

---

AAs are responsible for implementing the OSSF Program as outlined in the Orders approved by TCEQ. AAs are required to appoint Designated Representatives (DRs) who are responsible for conducting the necessary reviews and permitting inspections. Currently there are 340 AAs.

TCEQ licenses and regulates individuals involved in the OSSF installation and permitting process. TCEQ currently licenses installers, site evaluators, and DRs. Currently there are 5,819 OSSF licenses issued by TCEQ. A permit is required for every OSSF installed in the state with the exception of those located on tracts of land greater than 10 acres. Currently, the 340 AAs are issuing approximately 49,000 OSSF permits annually. TCEQ Regional Office staff are issuing approximately 1,100 OSSF permits per year.

TCEQ and AAs may establish whatever fee structure is necessary to fund their respective programs. AA permitting fees have ranged from \$150 – \$400 depending on the AA's cost to run the program. TCEQ reviews the AA's performance every 3 years. AAs are required to implement complaint and investigation programs for their areas of jurisdiction. Formal enforcement processes may include filing misdemeanor charges in a local Justice of the Peace Court or processing the case to the TCEQ enforcement program. From September 1, 1998 – August 31, 2003, TCEQ issued 115 administrative orders resulting in over \$262,000 in payable penalties. Nine licenses were revoked or suspended. These numbers do not include action by the AAs or TCEQ Regional staff in JP Court.

Texas is considered a model throughout the country for OSSF rules and regulations. Texas is one of the few states that requires maintenance contracts for aerobic (advanced) systems.

---

## COMMITTEE HEARING

The House Committee on Environmental Regulation held a public hearing on March 23, 2004, to consider the issues included in this report. Ten witnesses presented testimony. The summary of the testimony is in Appendix 1A.

### FINDINGS AND RECOMMENDATIONS

**FINDING NO. 1:** Current compliance education and training for OSSF owners and local elected officials who oversee and enforce the OSSF program is inadequate.

**RECOMMENDATION NO. 1:** TCEQ, in conjunction with the Texas On-Site Wastewater Treatment Research Council, should explore and implement innovative compliance education and training programs for OSSF owners and elected officials who oversee and enforce the OSSF program.

**FINDING NO. 2:** The current system for enforcing OSSF maintenance requirements is not adequate.

**RECOMMENDATION NO. 2A:** The Legislature should require that TCEQ license OSSF maintenance providers.

**RECOMMENDATION NO. 2B:** TCEQ, in conjunction with the Texas On-Site Wastewater Treatment Research Council, should appoint a stakeholder committee to develop a “*tracking*” system to monitor OSSF maintenance contracts and to recommend a civil enforcement model which will assure compliance by owners of advanced OSSF systems.

**FINDING NO. 3:** Current enforcement of TCEQ regulations applicable to OSSF licensees is not adequate.

**RECOMMENDATION NO. 3:** The Legislature should create an independent board attached administratively to TCEQ comprised of installers, site evaluators, regulators, maintenance providers, and public members to oversee the training and licensing of

---

installers, site evaluators, regulators, and maintenance providers or other appropriate matters.

---

## APPENDIX 1

### SUMMARY OF TESTIMONY GIVEN AT PUBLIC HEARING TEXAS HOUSE COMMITTEE ON ENVIRONMENTAL REGULATION MARCH 23, 2004

**Tony Franco**, Director of Compliance Support Division, TCEQ

- For daily flows of greater than 5,000 gallons, a wastewater permit under Chapter 26 of the Water Code is required.
- An EPA Report to Congress in 1997 stated that an estimated 25% of all households in the United States were served by OSSFs.
- An estimated 40% of all new households make use of an OSSF.
- Today, we estimate that approximately 5 million Texans are using OSSFs.
- An important component of the OSSF Program is the Authorized Agent (AA).
- AAs are responsible for implementing the OSSF Program as outlined in the Orders approved by TCEQ.
- AAs are required to appoint Designated Representatives (DRs) who are responsible for conducting the necessary reviews and permitting inspections.
- Currently there are 340 AAs.
- TCEQ licenses and regulates individuals involved in the OSSF installation and permitting process.
- TCEQ currently licenses installers, site evaluators, and DRs.
- Currently there are 5,819 OSSF licenses issued by TCEQ.

- 
- A permit is required for every OSSF installed in the state with the exception of those located on tracts of land greater than 10 acres.
  - Currently, the 340 AAs are issuing approximately 49,000 OSSF permits annually.
  - TCEQ Regional Office staff are issuing approximately 1,100 OSSF permits per year.
  - TCEQ and AAs may establish whatever fee structure is necessary to fund their respective programs.
  - AA permitting fees have ranged from \$150 – \$400 depending on the AA's cost to run the program.
  - TCEQ reviews the AA's performance every 3 years.
  - AAs are required to implement complaint and investigation programs for their areas of jurisdiction.
  - Formal enforcement processes may include filing misdemeanor charges in a local Justice of the Peace Court or processing the case to the TCEQ enforcement program.
  - From September 1, 1998 – August 31, 2003, TCEQ issued 115 administrative orders resulting in over \$262,000 in payable penalties. Nine licenses were revoked or suspended.
  - These numbers do not include action by the AAs or TCEQ Regional staff in JP Court.

**Lydia Bourg**, DR for Ft. Bend County Environmental Health Department

- I encourage training for elected officials who serve as AAs, such as County Commissioners, JPs, and homeowners.
- 90-95% of the new systems that we see are aerobic systems.
- To be a maintenance provider, you must be an Installer II and trained and certified by the manufacturer of the system.

- 
- Part of the problem with the enforcement of maintenance contracts is the system is to be checked every 4 months and a report filed within 14 days.
  - If the maintenance is not performed and reports not filed, homeowners are afraid to go to court against the people they have contracted with to perform maintenance.
  - In Ft. Bend County, the Commissioners Court is the AA. The Environmental Health Department is the DR.
  - In cities, the Municipal Judge needs to be educated.

**Don Canada**, Executive Director, Texas On-Site Wastewater Association (TOWA)

- TOWA was established in 1992. Our members are installers, site evaluators, manufacturers, regulators, sanitarians, pumpers, transporters, and maintenance providers. We have 600 members throughout the state.
- Texas is considered a model throughout the country for OSSF rules and regulations. Washington state and Texas are at the top.
- Conventional systems rely on gravity. Aerobic (advanced) systems utilize pumps that require maintenance.
- Texas is one of the few states that requires maintenance contracts for advanced systems on a perpetual basis.
- You must have a tracking system at the local level to monitor/enforce the maintenance contract requirements.
- Enforcement is a problem. The current system does not need a major overhaul. It just needs some “tweaking.”
- There is not clear legislative authority throughout the state that allows a person to be brought before a regulator and dealt with if he does not properly maintain his system. There needs to be clear legislative authority for enforcement . . . perhaps the DA.
- Increased training and education is important.

- 
- TCEQ needs assistance with its enforcement.
  - Please consider as the “*best fix*” an independent board that would deal with licensing and enforcement against its licensees including installers, site evaluators, designers, and others, including maintenance providers, but not PEs.

**Dixon Dryden**, Installer, maintenance provider, and site evaluator

- I work in the Ft. Bend and Galveston County areas.
- I think the 10-acre rule in the majority of the areas should be done away with.
- We must increase enforcement to solve the current problems.
- We need an independent board. Only TCEQ can take a license. Local entities cannot.
- Enforcement is the most important issue.
- I encourage developing rules, variances, etc. on a regional basis which would vary depending on the type of soil, etc.

**Neil Atkins**, DR, site evaluator, and registered sanitarian from Austin

- I recommend that we change from a maintenance agreement to an inspection agreement.
- We should require TCEQ to license maintenance providers.
- In Travis County, we don’t have the 10-acre rule.

---

**Jeff Snowden**, Texas licensed PE and Installer, TOWA Board Member

- Homeowners need help. They need protection from the “*bad players*” who are selling, installing, and maintaining systems.
- Education and enforcement is the answer.
- The TCEQ rules that we have now are good. The problem is that the rules are not being enforced.

**Frank Aguirre**, TOWA Board Member from San Antonio

- The main problem is enforcement. We need an independent board to oversee on-site.
- With the number of new permits each year, the local agencies are too short handed to enforce many times.
- Nothing works as well as self regulation.

**Montel Rutledge**, Texas On-Site Wastewater Treatment Research Council, Resource Witness

- The Council is available to assist the Committee in any way.

**Gerhardt Schulle**, Legislative and Governmental Affairs Director, Texas Society of Professional Engineers

- Mr. Schulle presented written recommendations to improve the design and installation of OSSFs in Texas.
- Texas is a very diverse state, from the arid west Texas to the marshy east Texas.
- Different systems work better in different areas of the state.
- The 5000 gallons is much too high and it should be lowered to 2000 gallons.

- 
- **Cathy Sisk**, Harris County
  - Fortunate to have some enforcement capability.
  - Will look into where Harris County's authority stands in reference to the gallons.
  - JP's handing out fines that are too small to unlicensed installers.
  - District attorney does not have ability of prosecuting these cases because they are misdemeanor cases that the JP's take care of. It is possible that they have prosecuted some cases under the Water Code.
  - Some local governments aren't enforcing vigorously enough.

---

**COMPLIANCE HISTORY**

---

## SPEAKER’S CHARGE TO THE COMMITTEE

On November 4, 2003, Texas House Speaker Tom Craddick issued four (4) charges to the House Committee on Environmental Regulation, including instructions to:

2. Examine compliance histories and incentives to reward compliance by entities regulated by the Texas Commission on Environmental Quality.

## COMPLIANCE HISTORY BACKGROUND

HB2912 (77<sup>th</sup> Legislative Session) required the TCEQ to develop a uniform standard for evaluating compliance history for any person regulated under Texas Water Code, chapters 26 or 27 or Texas Health & Safety Code, chapters 361, 382, or 401.

The commission adopted rules to implement this legislation effective September 1, 2002.

The rules:

- define who is included;
- provide the components of compliance history;
- defines “repeat violator”;
- defines the formula for rating a site and person to determine an overall classification;
- establishes mitigating factors;
- establishes an annual rating;
- establishes an appeal and correction process; and
- provides for the use of compliance history in the permitting and enforcement process, including as evidence in a contest case hearing.

The agency generated 216,101 (137,771 sites and 78,330 persons) compliance histories in FY04. Of the sites, classifications were as follows:

Poor Performers	1,242	0.9%
Low Average	444	0.3%
Average Performers	14,644	10.6%
Average by Default	97,163	70.8%
High Performers	24,278	17.6%

---

Of the persons, classifications were as follows:

Poor Performers	907	1.1%
Low Average	289	0.4%
Average Performers	13,568	17.3%
Average by Default	52,713	67.3%
High Performers	10,853	13.9%

The TCEQ received 95 appeals of site/person classifications. Of the 95 appeals, 37 sites/persons changed classification of Poor Performer to Average Performer.

For each permit action and each enforcement action, TCEQ staff evaluate the compliance history of the site under consideration and the person applying for the person or person named in the enforcement action to determine whether there should be additional or more specific requirements placed in a permit and/or enforcement order.

