

Chapter IX. POLICY ISSUES

The policy issues were derived largely from staff and outside recommendations as to how the TNRCC's processes could be made more efficient. These issues were selected based on the following criteria which were themselves based on the questionnaire for the Self-Evaluation Report:

- Issues had to be significant.
- Issues had to be those which would benefit from significant discussion by the Legislature and the public.
- Issues had to be related to a statute or have a statutory basis.
- Issues had to focus on making the agency more efficient or improve the delivery of services.

It should be noted that, as directed by the questionnaire, support by the agency or its commissioners was not used as a criterion for inclusion in this section. The issues discussed below do represent issues which the agency and its commissioners believe are significant and merit further discussion and analysis.

POLICY ISSUE 1: SHOULD TNRCC'S FEE STRUCTURE BE CHANGED TO MORE APPROPRIATELY REFLECT AND ADEQUATELY SUPPORT THE AGENCY'S CURRENT ACTIVITIES?

Discussion. Dedicated fee revenues currently make up approximately 90 percent of all non-federal dollars appropriated to the TNRCC. The advantages to fee-based funding include reduced competition for general revenue tax dollars, financial support by the regulated community whose activities impact the environment, and support from the public who benefit from the agency's activities. However, the TNRCC's efforts over the last several years to consolidate its activities by function, rather than by media, have minimized these advantages. Under the existing organization, the use of dedicated funds creates a challenge to the agency's ability to respond in a timely manner to ever changing priorities and to satisfy new federal and state mandates.

The TNRCC's funding structure creates significant administrative, management, and legal challenges. These challenges complicate the agency's ability to plan and implement effective environmental management strategies. In addition the administrative cost to support a structure that requires reporting, accounting, billing, processing, and auditing functions for more than 50 fees paid by many thousands of fee payers is significant. The TNRCC's funding structure as it has evolved lacks flexibility, equity, and stability. A more efficient funding system would necessarily have the following characteristics:

- Flexibility – The lack of a flexible, broad-based approach severely limits TNRCC's ability to adequately respond to statutory requirements, public expectations, legislative priorities, and emergency situations. Greater flexibility in the use of its funds will allow the agency to maximize fee revenues and address the most significant risks to citizens and the environment. In addition, fees authorized along media lines ignore the realities of multimedia effects on the environment and the rapidly growing knowledge of the complex causes of environmental challenges.
- Equity issues – Fees are assessed very differently, creating widely varying impacts on TNRCC's regulated community. For example, a fee for waste deposited in a commercial hazardous waste landfill is assessed at a rate of \$30 a ton, while a fee of \$26 a ton is assessed for air emissions and a fee of less than \$1 a ton for pollutants for permitted wastewater discharges.

- Stability– Fees tied to levels of waste production or emissions are appropriate revenue sources to support the permitting, monitoring, and enforcement programs. However, these fee revenues can vary and are subject to fluctuations due to the economy and the success of TNRCC programs promoting reductions in waste and emissions generation. Since many of the agency’s fees are based on emissions and waste volumes, which are decreasing, revenues to the agency have begun to decrease, resulting in an unstable revenue source. Also, such rigidly aligned fees are limited in the ability to support developing new, yet proven, approaches to environmental protection, such as pollution prevention technical assistance and voluntary cleanups.

Options. A broad-based and flexible fee structure could support the agency’s efforts to respond adequately, and in a timely manner, to the state’s environmental challenges. A fee structure that is flexible, equitable, broad-based, stable, and cost-effective to administer could provide the TNRCC the support necessary to meet the environmental challenges of the 21st century.

Pros /Cons

Pros: Such a fee structure would increase flexibility, equity, stability, and efficiency.

- Flexibility would ensure that the agency has the financial ability to meet its statutory obligations and respond to emergency situations within its overall appropriation authority and allow the Legislature and the agency to re-direct existing resources in response to changing priorities.
- Equity among fee-payers would allow fees to reflect the costs of regulation and levels of pollutants to the environment. Similarly, an equitable structure would ensure that statutory caps and limits on fees are set to ensure that fees are assessed fairly between large and small operators. Finally, equitable fee assessments would reflect the ability of persons to pay the fee and result in similar costs for similar fee payers, particularly those paid by the general public.
- A broad-based fee would mean that programs of broadest public benefit would be supported by the broadest based revenue sources. The uses for the revenues collected from broad-based fees would be expanded to support activities throughout the agency. Fee programs, therefore, would be based on the delivery of benefits that are consistent with the costs imposed on fee payers.
- A predictable and stable fee structure would produce revenue sufficient to meet statutory requirements and legislative expectations. Fees based on relatively stable and predictable factors would ensure some certainty for the agency’s budget and strategic planning process, as well as predictability for the fee payers.
- A cost-effective fee structure would minimize the substantial administrative costs associated with the current system and provide for minimal administrative requirements that are understood by fee payers.