In the enforcement process, the person's classification determines whether a proposed penalty is increased (for a poor performer), remains as calculated (for an average performer) or decreased (for a high performer). Additionally, the penalty will be increased if the person is defined as a repeat performer.

Additionally, the compliance history of the site under enforcement is evaluated and penalty increases and/or decreases may be made based upon the number of:

- Notices of Violations (NOVs);
- federal/state administrative/court orders;
- criminal convictions;
- chronic excessive emission events;
- audits conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74<sup>th</sup> Legislature, 1995;
- disclosures of violations based upon audits;
- implementation of an environmental management system;
- involvement in a voluntary on-site compliance assessment;
- participation in a voluntary pollution reduction program; or
- early compliance with, or offer of a product that meets future state or federal governmental requirements.

The TCEQ currently has a team working to identify specific incentives that may be given to a person to reward compliance. By rule, the TCEQ adopted more general incentives, including:

- one point of contact for coordinating innovative programs;
- technical assistance provided by the agency;
- accelerated access to agency information;
- modification of state or federal regulatory requirements that do not increase existing; emission or discharge limits or decrease public involvement;
- flexibility in regulatory processes; and

- 
- public recognition

---

## LEGISLATIVE ACTION ALREADY TAKEN

During the 78th Legislature, legislation on compliance history was considered in the Regular Session and three Called Sessions. During the Regular Session, both HB 1063 by Representative Wayne Smith and SB 455 by Senator Ken Armbrister died on the House calendar due to time constraints under House rules. During the First Called Session, HB 112 by Representative Wayne Smith was considered and reported by this committee. During the Second Called Session, HB 28 by Representative Wayne Smith was passed by the House. During the Third Called Session, HB 36 by Representative Wayne Smith was also passed by the House. Legislation on this subject was reported by this committee 5 times in 2003, 4 House bills and one Senate bill. Further, SB 455 passed the Senate in Regular Session and both HB 28 and HB 36 passed the House in Called Session. All versions of the legislation were similar.

The committee met on February 27, 2004, during the Fourth Called Session to hear testimony on Interim Charge #2. Since the issue had been before the committee five times during the past year, the committee focused its investigation narrowly to determine if circumstances had changed since the committee had acted in Regular and Called Session. The hearing featured an update from the Texas Commission on Environmental Quality and invited testimony from the Texas Association of Business and Texas Chemical Council.

## COMMITTEE HEARING

The House Committee on Environmental Regulation held a public hearing on April 27, 2004, to consider issues included in this report. Three witnesses presented testimony. The summary of the testimony is in Appendix 2.

## FINDINGS AND RECOMMENDATIONS

**FINDING NO.1:** The Legislature has not provided the TCEQ the tools to reasonably classify the wide range of entities it regulates based on compliance history. The task given the agency by the statute would require a significant increase in appropriations with very little, if any, increase in environmental protection or reduction of pollution. The committee finds that the money needed to reasonably classify facilities would be best spent enforcing current law and performing the other functions the Legislature has charged to the TCEQ. The TCEQ has not been able to find a meaningful way to classify “persons” since the formula simply averages the classification scores by site.

**RECOMMENDATION NO. 1A:** The Legislature should eliminate the requirement that the TCEQ classify entities it regulates based on compliance history.

**RECOMMENDATION NO. 1B:** The Legislature should eliminate the requirement that the agency evaluate compliance history based on a uniform standard.

---

**FINDING NO.2:** The agency has defined “repeat violator” too broadly. Although a statutory change may not be necessary to address this rule, the committee finds that additional statutory direction may be appropriate.

**RECOMMENDATION NO 2:** The Legislature should provide some statutory guidance for the agency to use when determining if an entity is a repeat violator. The guidance should include provisions requiring the violations to be in the same environmental media and have some relationship to each other.

**FINDING NO. 3:** There is a substantial amount of compliance information that is of dubious value in evaluating compliance history objectively. Such information is best evaluated subjectively by the agency.

**RECOMMENDATION NO. 3A:** Notices of violation should not be required to be a part of any evaluation of compliance history.

**RECOMMENDATION NO. 3B:** Entities should be allowed some opportunity to review and respond to compliance information before it is placed on the Internet.

**RECOMMENDATION NO. 3C:** With elimination of the classification system, the agency should be free to determine when to announce inspections based on its internal policies.

**RECOMMENDATION NO. 3D:** The TCEQ should be given clear statutory instructions that penalties should not automatically be increased because of unresolved notices of violation.

**FINDING NO. 4:** Information on compliance history from other jurisdictions, including the United States Environmental Protection Agency, may not be meaningful uniformly for use in evaluating compliance history. Other states may have different laws and rules and may follow different enforcement procedures. The U.S. EPA provides information in summary form on a database which needs to be interpreted to be of any value.

**RECOMMENDATION NO. 4A:** The statute should only require information from the U.S. EPA that is reasonably available.

**RECOMMENDATION NO. 4B:** The statute should not require information from other states.

**FINDING NO. 5:** The use of regulatory flexibility should be widely available to entities that perform satisfactorily based on compliance history and other factors determined by the TCEQ. Limitations on flexibility because of federal law make the use of any regulatory flexibility granted by Texas very narrow in its potential application.

---

**RECOMMENDATION NO. 5A:** The ability to use regulatory flexibility should return to an “equivalency standard” from a standard of “clear environmental benefit”.

**RECOMMENDATION NO. 5B:** The adequacy of demonstrations required of an applicant for regulatory flexibility should be determined by TCEQ.

---

## APPENDIX 2

Summary of Testimony Given at Public Hearing  
Texas House Committee on Environmental Regulation  
April 27, 2004

Paul Sarahan, Director, Litigation Division

Office of Legal Services

Texas Commission on Environmental Quality

- Discussed Subchapter Q—compliance history ratings and classification—and provided an update of the Enforcement Process Review
- Subchapter Q covers entities regulated under Chapter 26, Water Code; Chapters 361 & 382, Health & Safety Code,; and injection wells and low level radioactive waste
- Ratings are made for the entity overall and for each separate facility
- Do not rate water rights and rates; occupational licenses; collection of used oil
- Use a numerical rating system which includes both positive and negative factors over the last 5 years
- Positive points for self-audits
- Negative points for orders and notices of violation
- Inspections impact the ultimate number
- Prepare a document—Compliance History Report
- Formula uses elements of the report to prepare a numerical score
- 0 is perfect; round score to nearest 1/100 of a point
- No record—average by default; score is 3.01
- Rating: below .1—high performer; .1 to 45—average performer; over 45—poor performer
- Rating done every September 1 and published every October 1
- Compliance history report is generated on permit renewal, obtaining a new permit; determining administrative penalties; and determining whether an inspection will be announced
- Poor performers bear brunt of impact of classification system
- Report generated whenever an entity submits a permit application or the agency initiates formal enforcement
- Enforcement Process Review—Commission directed staff to determine if the process was working and what changes could be made
- Reviewing comments to develop key issues
- Posting updates on website
- TCEQ regulates over 215,000 sites of entities
- Approximately 35,000 are rated high; 28,000 rated average; and 2,000 rated poor; 150,000 rated average by default
- Most of those in the poor category are small business

- 
- 95 have appealed scores; 65 appeals granted to be reviewed; 47 scores changed
  - Very few have appealed an average score
  - Possible that some poor performers are because of paperwork violations
  - Points associated with notices of violations are not as high as those associated with orders
  - High performers get a 10% reduction in proposed penalties

Jon Fisher, Senior Vice President

Texas Chemical Council

- TCC involved in Sunset Bill where this concept originated
- Supported Representative Wayne Smith's bill in 2003
- Also concerned about TCEQ use of compliance history in permitting and enforcement—  
notices of violation required to be used and double and triple-counting by agency in  
penalty policy
- Uniform standard requirement not appropriate for broad range of businesses regulated by  
TCEQ
- Formula hurts small business and large complex businesses
- Not enough money to rank all facilities regulated
- Should not be ranking facilities that are currently average by default
- Notices of violation should not be required—allegation of violation, not a final indication  
of a violation
- Size and complexity, as well as type of activity, should be considered when ranking
- Provide resources appropriate with what Legislature mandates or scrap the whole  
program
- Classification program not preventing any pollution
- Repeat violator definition needs to be revised to reflect common sense
- Ranking system should not apply to persons since the formula averages facilities  
regardless of size
- Entities should be able to correct mistakes before compliance information posted on  
Internet
- Regulatory flexibility is not used often since limited to nonfederal requirements—need  
lower standard of equivalency to allow for use—not used with clear environmental  
benefit standard
- Notices of violation should be relevant before being used
- Penalty policy has serious problems—violations double and triple counted—correctly  
applies ranking system
- High performers can have penalties reduced by ranking and then raised again by same  
compliance history
- Revisit the compliance history changes from 2001

---

Mary Miksa

Texas Association of Business

- Here to speak for small businesses
- Support testimony of TCC concerning notices of violation, repeat violator, and penalty policy
- Compliance history formula stacked against small business
- Number of inspections dilutes score
- Lack of inspections hurts
- Alternative is to inspect small business more—not sure a good use of resources based on risk
- What small business need to lower their scores is not justified from environmental or public health perspective

---

## **TEXAS EMISSION REDUCTION PLAN**

---

## **SPEAKER'S CHARGE TO THE COMMITTEE**

On November 4, 2003, Texas House Speaker Tom Craddick issued four (4) charges to the House Committee on Environmental Regulation, including instructions to:

3. Monitor the implementation of HB 1365 (78th Legislature), Texas Emission Reduction Plan, to ensure compliance with federal Clean Air Act standards and deadlines.

## **TERP BACKGROUND**

The Texas Emissions Reduction Plan (TERP) was established by the 77<sup>th</sup> Texas Legislature in 2001, through enactment of Senate Bill (SB) 5 to help improve and maintain good air quality in areas throughout the State. Agencies responsible for developing and implementing TERP programs are the Texas Commission on Environmental Quality (TCEQ), the Comptroller's Office, State Energy Conservation Office, Public Utility Commission of Texas, and local governments. The Energy Systems Laboratory at Texas A & M University assists in energy efficiency and renewable energy research and emission reduction calculations.

The goals of the TERP are:

- ensure that the air in this state is safe to breathe and meets minimum federal standards established under the federal Clean Air Act (Section 7407, Title 42, United States Code);
- develop multi-pollutant approaches to solving the state's environmental problems; and,
- adequately fund research and development that will make the state a leader in new technologies that can solve the state's environmental problems while creating new business and industry in the state.

The past and present focus of the TERP is to reduce emissions of nitrogen oxides (NOX) through voluntary economic incentive programs. The programs are intended to replace reductions that would have been achieved through mandatory measures. In 2003, HB 1365 added new revenue sources for the Plan, increased the number of eligible counties (see Attachment 1), and added a Small Business Grants Program.

One of the primary TERP programs administered by TCEQ is the Emissions Reduction Incentive Grants Program. Authorized in Subchapter C, Chapter 386, of the Health and Safety Code, the program provides for grants to fund the incremental cost of projects in the State's 41 air quality nonattainment and near-nonattainment counties. Eligible projects include new purchases, replacements, and repowers for vehicles, equipment, locomotives and marine vessels; retrofit

technologies; infrastructures for idle reduction technologies and alternative fueling stations; and, qualifying fuels.

A new TCEQ program in 2003 is the Small Business Grants Program. Per Section 386.116, this program is for businesses that own and operate not more than two vehicles or equipment.

**FY02/03 TERP Revenue Sources**

<b>REVENUE SOURCE</b>	<b>CITATION</b>	<b>EXPIRES</b>	<b>FY02 \$\$</b>	<b>FY03 \$\$</b>
1% surcharge on sale price or lease/rental amount of off road diesel equipment sold, rented or lease (effective July 2003, the surcharge was increased to 2% and a storage, use, and consumption surcharge added)	Tax Code §151.0515(b)	9/30/08	\$7.6 million	\$9.7 million
2.5% surcharge of the total consideration on sale or lease of model year pre-1997 vehicles over 14,000 lbs (effective July 2003, HB 1365 added the surcharge for the use of such vehicles and a surcharge for 1997 or later model year vehicles of 1 %)	Tax Code §151.0215(a)	9/30/08	\$3.3 million	\$6.6 million

REVENUE SOURCE	CITATION	EXPIRES	FY02 \$\$	FY03 \$\$
10% surcharge of total fees due for registration of truck tractors and commercial motor vehicle	Transportation Code §502.1675	8/31/08	\$6.7 million	\$8.6 million
\$225 fees for inspection of out of state vehicles brought into Texas	Transportation Code § 548.256(c)	8/31/08 - this provision was subsequently ruled unconstitutional ( <i>H.M. Dodd Motor Co. Inc. v. Tex. Dep't of Public Safety, No. GN102585, 200<sup>th</sup> Dist. Ct., Travis County, Tex., Apr. 12, 2002</i> )	\$0	\$0
As of July, 2003, portion of certificate of the vehicle title fee - \$20 out of \$33 fee for applicants in nonattainment counties and \$15 out of \$28 fee for applicants in other counties	Transportation Code §501.138(a)	after 9/1/08 is deposited into Texas Mobility Fund	\$0	\$6.0 million
\$10 fee on commercial motor vehicles required to be inspected	Transportation Code §548.5055	8/31/08	\$2.8 million	\$4.1 million
Interest on fund balance			\$183,000	\$532,000

**FY04 TERP Revenue Sources**

<b>REVENUE SOURCE</b>	<b>CITATION</b>	<b>EXPIRES</b>	<b>FY04 \$\$ (thru June 2004)</b>
the surcharge on the retail sale, lease or rental of new or used off-road heavy-duty diesel equipment was increased from 1 percent to 2 percent. A surcharge of 2 percent for the storage, use, and consumption in Texas of new and used equipment was authorized.	Tax Code § 151.0515(b) and 151.0515(b)(1)	9/30/08	\$17.4 million
the 2.5 percent surcharge on sale or lease on pre-1997 model year vehicles over 14,000 lbs was expanded to include the <u>use</u> of such vehicles. A surcharge for 1997 or later model year vehicles of 1 percent was added.	Tax Code § 151.0215(a)	9/30/08	\$6.2 million
10% surcharge of total fees due for registration of truck tractors and commercial motor vehicles.	Transportation Code § 502.1675	8/31/08	\$7.2 million
portion of certificate of vehicle title fee - \$20 out of \$33 fee for applicants in nonattainment counties and \$15 out of \$28 fee for applicants in other counties	Transportation Code § 501.138(a)	after 9/1/08 is deposited into Texas Mobility Fund	\$81.7 million
\$10 fee on commercial motor vehicles required to be inspected	Transportation Code § 548.5055	8/31/08	\$3.2 million
Interest on fund balance			\$1.1 million

In FY02, TCEQ received \$14.0 million; in FY03, \$24.4 million, to provide grants for the Emission Reduction Incentive Grants Program. In FY04, TCEQ received \$120 million for the Emission Reduction Incentive Grants and Small Business Grants Programs.

---

**EMISSIONS REDUCTION INCENTIVE GRANTS  
PROGRAM IMPLEMENTATION**

From the onset of the Program, there have been over 100 projects funded, for a total of \$42,530,151.68 (FY02 through August 24, 2004). These projects are projected to result in NOx emission reductions of 7,616.3247 tons, or 4.5567 tons per day (tpd) in 2007. The projected average cost per ton is \$5,584.

Since the beginning of the program, there have been two requests for application periods in each fiscal year. In FY02, the first round ended on November 21, 2001; the second deadline was March 29, 2002. The two requests for applications in FY2003 were from September 1, 2002, to October 18, 2002 and February 23, 2003, to April 9, 2003. Likewise, in FY 04, there were two rounds - the first from August 4, 2003, to September 17, 2003; the second from January 5, 2004 to March 12, 2004.

**Projects Funded to Date (September 1, 2001 through August 24, 2004)**

<b>Area<sup>1</sup></b>	<b>No. of Projects</b>	<b>Grant Amount</b>	<b>Projected NOx Reductions (tons)</b>	<b>Projected NOx Reductions (tons/day)</b>	<b>Average cost per ton/NOx<sup>2</sup></b>
Austin	4	\$514,423	41.1708	0.0107	\$12,174
Beaumont/Port Arthur	1	\$400,000	120.2500	0.0962	\$3,326
Corpus Christi	1	\$15,432	3.3029	0.0026	\$4,672
Dallas/Fort Worth	31	\$11,347,229.06	3,098.4084	1.7738	\$3,662
El Paso	1	\$1,475,000	327.3413	0.1637	\$4,506
Houston/Galveston	71	\$23,661,680.62	3,117.5285	2.0415	\$7,590
San Antonio	2	\$5,116,387	908.3228	0.4682	\$5,632
<b>Total</b>	<b>111</b>	<b>\$42,530,151.68</b>	<b>7616.3247</b>	<b>4.5567</b>	<b>\$5,584</b>

**Project Selection Summary FY04 - 2nd Round (as of July 26, 2004)**

<b>Area<sup>1</sup></b>	<b>No. of Projects</b>	<b>Grant Amount</b>	<b>Projected NOx Reductions (tons)</b>	<b>Projected NOx (tons/day)</b>	<b>Average cost per ton/NOx<sup>2</sup></b>
Austin	43	\$6,069,179	871.91	0.59	\$6,961
Beaumont/Port Arthur	7	\$2,181,910	426.48	0.29	\$5,116
Corpus Christi	4	\$1,907,996	275.35	0.22	\$6,929
Dallas/Fort Worth	93	\$29,693,983	5564.12	3.78	\$5,337
El Paso	2	\$457,018	113.90	0.09	\$4,012
Houston/Galveston	43	\$36,408,518	5690.89	3.72	\$6,398
San Antonio	5	\$2,547,923	388.59	0.26	\$6,557
Tyler/Longview	2	\$799,450	122.74	0.10	\$6,513
Victoria	4	\$828,390	119.89	0.51	\$6,910
<b>Total</b>	<b>203</b>	<b>\$80,894,367</b>	<b>13,573.87</b>	<b>9.55</b>	<b>\$5,960</b>

<sup>1</sup>Projects may operate in more than one area - they are listed by the primary area of operation

<sup>2</sup>The average cost per ton is based on the dollars awarded divided by the projected tons of NOx to be removed by the projects

The Program Guidelines were revised following a public comment period from August 26, 2003, through October 10, 2003. A public meeting was held on September 17, 2003, to provide the public the opportunity to present oral comments on the draft. The revised document was then made available on TCEQ's website, along with the application forms and technical supplements, for the FY04 2<sup>nd</sup> round Request for Applications.

TCEQ also held public workshops throughout the State in January and February 2004 to explain the Emissions Reduction Incentive Grant Program to interested parties. The application process was explained and staff were available to answer questions related to completing the application forms and calculating the project cost-effectiveness. Ten workshops were held, with 300+ people attending. To prepare for the FY05 Request for Applications (RFAs) period, workshops were held in August 2004 in the affected areas. Total attendance was approximately 300 interested parties. The FY05 RFA is expected to be released in late September.

To further improve the ability of the Emissions Reduction Incentive Grants program to achieve its goals, HB 1365 provided that persons other than owners may apply for and receive grants (section 386.103(a)). In the 2004 revised Guidelines, general procedures were spelled out for "Third-Party Grants." In August 2004, TCEQ and the Railroad Commission of Texas (RRC) entered into an inter-governmental cooperative agreement to allow the RRC to use TERP funds for a forklift initiative program. The Program will focus on encouraging the purchase of lower-emitting forklifts and replacing, repowering, or retrofitting higher polluting forklifts.

---

To minimize the risk of fraud, TCEQ established a three-tiered Quality Assurance and Fraud Prevention and Detection Program. The three levels of checks and balances occur during the application phase, contract phase, and tracking and reporting phase.

### **SMALL BUSINESS GRANTS PROGRAM IMPLEMENTATION**

In accordance with Section 386.116, Texas Health and Safety Code, in FY04, the TCEQ established a grant program targeted at small businesses and other entities that own and operate not more than two vehicles or equipment. The program is a stream-lined way for small businesses in the 41 counties to apply for financial assistance to replace or repower vehicles or equipment, via a simplified application process. The program is funded through the Emissions Reduction Incentive Program and is administered under the same quality assurance and fraud prevention and detection program measures.

The first Small Business Request for Applications (RFA) had a deadline of March 12, 2004. Five applications were received and three projects were approved for funding. The type of activities funded included replacement vehicles for businesses transporting materials and a mobile heavy-duty equipment repair operation. Table 7 summarizes the two projects under contract. The third approved project, for \$91,624, is in the final contract stage.

#### **Small Business Funded Projects as of June 30, 2004**

<b>Grant Amount</b>	<b>Area</b>	<b>Projected NOX reductions (tons)</b>	<b>Projected NOX reductions (tons/day)</b>	<b>Average Cost per ton/NOX</b>
\$ 38,500.00	SAT	3.2792	0.6558	\$11,741
\$ 104,531.00	DFW	9.2464	1.8493	\$11,305

An explanation of the Small Business Program was included in the August 2004 workshops. In addition, TCEQ is developing a targeted outreach program for small businesses in the affected counties. The outreach will be done in conjunction with the release of the FY05 RFA in early autumn.

---

**FISCAL YEAR 2005 CONSIDERATIONS  
FOR THE TCEQ PROGRAMS**

Based on direction from the TCEQ Commissioners and following consultation with the TERP Advisory Board, the following program adjustments will be made for FY05.

**Emissions Reduction Incentive Grants Program.**

- Efforts will focus on achieving the San Antonio and Austin area commitments of two tons/day NOX reduction by 2007 (meaning projects must be funded with FY05 funds in order for emission reductions to start in 2006). In addition, efforts to fund some projects in all other areas will be made, keeping in mind the substantial commitments of the Houston/Galveston and Dallas/Fort Worth areas.
- The project cost effectiveness eligibility criteria will be capped at \$7,000/ton
- Grants awarded for fixed infrastructure projects, such as fueling stations, will be capped at 50% of the eligible incremental costs
- TCEQ will continue to work with public entities who are interested in pursuing third party grants. No private organization third party grant projects will be considered.

**Small Business Grants Program.** The project cost effectiveness eligibility criteria will be capped \$8,500/ton.

**ATTACHMENT 1**

**TERP ELIGIBLE COUNTIES**

As of 2001, per SB 5

Bastrop	Bexar	Brazoria	Caldwell	Chambers	Collin
Comal	Dallas	Denton	Ellis	El Paso	Fort Bend
Galveston	Gregg	Guadalupe	Hardin	Harris	Harrison
Hays	Jefferson	Johnson	Kaufman	Liberty	Montgomery
Nueces	Orange	Parker	Rockwall	Rusk	San Patricio
Smith	Tarrant	Travis	Victoria	Waller	Williamson
Wilson	Upshur				

Counties added by HB 1365 in 2003: Henderson, Hood, and Hunt

---

**SUMMARY OF TESTIMONY GIVEN AT PUBLIC HEARING ON TERP AND OTHER  
AGENCY PROGRAMS  
TEXAS HOUSE COMMITTEE ON ENVIRONMENTAL REGULATION  
SEPTEMBER 8, 2004**

**Kathleen Hartnett White**, Chairman, Texas Commission on Environmental Quality

- Thanked committee for invitation to testify
- Informed committee that all commissioners were present as well as staff to discuss specific issues including TERP, SIPs, the agency's enforcement review and the implementation of HB 1567 (low-level radioactive waste disposal)

**Ralph Marquez**, Commissioner, Texas Commission on Environmental Quality

- Testified on the status of the SIPs
- El Paso area is expected to be in attainment for all pollutants and that the TCEQ is beginning the process to redesignate the area
- Northeast Texas will be in attainment by 2007
- Austin and San Antonio signed an Early Action Compact (EAC) and had submitted strategies for their areas to ensure compliance with the 8-hour ozone standard
- TCEQ is currently reviewing the request and will submit the package (along with Northeast Texas') by December to the EPA
- DFW SIP 2007 attainment date for 1-hour attainment has not been approved by EPA because of poor decisions
- Three alternative choices available for the DFW area
  - 1) reach 1-hour attainment by 2005 (not realistic)
  - 2) reach 8-hour attainment by 2005 (not realistic)
  - 3) 5% reduction "down payment" - will more than double current reductions in area
- Working on attainment SIP to be achieved by 2010 under 8-hour ozone standard
- The 5% reduction in emissions translates to an additional 30 tons per day emissions reduction and the area and the agency are committed to reaching attainment
- Regarding the Houston - Galveston - Brazoria area, they are using new and evolving science that the agency was obtaining on how ozone is formed
- He discussed the initiatives that are currently being proposed for the area, including additional control measures for HRVOCs
- He also testified about the agency's new initiative to conduct air monitoring activities and the movement toward real time information to help facilities develop operational processes that are most conducive to minimizing emissions.
- Provided the Committee with an overview of the agency's implementation of TERP, the efforts to award the FY '04 funds and the need to reduce the per ton reduction cost so that it will be closer to the \$5,000 per ton of reduction that the TERP appropriation is based on. He testified about the allocation table that the Commission has considered to ensure that the required SIP credit would be obtained. He also discussed the need to develop a strategy to determine what projects to fund to ensure that the state receives full SIP credit

---

in those areas where those reductions are needed. He discussed the Legislature's intent to also provide funding to other near nonattainment areas to ensure continued compliance. He mentioned that the TERP grant program had become very competitive, which will drive down the per ton reduction cost and require the agency to carefully balance its funding decisions.

- Chairman Bonnen asked about the TERP applications submitted by the railroad industry and the fact that this industry received significant amounts of TERP grants. Marquez explained that some of the railroad projects were the most cost-effective received. He also reminded the Committee that the federal government has the primary authority to regulate that industry, the state can only regulate use. Chairman Bonnen indicated that if that industry was going to benefit from the TERP program that it should participate in the agency's activities to reduce emissions, including having retrofits conducted sooner. He also stated that locomotive, aviation and marine sources received 47.3% of the grants, but these industries do not pay directly into the fund.
- When asked by Rep. Smith about HRVOC emissions, Marquez explained that four are currently being regulated. These four are used primarily by the chemical industry. He discussed the monitoring requirements and the importance and usefulness of monitoring at the source. He also discussed the significance of the Houston Ship Channel in addressing the air quality issue in the HGB area.
- Rep. Kuempel requested information about the San Antonio EAC. Marquez responded by informing the Committee that the area has had its nonattainment for the eight hour ozone standard designation deferred because it signed an EAC. He told them that the attainment date for the area in 2007 and reinforced that the area and the TCEQ is committed to meet that date.
- Rep. Kuempel also asked about the 5% requirement for DFW, which Marquez explained represented double the current emission reductions. He discussed some of the measures to meet the 5%, including TERP grants, reductions by the ALCOA facility, gasoline container requirements, cleaner vehicles and gas, and possibly expanding certain control measures beyond the current four county DFW area. He informed the Committee that a proposal is expected to be laid out later in the month for public comment.

**John Steib**, Deputy, Office of Enforcement , Texas Commission on Environmental Quality

- Provided the Committee with an overview of the agency's review of its enforcement process.
- Margaret Hoffman began the review soon after taking the position of Executive Director.
- He mentioned that the review was to consider whether goals established by the agency were being met. Some of the goals included a stronger enforcement policy and consistency in the application of the enforcement policy. He said the review also served as an acknowledgment of the agency's current enforcement activities (regulating 220,000 facilities, conducting 70,000 inspections, issued 6,000 NOVs and responded to 6,000 complaints). He also talked about the fact that the agency's efforts are based on significant federal requirements. Some of the areas reviewed included: compliance; corrective action; penalties; clarity and simplicity of regulations; transparency; impact on small businesses and cities; and effectiveness as a deterrent. Some of the issues that surfaced as possible needing to be addressed (possible recommendations): .refocus

---

resources to compliance monitoring and enforcement; focus on those violations that cause harm to the public and the environment; strengthening enforcement; establish minimum penalties; ensure that there is no economic benefit for noncompliance; streamline enforcement process; reduce timelines; and have small businesses focus its resources on corrective actions.

- Outlined the public's participation in the process, testifying that a draft of the report has been placed on the agency's web page for the public to provide comments on through the month of September. He mentioned that the Commissioners will review and discuss the final report at four separate work sessions to be held this fall.
- Following his presentation, Rep. Kuempel and Steib discussed the agency's efforts to determine the compliance record for several industries, such as rock crushers and rock quarries. They talked about the fact that many facilities did not have proper authorization to operate and that many of the new requirements, such as stormwater permits, were not readily known by the facilities. There was a discussion about Texas' delegation of the stormwater program activities and that EPA had not been inspecting those facilities when they were under their jurisdiction. There are 39,000 facilities that need this permit and the agency has been inspecting 1,000 facilities a year since having the federal program delegated to the state. Steib indicated that the agency has been working to educate that community of the requirements to operate these types of facilities.

#### **Chairman White**

- Entered the discussion stating that many of the violations that were discovered during this initiative by the agency were paperwork type violations. She also informed the Legislature that many of the inspections are done either because of federal requirements or in response to complaints. Rep. Kuempel asked her what would be helpful to the agency regarding enforcement activities and Chairman White replied that TCEQ should not be held to a specific number of inspections in a given area, rather that the agency be allowed to prioritize what is inspected based on the risk to the environment and public health. She also testified that the agency would welcome the Legislature's guidance in establishing these priorities and the possibility of additional resources. Chairman Bonnen expressed an interest in determining the amount of resources expended on paperwork type violations, whether those violations indicated other more significant issues and the need for the agency to focus its resources elsewhere. He further stated that logic needed to dictate decisions about how the agency expends its resources.

#### **John Steib**

- Rep. Kuempel and Chairman Bonnen then asked several questions concerning the issue related to Texas Disposal Systems (TDS) and Penske. Chairman Bonnen indicated that answers to these questions were needed, even if another hearing was required.
- Rep. Kuempel asked how the ED can issue an NOV and not be fined. Steib explained that one does not follow the other, it depends on the corrective action requested and conducted, etc.. Steib responded to Rep. Kuempel that the agency issued an NOV to Penske and required corrective action, but no decision about a fine has been made.

---

Decisions about penalties involve considering lots of factors. He also indicated that it was arguable whether the waste was hazardous when deposited at TDS. In response to Chairman Bonnen's question, Steib told the Committee that the NOV was issued in May.

- Steib discussed how the Penske waste from the accident was co-mingled and that the samples of the waste taken by the agency did not reveal any hazardous waste characteristics. He also stated that the decision to classify the waste as "special" and not hazardous was consistent with federal guidelines. Rep. Kuempel questioned whether the Executive Director's decision to classify this waste as anything other than not hazardous would set a precedent that would encourage others to sneak hazardous with non-hazardous by co-mingling waste. Steib responded that the letter of the law has been followed and no such precedent has been established. Steib informed the Committee that this issue was scheduled for Commission consideration at a September 16<sup>th</sup> Agenda.
- Rep. Smith asked about the amount of effort and resources needed to issue NPDES permits (stormwater, stormwater pollution prevention plans) and if those resources are not focusing on significant environmental issues. Steib responded with information about the types of inspections required for those permits and the various drivers regarding the number and types of inspections conducted by the agency, in particular LBB performance measures and EPA grant requirements. He also mentioned that the agency's review indicated that too much staff time is spent on paperwork violations. He also indicated that agency staff will be developing a risk-based inspection plan for the Commission to review. Rep. Smith also asked about efforts for on-line self-reporting, as well as on-line permitting activities. Chairman Bonnen mentioned that on-going efforts to provide on-line activities would require additional resources for the agency.
- Chairman Bonnen expressed concerns with the agency's activities associated with the implementation of the MSD legislation (HB 3152) and the length of time for the agency to complete. He asked about the pilot projects conducted and questioned the method used to select the pilots. He questioned whether everyone was given an opportunity to participate as pilots. When Chairman White informed the Committee about a letter that the TCEQ received from the City of Houston indicating that it would not welcome an MSD, Chairman Bonnen stated that this was a voluntary program for the locals.

**Susan Jablonski**, Office of Permitting, Texas Commission on Environmental Quality

- provided information to the Committee about the agency's implementation of HB 1567, the management of low level radioactive waste.
- Outlined that the legislation allowed for the privatization of a facility to dispose of this waste, as well as an adjacent facility that could dispose of federal waste.
- Explained that the agency had completed rulemaking at the end of 2003 and that applications were received from July 8<sup>th</sup> through August 4<sup>th</sup> 2004 and that the agency received one application.
- She testified that the application is currently in the administrative review process.
- Responding to Rep. Smith's question when the state could expect construction of the facility to begin, she indicated that Commission would have an opportunity to consider the license application in 2007 and if issued at that time, construction could then begin.

---

**Judge Ron Harris and Kelly Frels, Texas Clean Air Working Group**

- Need to continue providing funding for TERP and research beyond 2007.
- They discussed the importance of having “good science” when developing SIPs.
- They thanked the Legislature for passage and financial support for TERP.
- He also testified that they believe the eight hour ozone standard will be challenging to meet. Chairman Bonnen asked whether some of those industries (marine, locomotive and aviation) that are not currently paying into the TERP fund should begin to participate.

**Dana Blume, Port Authority**

- Discussed the air quality plans that have been developed for the port area to secure emission reductions.
- Testified that the Authority had been working with the various entities involved in port activities to develop processes, etc.. conducive to improving air quality.
- When asked by Rep. Smith about the amount of pollution produced by the Houston Ship Channel, she discussed the need ensure that the activities at the port are conducive for shipping so that the shippers would not leave Houston for other areas, such as New Orleans. She also mentioned the fact that emissions from ships are not regulated. In response to Chairman Bonnen’s inquiry, she testified that their national association is working on the federal level to address some of the port/air quality-related issue.

**Chris Newton, Texas Petroleum Marketers and Convenience Store Association**

- Testified about the petition that they had filed with TCEQ to delay the March 2005 effective date that certain areas of Texas must use TxLED fuel.
- Said that the petition requested an 18 month delay and that their members were concerned about the potential difficulty in obtaining adequate supplies of either TxLED fuel or its equivalent. He further stated that they did not want to be seen as hindering the state’s ability to comply with federal clean air requirements.
- Chairman Bonnen asked him about price spikes and why they are bothersome. Newton testified that price spikes upset the marketplace, that this is a very competitive market, and that lines of credits established by operators would be pushed to the limit. In questions about the petition, he continued to press that concerns about supply were the primary driving force behind the petition and that his clients were also concerned about the ability of TCEQ to enforce the requirements to ensure that there is a level playing field.
- Rep. Crowover asked who produces TxLED and he testified that Valero did and that there were others that produced an equivalent fuel. He also said that there was continuing uncertainty about what would be an equivalent fuel and that there was a potential for prices to escalate considerably.

**Joseph Heller, Daniel Sloan, Phil Roberts, Emission Reduction Consulting**

- Testified about the TERP grant applications that they had submitted on behalf of clients.

---

They expressed shock that none of the retrofit applications were funded in '04.

- They stressed that though the agency only funded certified or verified equipment, that consideration should have been given to technology that is available today, even if it has not been certified.
- Chairman Bonnen questioned them about the process to certify the equipment and the representatives discussed its efforts with CARB (California Air Resources Board) and EPA.
- They also testified that cost effectiveness was another reason that the agency denied these applications. Chairman Bonnen indicated that at the end of the day the agency needs to fund projects that can provide SIP credit and uncertified equipment would not provide that credit. He also mentioned that he agreed with their overall goal to develop technologies for the future, but that at this point in time the TERP grants must address the current needs of the state. The representatives testified that they were concerned that the agency would not be able to meet its SIP requirements without using this technology now.

### **Commissioner Marquez**

- Testified that he was sympathetic to ERC's efforts and that this is the type of technology that the agency wants to see developed. He mentioned that the agency has been working with EPA on an agreement (the only one in the nation) to certify more technologies. He mentioned that the first two years of the grant programs there were less applications and the agency funded almost all of them.
- However, now there is an increasing competitiveness for the TERP grants, which allows the agency to consider the overall value of each particular project and how it fits with the bigger picture. He stressed the importance of balancing all the different types of projects.
- Chairman Bonnen mentioned that thought has to be given to how much funding should be provided for experimental types of projects because of the need to move the technology forward.

### **Scheleen Walker**, Travis County Transportation and Natural Resources Department

- Discussed the county's EAC efforts, its work with TCAWG and the \$6 million it received in TERP grants for 0.6 tpd reduction. She testified that through TERP grants, the area is committed to securing 2 tpd reductions in the future. She also stated that TERP should be extended beyond 2007, though she recognizes that the majority of the TERP revenue shifts to the Texas Mobility Fund in 2008. She indicated that additional review needs to be given about extending the program and its funding source. She also stated that if TPCA's TxLED petition is approved that Travis county would have to conduct new modeling to determine the impact of the changed timeline for the use of that fuel in the 110 counties. Finally she offered support of the agency's decision to only fund verified technologies under the emission reductions grant program.

### **Tom "Smitty" Smith**, Public Citizen

- 
- Testified that the Legislature needs to consider changes to the TERP program, as well as address SIP issues during the upcoming session. He focused on the need to secure additional reductions from power plants and to increase energy efficiencies throughout the state.
  - He also told the Committee that the Mexican trucks that will be allowed into Texas and the U.S. are older and not as clean as U.S. fleets and that this issue needs to be addressed, possibly by the establishment of “clean corridors” between Mexico and into Texas, as well as some type of inspection process of diesel engines.
  - He also mentioned the need for more progress on securing emission reductions from light duty vehicles particularly fleets, such as taxis that operate around the airport areas. He acknowledged that there had been reductions in emissions from power plants, but that additional reductions were needed if the areas around the state were to comply with the eight hour ozone standard. Chairman Bonnen stated that he did not believe that compliance with the eight hour standard would be as difficult as some were saying.
  - He also testified about some of the on-going efforts to bring in low level radioactive waste from states other than Vermont and Maine (which are in a Compact with Texas). He mentioned the efforts of Nebraska and Louisiana to seek permission for their waste to be sent to Texas, now that the state is scheduled to have a disposal site.
  - He asked that the Committee discuss the issue of other states bringing waste to the state and whether this is the policy that Texas wants set.

**Beth O’Brien**, Public Citizen

- Testified about the effect of upset emissions on an area’s air quality and the difficulty these emissions add to efforts to comply with federal clean air standards. Upset emissions should be included in the state’s emission inventory.
- Expressed concerns that too little enforcement of emission events; permits are too weak, do not include these emissions; federal and state loopholes allow these emissions not to be calculated; and fines are too small.

**Seth Cohen**, Texas Public Interest Research Group

- Testified about the need for the agency to ensure that penalties assessed for violations of environmental law and regulations are greater than the benefit of noncompliance. In his testimony he referred to the report conducted by the State Auditor’s Office (SAO) on TCEQ’s enforcement policies.
- He specifically mentioned the recommendation that the agency eliminate deferrals and discounts as a move in the correct direction. He stated that the current policies can be considered as allowing polluters to violate laws because the cost of noncompliance is limited; that an unfairness in the system is created for those who do comply with the rules and law; and that without full economic benefits being recovered, the state loses out on a source of revenue.

---

## **OVERSIGHT**

---

## **SPEAKER'S CHARGE TO THE COMMITTEE**

On November 4, 2003, Texas House Speaker Tom Craddick issued four (4) charges to the House Committee on Environmental Regulation, including instructions to:

4. Monitor the agencies under the committee's jurisdiction.

## **IMPLEMENTATION OF HB 1567 RELATED TO LOW-LEVEL RADIOACTIVE WASTE DISPOSAL**

### **SUMMARY OF IMPLEMENTATION**

House Bill 1567 by the 78<sup>th</sup> Texas Legislature marked a policy change in Texas statutory provisions regarding the disposal of low-level radioactive waste. Key changes for this disposal concept include:

- Privatizing one disposal facility (formerly limited to a public entity);
- Allowing the disposal of federal facility waste, in addition to Texas Low-Level Radioactive Waste Disposal Compact (Texas Compact) waste, under one license; and
- Depositing a special fee on waste into the state's general revenue fund.

The Texas Commission on Environmental Quality (TCEQ) continues to implement the provisions of House Bill 1567 by meeting the statutory time line for the acceptance and processing of low-level radioactive waste disposal applications. The TCEQ held a stakeholders meeting in July 2003 to discuss the rulemaking process prior to the proposal of draft rules to implement House Bill 1567. On August 6, 2003, TCEQ proposed rules to accept and review applications from private companies for low-level radioactive waste disposal. Following a public meeting and the review of public comment, the TCEQ adopted rules on December 17, 2003, with an effective date of January 8, 2004.

Since issues involving low level radioactive waste are partially under the jurisdiction of the U.S. Nuclear Regulatory Commission (NRC), the TCEQ is required to advise the federal agency of any changes to rules governing this issue. On January 22, 2004, in a letter issued to the TCEQ, the NRC stated that they found no compatibility issues with the new Texas rules. The NRC requested to be informed of any exemption the TCEQ may consider as part of a low-level radioactive waste disposal application so that they may conduct a compatibility review of the circumstances at that time.

On January 9, 2004, a notice was published in the Texas Register that the TCEQ would accept applications for low-level radioactive waste disposal for a 30-day period beginning on July 8, 2004 and ending on August 6, 2004.

One application was received during the 30-day acceptance period from Waste Control Specialist,

---

LLC for a proposed site in Andrews County, Texas. TCEQ will conduct an administrative review, a merit review based on statutory tiered criteria, and a technical review as part of the licensing application review process prescribed in House Bill 1567. There may also be a contested case hearing on a pending application that is statutorily limited to one year in length.

TCEQ staff has begun the administrative review process for the one application received on August 4, 2004. The initial administrative review of the application will be completed in 45 days of receipt of the application. TCEQ will conduct a public meeting in the proposed host county following any declaration of administrative completeness of an application. A final decision of license issuance is projected to come before the TCEQ commissioners in late 2007.

The TCEQ is also charged with setting fees for a licensed low-level radioactive waste disposal facility that accepts waste from the Texas Compact. Fees will need to be determined by TCEQ rule prior to the opening of a disposal site in Texas. The TCEQ will begin the rulemaking process for fee setting, with a concentrated effort to seek stakeholder input, during the license application review process.

## **BACKGROUND OF LOW-LEVEL RADIOACTIVE WASTE**

Under federal law, Texas is responsible for managing the low-level radioactive waste generated within its borders. Low-level radioactive waste is generally paper, plastic, glass, or metal that has been contaminated by or that contains radioactive material and that has been declared as waste. There are sub-categories, or classes, of low-level radioactive waste that are segregated by the radioactive concentration and type of radioactive material contained in the waste.

The least hazardous sub-category, Class A low-level radioactive waste, generated within the Texas can currently be shipped for disposal to either the Chem-Nuclear facility near Barnwell, South Carolina or the Envirocare facility near Clive, Utah. More highly radioactive classes of waste, Class B and Class C low-level radioactive waste, generated in Texas can currently only be disposed of at the Chem-Nuclear facility. The Chem-Nuclear facility is scheduled to stop accepting waste from outside its compact, comprised of the states of South Carolina, New Jersey, and Connecticut, in mid-2008. Although there is currently access to disposal facilities for Texas waste generators, other factors affecting the timely disposal of waste include the high cost of disposal, the necessary negotiated contracts for disposal facility access, and long-term liability considerations.

## **CURRENT STATUS OF THE TEXAS COMPACT**

The withdrawal of the State of Maine from the Texas Compact became effective on April 5, 2004, two years after emergency legislation passed in Maine became effective. The State of Vermont remains as the only non-host party state to the Texas Compact. Provisions of the Texas Compact require each non-host party state to pay Texas \$25 million in the form of two payments, an initial payment following the ratification of the Texas Compact and an additional payment upon facility opening. House Bill 1567 provides for the collection of the initial \$12.5 million from each party state to the Texas Compact. The State of Vermont has made two of three scheduled installments to

---

complete the initial \$12.5 million payment to Texas as part of an agreed upon payment plan.

---

## **TCEQ ENFORCEMENT PROCESS REVIEW**

### **BACKGROUND**

In December, 2003, the TCEQ announced a comprehensive review of its enforcement functions. The TCEQ's consolidated enforcement division was created in 1996 in an effort to bring consistency to the enforcement process across the state. The goal of the review was to ensure that the agency is enforcing environmental laws fairly, effectively, and swiftly. This year long review encompassed all the major functions and processes associated with the agency's enforcement role and sought to achieve several key goals, including evaluating existing compliance and enforcement policies and statutes, enhancing consistency, environmental protection, and deterrence, developing simplified processes that result in timely, efficient, and effective enforcement, and achieving greater compliance with environmental laws that protect public health and the environment.

### **SUMMARY OF PROCESS**

To assure that the process covered the significant issues under review, the agency formed a Steering Committee. The significant issues considered in the review were: compliance history; the enforcement process; penalties; and corrective actions.

In developing the report on the review, the following criteria was used in making recommendations:

- Improvement to the process
- Clarity, transparency and simplicity
- Consistency across regions and programs
- Small Business and local government impacts
- Maximizing environmental benefit
- Deterrence and incentives
- Timeliness and efficiency

The initial draft report represents recommendations by the agency's steering committee to the commissioners. This initial draft was provided for public comment through the month of September. Once the public comment period ended, the agency staff prepare the report that the agency's Commissioners will review and consider the recommendation during four worksessions planned for the fall.

Attached is the executive summary of the initial draft report.

### **PUBLIC PARTICIPATION**

---

The TCEQ provided the opportunity for public comment at each milestone during the review. The agency solicited public comment early in the process through a mail and web survey, and held public meetings in Houston, Harlingen, Dallas-Ft. Worth and Midland. As issues arose, they were then published on the web site for additional comment.

The agency received extensive comment from the public. The TCEQ continues to encourage participation by the public and other parties interested in this review to help ensure that a full and fair discussion of the issues occurs. Obtaining a variety of perspectives has improved the quality of the recommendations provided to the Executive Director and the Commission.

The initial final draft report was released to the public through the agency's website and TCEQ reviewed each comment and incorporated any needed changes to the document prior to presentation of the recommendations to the Commission later in the fall.

### **SIGNIFICANT RECOMMENDATIONS**

All of the significant recommendations are included as an attachment to this document. Depending upon the recommendation, implementation may require anything from an operational change up to a statutory change followed by a rule process and policy changes.

Collectively, these significant recommendations would result in important improvements to the enforcement program. Generally, they fall into the following categories:

- The TCEQ should refocus our resources in both compliance monitoring and enforcement to give the highest priority to violations that result or could result in actual harm to the environment.
- ▶ The enforcement process could be strengthened by eliminating individual assessments on most paperwork violations, and focus individual assessments on violations that result in environmental harm and establish standard minimum penalties for violations.
- ▶ Ensure that regulated entities do not gain an economic advantage by failing to comply with requirements.

- 
- ▶ Streamline the enforcement process and reduce the timeframe by up to 125 days as a result of standardized penalties and simplifying policies and procedures.
  - ▶ Allow small businesses and local governments to focus limited financial resources on corrective actions.

## **IMPLEMENTATION**

Several factors will affect implementation of the final recommendations. Since the recommendations include statutory changes, rulemaking, policy or guidance changes, and operational changes, timing will be dependent on several factors outside the agency's control.

Statutory changes would not be implemented until after the completion of the 79<sup>th</sup> Legislative Session. As is generally the case for the agency, rulemaking would be required and a least another six months would be needed for rule adoption. Therefore, recommendations requiring statutory and rule changes would not likely not be implemented until December 2005 or later.

Rule changes normally require six months to one year to complete depending upon complexity and requirements which must be met under the Administrative Procedures Act.

Changes to policy and guidance documents will vary dependent upon the level of development needed and the level of public participation. For example, some recommendations have already been implemented, such as providing additional enforcement information on the agency's website and making complaints concerning environmental concerns clearer to the public. Other changes, such as those which would require input from Commissioners or those which require additional input from staff or the public will require a longer timeframe.

Operational changes may be implemented immediately after approval by the Commission, or may require several months dependent again on the complexity of the recommendation.

## **TIMELINE**

A detailed timeline is attached to this document; however, the critical milestones for this review have generally been completed and the remainder of the review will focus on incorporating public comment and presentation of the recommendations to the Commission for approval or disapproval.

---

Due to the scope of this review and the significant number of recommendations that will require input from the Commission, the agency has scheduled four work sessions to cover the scope of the report.

Those worksessions will take place on the following dates: October 15, November 1, November 15, and December 17.

### **ENFORCEMENT REVIEW TIMELINE**

Meet Every through March 31	Committee Chairs meet bi-weekly to review and analyze the directives and Tues/Thurs. specific questions assigned by the Steering Committee and will forward all public comments to appropriate subcommittees
Feb. 9 - March 31	Initial Public Comment/Survey Period
March 4 - April 12	Identification and prioritization of key issues by subcommittees
April 1 - April 22	Committee Chairs meet weekly to review progress in key issue development and to continue subcommittee coordination
April 12	Key issues submitted to Committee Chairs from subcommittees
April 22	Committee Chairs finalize key issues and present single draft document and findings to the Steering Committee
April 27 - May 28	Key issues posted on public website for external review and comment
April 22 - June 24	Subcommittees develop draft final report which includes recommendations to key issues, incorporating public comments as appropriate
June 25	Draft subcommittee reports and recommendations due to Committee Chairs
June 25 - July 9	Committee Chairs/Subcommittee Chairs will coordinate and review reports and recommendations to ensure consistency
July 13	Send draft report from Committee Chairs to the Steering Committee
July 15	Present Final Draft Report to Steering Committee
July 29	Steering Committee completes review of draft final recommendations

---

July 29 - Aug. 13	Management/Commissioner Review/Briefings on Steering Committee final draft recommendations
Aug. 13 - Aug. 20	Committee Chairs incorporate management/Commissioner comments into final draft recommendations
Aug. 20 - Sept. 30	Post final draft recommendations to public website for comment
Aug. 23 - Oct. 14	Steering Committee review of public comment
Oct. 15	Present organizational information and preliminary feedback on public comment to Commissioners at worksession
Nov. 1	Present final draft recommendations, which includes consideration and incorporation of public comments, to Commissioners at worksession
Nov. 15	Present final draft recommendations, which includes consideration and incorporation of public comments, to Commissioners at worksession
Dec. 17	Present final draft recommendations, which includes consideration and incorporation of public comments, to Commissioners at worksession

---

**Texas Commission on Environmental Quality  
(TCEQ)  
Enforcement Review Final Report**

**August 20, 2004**

---

# Executive Summary

## Background

In December, 2003, the TCEQ announced a comprehensive review of its enforcement functions to ensure that the agency is enforcing environmental laws fairly, effectively, and swiftly.

In the course of the review, the agency solicited public comment through a mail and web survey, along with hearings in Houston, Harlingen, Dallas-Ft. Worth and Midland. A steering committee established by the executive director, along with chairs of three major committees and a number of subcommittees, reviewed the comments and identified key issues raised in the comments. These issues were then published on the web site for additional comment.

The steering committee identified seven criteria for the evaluation of issues:

- Improvement of the enforcement process
- Clarity, transparency, and simplicity
- Consistency across regions and programs;
- Impact on small business;
- Maximizing compliance through deterrence and incentives;
- Maximizing benefit to the environment in the agency's enforcement policies; and
- Timeliness, efficiency, and effectiveness.

Three broad categories of issues were identified:

- compliance history
- the enforcement process
- penalties and corrective action

These issues were further subdivided into a number of key issues, which were assigned to subcommittees for research, analysis and recommendation. The subcommittee recommendations were collected and reviewed by the chairs of the three major issues, who in some cases recommended changes. The report of the chairs was then evaluated by the full steering committee, and any changes that were deemed necessary were made. The current document represents the recommendation of the steering committee to the commissioners.

---

## **Significant Recommendations**

All of the recommendations are included in Attachment 1 of this report. The attachment summarizes the analyses and recommendations proposed by the subcommittees to address each key issue identified. In each instance, a primary recommendation is identified, and the basis of the recommendation is discussed. In some cases, alternative recommendations and analyses are also included. Depending upon the recommendation, implementation may require anything from an operational change up to a statutory change followed by a rule process and policy and operational changes.

The most significant changes proposed are also summarized in Table 1. Collectively, these significant recommendations would result in important improvements to the enforcement program.

### **Focus on Environmental Harm**

Several recommendations would sharpen the agency's focus on preventing and reducing risk to human health and the environment. Implementation of these recommendations would assign a higher priority and additional agency inspection and enforcement resources to those violations causing harm or that have the potential to cause harm. For instance, inspections would be scheduled based primarily on a facility's potential risk to the environment. Because unauthorized facilities are less likely to install the controls needed to protect the environment, field resources would also be reserved every year to address sectors that have high levels of unauthorized operations. To ensure proper enforcement against environmental problems detected through citizen complaints, the agency would implement a new complaints manual and a nuisance odor protocol. Base penalties for violations that caused actual environmental harm would be increased. Finally, an entity's compliance history score would be based more on the frequency of violations causing environmental harm. Penalties would also be enhanced when a violator does not respond to enforcement notices.

### **Strengthen the TCEQ Enforcement Program**

Several recommendations would make the enforcement program stronger by making the process faster and more predictable. By eliminating individual assessments for minor violations, the use of standard penalties would shorten timelines and allow a shift of resources to serious violations. The use of standard and minimum penalties would also make outcomes more predictable, which enhances deterrence. Eliminating deferrals and enhancing penalty amounts for cases that do not settle quickly could encourage speedier resolution of cases and address violations more quickly.

Other recommendations would more firmly tie violations to appropriate consequences. For example, ensuring that penalties reduce the economic benefit of non-compliance would take away an important incentive for non-compliance. In order to ensure that penalties are paid

---

promptly, interest charges would be assessed on overdue penalties, and the agency would adopt new procedures to collect delinquent fees and penalties. These procedures would include the use of a collection agency, additional referrals to the Attorney General for collection, and the return of permit applications if the applicant has past due fees and penalties. A poor compliance record should also limit an entity's opportunity to obtain new authorizations. For example, if an applicant has a poor compliance record, the agency would either return the application up front, or add conditions designed to ensure compliance.

### **Streamline the Enforcement Process**

Much of the public comment focused on how long the enforcement process takes. The subcommittees looked at ways to shorten the existing process and considered options for a fast-track process for certain enforcement cases. Changing and enforcing the current "expedited" timeline could reduce the average length of the enforcement process by as much as 125 days.

The process could also be streamlined by simplifying the penalty policy and establishing standard penalties would expedite the calculation of penalties and the issuance of orders. Setting firm deadlines for submitting SEP proposals and documentation of financial inability to pay that are much earlier in the process would ensure earlier review and reduce delay. A greater variety of pre-approved SEP projects and the use of tools such as thresholds and EPA software for financial inability to pay reviews should further speed the process. In addition, a field citation program in which the regional offices would assess fines directly could allow immediate resolution of some violations. These improvements should also increase deterrence by shortening the time period between when the violation occurs and when the agency takes enforcement action.

### **Simplify and Clarify the Process**

Many of the public comments indicated that the current enforcement process is too complicated and hard to understand. Based on these comments and guidance from the Steering Committee, we recommend that two key areas would be simplified: the calculation of compliance history ratings and the assessment of penalties. First, compliance history would be based on having violations that have harmed or are likely to harm the environment rather than on a complicated mathematical formula.

The committee recommends several changes to the penalty policy to make it simpler and more accessible. First, we recommend that the commission adopt the penalty policy in rules so that it can be easily found by all citizens. The rule process will also allow all interested parties to provide input on the priorities contained in the document. In order to make the calculation of penalties more understandable, the TCEQ would eliminate the penalty matrix and replace it with common categories of violations. Potential harm and paperwork violations would be addressed primarily with standard penalties. To eliminate double-counting and make the process simpler,

---

the TCEQ would no longer consider compliance history components in calculating a penalty. Instead, staff would simply use an entity's compliance history rating to determine whether a penalty should be increased or decreased.

### **Recommendations Relating to Small Entities**

An estimated two out of three enforcement cases now brought by the TCEQ address either a small business or a small local government. One of the committee's criteria for evaluating issues was how small local governments and businesses are affected. This evaluation led to a recommendation to change the penalty policy to allow for penalty reductions of 15% to small entities. So that monies can be applied toward correcting problems, the committee also recommends that there be an opportunity for small local governments to defer penalties. If the environment would not be affected, small entities could also receive additional time to come into compliance. Finally, the committee recommends that the commission adopt a consistent definition of "small" for purposes of enforcement.

The committee recommends no changes in the criteria for referral for formal enforcement to address small entities, or to the requirements for corrective action. SEPs with a 100% offset of a penalty would continue to be available to small cities and local governments.

### **Resource and Training Needs**

The review identified several changes that would improve the effectiveness of agency enforcement staff. There may be a need for additional employees in the Litigation Division, and in the administration of both the SEP and financial inability to pay programs, but enforcement and investigative resources were found to be adequate at this time. However, the committee recommends reviewing the allocation of enforcement and investigative resources after the recommendations have been implemented to determine whether some shift in staffing is needed to address enforcement priorities. In addition, development of media-specific expertise in enforcement and a formal mentor program in Field Operations and Enforcement could make the programs more effective. Providing additional technical training to investigators, enforcement staff, and attorneys would also improve the effectiveness of enforcement staff. Finally, training more agency staff in CCEDs applications and providing more specialized access to enforcement information would improve the agency's use of compliance history information and enforcement data.

### **Access to Enforcement Information and Public Outreach**

The committee also recommends several changes to provide better public access to agency enforcement information and a clearer understanding of enforcement goals and procedures. The public web site access for reporting environmental complaints should be more informative and

accessible, especially from the home page. The web site should also include enforcement process information, including case status information and access to Commission-issued orders, along with a clear, step-by-step description of the process. These pages should also include links to other enforcement-related topics such as compliance history, SEPs, and investigation and complaint information. The enhanced web site would provide a more complete look at the enforcement process and would allow the public access to site-specific enforcement information. Additional information would be added to the public web site on compliance history and complaint information such as the nuisance odor protocol and enhanced citizen-collected evidence information. Enforcement outreach materials would be reviewed and updated for a larger audience including citizens, and there would be more focus on agency outreach efforts at the regional level. Finally, a targeted public campaign would be implemented to encourage public awareness and reporting of violations that harm the environment. These recommendations would improve the public's perception of the enforcement process by making it more open and easier to understand.

<b>Table 1: Significant Recommendations from the Enforcement Review</b>	
1. Risk based approach to investigation priorities incorporating agency wide input (pg 157)	2. Strategy to identify and inspect unauthorized facilities (pg 161)
3. Agency wide effort to maintain an up to date EIC document (pg 164)	4. Implement the draft guidance document for investigations of complaints; implement the draft nuisance protocol (pgs 244, 259)
5. Modify the agency's web site to make complaint reporting easier (pg 294)	6. Reduce the timeframe to move cases through the enforcement process (reducing it by as much as 125 days for expedited process) (pg 209)
7. Establish firm deadlines for submittal of financial inability and SEP documentation (pgs 225, 228)	8. Develop a limited field citation program (pg 220)
9. Enhance enforcement staff qualifications and specialization (pgs 229, 231)	10. Simplify the overall penalty calculation methods by using only the compliance history classification, and eliminate use of specific compliance history components (pg 88)

<b>Table 1: Significant Recommendations from the Enforcement Review</b>	
11. Eliminate the \$15,000 threshold for economic benefit enhancement and recover economic benefit of noncompliance up to statutory caps, rather than adjusting the base penalty (pg 89)	12. Establish downward penalty adjustments available to some defined small entities, reducing the penalty by 15% and allowing Commission discretion to consider further adjustments (pg 92)
13. Adopt the penalty policy by agency rule (pg 98)	14. Simplify penalty policy by eliminating “potential release” from the matrix and increasing the base penalty percentages for actual releases (pg 100)
15. Implement the use of standard penalty amounts for specific violations (especially common violations and violations with only potential harm) (pg 100)	16. Eliminate use of penalty deferrals; increase penalties if settlement is not reached during expedited process (pgs 104, 209)
17. Develop and approve lists of designated SEP projects (pg 143)	18. Encourage preferred (direct benefit, same media, community-based) SEP projects with higher offsets and use lower offsets for other projects (pgs 145, 151)
19. Expand the opportunity for a 100% penalty offset for direct benefit SEP projects to include small businesses (pg 155)	20. Develop additional monitoring, root cause assessment, and financial assurance as ordering provisions for repeat violators (pg 136)
21. Self reported violations should be counted as a violation and as an inspection in the compliance history formula once captured in an NOV/NOE (pg 11)	22. Site complexity should not be a component in determining facility compliance history (pg 35)
23. Revise the compliance history formula especially revisions to the formula to better reflect actual performance (pg 37)	24. Use the final compliance history classification system for all entities, including small business and local government (pg 56)

<b>Table 1: Significant Recommendations from the Enforcement Review</b>	
25. Provide a compliance history appeals process to all entities regardless of classification (pg 57)	26. Continue existing practice for use of compliance history in permitting and enforcement decision making, including shutdowns and permit revocation (pg 70)
27. Existing system of providing incentives based on compliance history should be reviewed and expanded (pg 82)	28. Fees should be increased or lowered based on compliance history (pg 86)
29. Hold all permit applications if the applicant owes the agency more than \$200 in delinquent fees or penalties. The holding period will not be included in backlog calculations. Permits will be returned if fees or penalties are not paid within a specified period of time (pg 173)	30. More aggressively collect delinquent fees and penalties through the use of the Attorney General and a collection agency (pg 188)
31. Establish an initial screen of 1% of annual revenue for small businesses to determine financial inability to pay a penalty; conduct a more thorough analysis only if 1% of annual revenue does not pay the entire penalty (pg 192)	32. For small local governments, use MUNIPAY formula developed by EPA to determine financial inability to pay penalties (pg 198)
33. Seek legislative approval to assess interest charges on penalty payment plans and delinquent penalties (pg 206)	34. Enhance and expand the TCEQ public Web site and T-Net to provide access to enforcement and compliance history information for internal and external use (pg 237)
35. Request proposals for a statewide public awareness campaign to better inform the public about the agency's roles and ways in which the agency maintains and improves the environment (pg 240)	

---

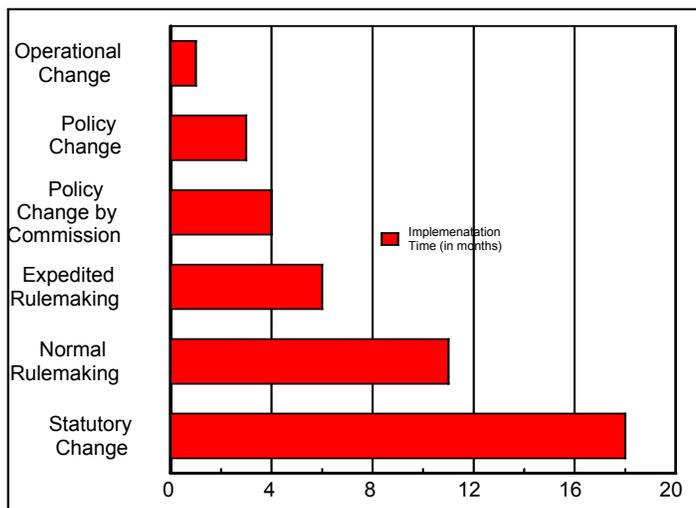
**Factors Affecting Implementation  
Implementation Time Line**

Statutory changes generally are not finally adopted until June following a session, when the governor signs or does not veto approved legislation. If, as is commonly the case, rulemaking is required, at least another six months should be allotted for the adoption of rules. Therefore, elements requiring a statutory change would likely be implemented in December, 2005.

A change to existing rules normally require around a year to complete, including time for drafting and review, the procedures required under the Administrative Procedures Act, and optional stakeholder comment opportunities. This process can be expedited so that a rule change could be made in approximately six months. Depending on the level of additional public participation desired, and the extent of comments received during the Administrative Procedures Act comment period, this time could be shorter or longer.

The time needed to implement changes requiring policy and guidance development will vary according to the magnitude of development needed and the level of formality and public participation desired. In the case of recommendations made in this document the level of time needed will also vary according to how fully developed the recommendation is. For instance, the recommendation to implement the already-drafted nuisance odor protocol could be implemented immediately. Similarly, guidance for the Office of Permitting, Remediation and Registration on holding permits where the applicant has failed to pay a penalty or fee could be quickly drafted implemented. Other recommended guidance projects, such as the need for additional incentives for high performers could require several months. Similarly, guidance or policy areas that merit determinations by the commission will require additional time, particularly if they are to be heard at an agenda. Therefore, recommendations which require policy or guidance development should be assumed to require between one and six months, depending on the project.

Operational changes may require as little as a month to implement, or as long as several months. As is the case for changes to policies and guidance, the length of time required for operational changes will depend on the complexity of the change, the extent to which the needed change has been fully articulated in the recommendation and the formality needed in making the change



---

## **AIR QUALITY ISSUES**

---

## **REPORT OF ACTIVITIES RELATED TO THE 8-HOUR OZONE STANDARD**

The U.S. Environmental Protection Agency (EPA) issued the 8-hour ozone national ambient air quality standard in July 1997 and after significant legal challenges and delays began implementation of that standard in 2002.

During this same time-frame, the staff of the Texas Commission on Environmental Quality (TCEQ) began review and analysis of the air quality data and other criteria EPA identified as requiring consideration in determining the status of a state's areas compliance with the 8-hour standard. Attachment A is a copy of the EPA criteria.

In response to a request from EPA to the Governor, the Commission developed a designation recommendation based on their regional air quality planning strategy, the then current air quality data, and the most significant of the EPA criteria. That recommendation was forwarded to Governor Perry who submitted the 8-hour ozone standard designation recommendations for all areas in Texas on July 15, 2003 (Attachment B).

After initial review of the Governor's recommendation, EPA requested additional information supporting that recommendation including an analysis of each of their identified criteria. On October 16, 2003, the TCEQ submitted additional information that included analysis of the most significant of EPA's criteria. The agency requested approval of the Governor's recommendation based on the information submitted and the state's regional air quality planning area approach including voluntary and mandated control strategies to reduce pollution in the East and Central Texas Region.

In December, 2003, EPA responded to the Governor's recommendation indicating that Travis and Gregg counties had come into compliance with the 8-hour standard and agreement on the recommendation for the Houston and Beaumont areas. However, EPA disagreed with the recommendation for the Dallas-Fort Worth (DFW) and San Antonio (SA) areas by adding additional counties in each area to include the full Consolidated Metropolitan Statistical Area (CMSA) for each.

This notification initiated a 120 day consultation period required by the federal Clean Air Act during which the state and Governor presented additional information to EPA concerning disagreement over area designations. The TCEQ conducted additional analysis including all of the EPA criteria and presented additional information supporting the recommendation to support the Governor's original recommendation of attainment designation for Henderson, Hood, Hunt, Kaufman and Rockwall counties in the DFW area and Comal, Guadalupe, and Wilson counties in the SA area.

On April 15, 2004, the EPA Administrator signed the final designations of areas under the 8-hour ozone standard as well as classification of those areas. EPA disagreed with the state's recommendation and included Kaufmann, Rockwall, Comal and Guadalupe as nonattainment counties. The following table compares EPA's final designations with the Governor's July 15,

---

2003 recommendations with the exception of Travis and Gregg counties which met the 8-hour standard based on more recent (2003) air quality data. Since then, the TCEQ has begun the process of developing plans to demonstrate attainment of the 8-hour standard for the designated areas by their respective attainment dates.

On that same date, the EPA administrator also signed Phase 1 of their final 8-hour ozone implementation rule. Phase 1 covers the issues of classifications for the 8-hour ozone standard, revocation of the 1-hour ozone standard, antibacksliding principles, attainment dates, and when emissions reductions are needed for attainment. Phase 2 of the rule, which EPA projects to be issued by the end of October 2004, will address the remaining 8-hour implementation issues, including requirements for reasonable further progress (RFP), modeling and attainment demonstrations, reasonably available control measures (RACM), and reasonably available control technology (RACT). Attachment E is a brief summary of the pertinent issues included in EPA's final 8-hour Implementation Rule - Phase 1 as they may relate to Texas' affected

---

**EPA'S BOUNDARY GUIDANCE ON AIR QUALITY DESIGNATIONS  
FOR THE 8-HOUR OZONE NATIONAL AMBIENT AIR QUALITY STANDARDS  
(NAAQS)**

**EPA Boundary Presumptions**

- Any county with monitored violations
- Whole C/MSA's
- 1-hour NAA boundary or C/MSA whichever is larger

**Criteria for other than C/MSA**

- Emissions and air quality in adjacent areas (including adjacent C/MSAs)
- Population density and degree of urbanization including commercial development (significant difference from surrounding areas)
- Monitoring data representing ozone concentrations in local areas and larger areas (urban or regional scale)
- Location of emission sources (emission sources and nearby receptors should generally be included in the same nonattainment area)
- Traffic and commuting patterns
- Expected growth (including extent, pattern and rate of growth)
- Meteorology (weather/transport patterns)
- Geography/topography (mountain ranges or other air basin boundaries)
- Jurisdictional boundaries (e.g., counties, air districts, existing 1-hour nonattainment areas, Reservations, etc.)
- Level of control of emission sources
- Regional emission reductions (e.g., NO<sub>x</sub> SIP call or other enforceable regional strategies)

A State or Tribe choosing to propose area boundaries smaller than a C/MSA or tribal land should consult with its EPA Regional Office. The EPA will consider alternative boundary recommendations on a case-by-case basis to assess whether the recommendation is consistent with §107(d)(1) of the Act.

**Comparison EPA's Final 8-hour Designation - Texas' Recommendations**

<b>Area</b>	<b>Texas' July 15, 2003 Recommendation Counties</b>	<b>EPA's Final Designations Counties</b>
<b>Beaumont/Port Arthur</b>	Hardin Jefferson Orange	Hardin Jefferson Orange
<b>Dallas/Fort Worth</b>	Collin Dallas Denton Tarrant Ellis Johnson Parker	Collin Dallas Denton Tarrant Ellis Johnson Parker Kaufman Rockwall
<b>Houston/Galveston</b>	Brazoria Chambers Fort Bend Galveston Harris Liberty Montgomery Waller	Brazoria Chambers Fort Bend Galveston Harris Liberty Montgomery Waller
<b>San Antonio (EAC)</b>	Bexar (Deferred)	Bexar Comal Guadalupe

---

## Summary of EPA's 8-hour Ozone Implementation Rule - Phase 1 April 30, 2004

### Area Classifications

- Subpart 2 - Areas with a 1-hour design value at or over 0.121 ppm will be classified according to the 8-hour design value and EPA's revised classification table.
- Subpart 1 - All other areas using 8-hour design value, most areas with no classification, some under "Overwhelming Transport" classification, which must meet rural transport area definition, but allows consideration of intrastate transport.

**8-hour Attainment Dates** - Based on number of years after effective date of 8-hour designation

<u>Area</u>	<u>Classification</u>	<u>No. Years</u>	<u>Year</u>
<u>Subpart 2</u>			
BPA	Marginal -	3	(2007)
DFW, HGA	Moderate -	6	(2010)
	Serious -	9	(2013)
	Severe 15 or 17 -	15 or 17	(2019 or 2021)
	Extreme -	20	(2024)
<u>Subpart 1</u>			
San Antonio		EAC, nonattainment deferred to 09-30-2005	(2007)

**1 year Attainment Date Extensions:** 4<sup>th</sup> high ozone level in the attainment year 0.084 ppm or less

**Revocation of the 1-hour Ozone NAAQS:** 1 year after effective date of 8-hour designations

### Transition from 1-hour to 8-hour Ozone Standard & Antibacksliding Houston-Galveston, Beaumont-Port Arthur & Dallas-Fort Worth

#### 1-hour Nonattainment/8-hour Nonattainment

- 8-hour NSR applies, with the exception of 1-hour NSR major source thresholds for RACT
- Approved SIP obligations - Areas remain obligated to adopt or implement most 1-hour requirements (except major source thresholds for permitting, NSR offsets, and RFG) (BPA & DFW 4 counties) If area has unmet 1-hour attainment demonstration obligation, then must choose either to:
  - submit 1-hour attainment demonstration within 1 year after designation; or
  - submit 8-hour RFP plan within 1 year after 8-hour designation (5% reduction from 2002 baseline and over approved SIP measures or enforceable commitments or national / regional measures) with reductions achieved no later than 3 years after designation; or
- submit an 8-hour attainment demonstration within 1 year after designation that provides for 8-hour RFP to the attainment date & for initial period (2003-2008) and achieves emissions reductions by end of 2007.

- 
- (BPA & DFW 4 counties) If area has unmet 1-hour ROP obligation; must develop and submit all 1-hour ROP. 8-hour RFP can be used to satisfy the 1-hour ROP obligation if the emission targets are at least as stringent, if 8-hour ROP overlaps the 1-hour ROP obligation.
  - How long do 1-hour obligations remain?  
After attainment of the 8-hour NAAQS, may shift to contingency measures upon demonstration consistent with FCAA 110(l) and 193.
  - (DFW Additional Counties) - Only the part of the 8-hour nonattainment area that was also 1-hour nonattainment is required to keep mandatory 1-hour SIP measures, however, all counties may revise the 1-hour measures used in the DFW 4 county SIP if non-interference with 8-hour attainment is demonstrated.
  - (HGA) Mid-course review commitment remains as existing enforceable SIP commitment.

#### **El Paso County (1-hour Nonattainment/8-hour Attainment)**

- Nonattainment NSR no longer applies, subject to 8-hour PSD - These changes need SIP revision.
- Approved SIP obligations - May request 1-hour requirements that remain under 8-hour be shifted to contingency measures after 1-hour revocation, consistent with FCAA 110(l) and 193.
- Unmet 1-hour obligation (If no approved attainment demonstration or ROP)
  - Obligation to submit is deferred as long as attainment for 8-hour and
  - Obligation to submit no longer applies once area has an approved 8-hour maintenance plan
- 8-hour Maintenance Plan Requirement - Must adopt under FCAA 110(a)(1) within 3 years demonstrating maintenance for 10 years and including contingency measures. If area violates 8-hour prior to having an approved 8-hour maintenance plan, then:
  - Instead of outstanding obligation to submit attainment demonstration, within 1 year after violation determination, must submit (or revise) 8-hour maintenance plan to:
    - address the violation through modeling; or
    - submit a SIP providing for a 3% increment of emissions reductions from the 2002 baseline, in addition to measures or enforceable commitments or national or regional measures; that provides for emission reductions within 3 years after violation determination.

#### **Victoria County (1-hour maintenance plan/8-hour Attainment)**

- Approved SIP obligations - May request 1-hour requirements that remain under 8-hour be shifted to contingency measures after 1-hour revocation, consistent with FCAA 110(l) and 193.
- 8-hour Maintenance Plan Requirement - Must adopt under FCAA 110(a)(1) within 3 years demonstrating maintenance for 10 years and including contingency measures.
- Requirement for 1-hour maintenance plan after approved 8-hour attainment demonstration or maintenance plan:
  - Don't have to update 1-hour maintenance plan, and
  - Don't have to implement contingency measures upon a violation of the 1-hour NAAQS.

---

**What is No Longer Required upon 1-hour Revocation**

- Conformity - 1-hour conformity no longer applies and 1-hour conformity determinations no longer required;
- Findings of failure to attain 1-hour NAAQS no longer required;
- Reclassifications for 1-hour NAAQS failure to attain no longer required;
- States no longer required to impose FCAA 181(b)(4) and 185 fees for failure to meet 1-hour attainment dates.

**When 8-hour Emissions Reductions Required**

- 8-hour attainment emissions reductions must be implemented by beginning of the ozone season immediately preceding area's attainment date, eg: must be in place by ozone season of 2006 for a 2007 attainment date.

**8-hour Nonattainment only** (Additional DFW counties and San Antonio)

- Must implement 8-hour Subpart 2 Classification or EAC requirements.
- 

This table identifies all counties EPA has designated as nonattainment. In some cases EPA designated partial counties. These are identified by a (P). Also, some counties are participating in an early action compact. These are identified as EAC. If a county is not listed below, EPA has designated it as unclassifiable/attainment

<b>Nonattainment Area Name</b>	<b>Counties</b>	<b>Classification</b>	<b>Maximum Attainment Date (from June 15, 2004)</b>
Beaumont/Port Arthur , TX	Hardin Jefferson Orange	Marginal	June 2007
Dallas-Fort Worth , TX	Collin Dallas Denton Tarrant Ellis Johnson Kaufman Parker Rockwall	Moderate	June 2010

<b>Nonattainment Area Name</b>	<b>Counties</b>	<b>Classification</b>	<b>Maximum Attainment Date (from June 15, 2004)</b>
Houston-Galveston-Brazoria, TX	Brazoria Chambers Fort Bend Galveston Harris Liberty Montgomery Waller	Moderate	June 2010
San Antonio, TX (EAC)	Bexar Comal Guadalupe	Basic	Dec 2007