Cons: A broader fee base would spread the burden to more individuals. In addition, a more equitable fee structure would redistribute the burden among existing fee payers. In some cases, this could result in additional burdens. Finally, depending on its structure, a broad-based fee could require some entities to collect a fee in lieu of the TNRCC.

POLICY ISSUE 2: SHOULD ENVIRONMENTAL REGULATORY PROGRAMS BE CONSOLIDATED AND OTHER PROGRAMS TRANSFERRED?

Discussion. The TNRCC now has responsibility for several functions that are not intended to protect the environment or public health. These include inspections of aboveground storage tanks for compliance with insurance requirements, establishing rates for the provision of water and sewer service, administration of water rights, licensing and administration of grant funding for weather modification programs, and administration of the state's floodplain management program. These programs are related to programs administered by other state agencies. For instance, the rules for aboveground storage tanks are developed by the state fire marshal. Similarly, the Texas Water Development Board already assesses the availability of water in the state and provides funding for its management. The Public Utility Commission now establishes rates for telephone and electric utility service. These responsibilities were given to the TNRCC as part of the consolidation by media that occurred in 1985.

Options. The Sunset Commission should consider consolidating environmental programs and transferring responsibility for non-environmental functions to related agencies. The impact on the public and regulated entities should be a change in the locus of services provided. However, the benefit to the state could be more efficient and systematic regulation. Some suggestions for appropriate placement of programs include the following:

Consolidation

- Responsibility for recycling market development could be transferred from the General Land Office to the TNRCC.
- Spill response authority could be consolidated within one of the three agencies currently having jurisdiction over spills.
- TNRCC and the Texas Department of Agriculture could enter into an MOU for consolidated inspections.

Transfers

- Initial inspection of aboveground storage tanks for compliance with fire/insurance regulations could be transferred to the Office of the State Fire Marshal.
- Regulation of ratemaking for water utilities and district management could be transferred to the Public Utility Commission or the Texas Water Development Board.
- Weather modification could be transferred to either the Texas Water Development Board or the Texas Department of Agriculture.
- Floodplain management program could be transferred to either the Governor's Department of Emergency Management or Texas Water Development Board.
- Dam Safety Program could be transferred to either the Governor's Department of Emergency Management or Texas Water Development Board.
- Occupational licensing programs could be consolidated and considered for transfer to the State Department of Licensing and Regulation.
- Regulation of tourism development districts could be transferred to the Texas Department of Economic Development.

Pros/Cons

Pros:

Transfer of programs relating to emergency management, public safety, and occupational licensing would result in the TNRCC's responsibilities being more focused and comprehensible to the average citizen. In addition, the location to which each of these programs is proposed to be transferred already has similar responsibilities, which would limit the number of agencies doing the same kind of regulation. Transfer of programs relating to recycling and spill response would consolidate these types of activities and provide for a uniform, one-stop response.

Cons:

Transfer of programs could cause confusion on the part of the regulated community and public. Movement of programs will require the diversion of resources to the transfer process and away from the regulatory process. In addition, transferring staff to a different agency could affect morale. Transfer of certain of these programs could require the development of new expertise and could result in an entity being regulated by a different unfamiliar agency. This could make such transfers less efficient. For example, a receiving agency that previously had only an Austin location might be required to develop a new enforcement program with regional inspectors. Finally, programs such as water utilities have coordinated with programs designed to protect the environment to make both programs more efficient and environmentally sound. Transfer of such programs could disrupt this coordination.

POLICY ISSUE 3: SHOULD THE LEGISLATURE REDISTRIBUTE AUTHORITY OVER LOW-LEVEL RADIOACTIVE MATERIAL AND WASTE?

Discussion. At present, responsibility for low-level radioactive material is divided among three state agencies: the Texas Railroad Commission, the Texas Department of Health, and the TNRCC. The RRC is now charged with regulating radioactive materials and waste generated by oil and gas exploration and production. TDH presently has jurisdiction over the use, storage and processing of radioactive material, while TNRCC is charged with regulating its disposal. Within this general framework, there are also now areas of overlap, ambiguity and conflict. For instance, in addition to regulating disposal, TNRCC is charged with obtaining a disposal license. TNRCC, similarly, could have jurisdiction over the air emissions of radioactive material that otherwise is regulated by TDH. TDH also has the authority to classify some radioactive material as exempt from both TDH and TNRCC regulation.

There are several issues relating to licensing of commercial low-level radioactive waste disposal that will have crucial repercussions to the state and the TNRCC radiation program. These are listed below:

(1) Compact Waste: Since the federal Low-Level Radioactive Waste Policy Act (PL 96-573) was passed in 1980, there has been no real progress in development of new regional (or compact) Low-Level Radioactive Waste (LLRW) disposal facilities. Texas entered into a compact with Maine and Vermont in 1995, which was ratified by the US Congress in 1998. The compact law requires Texas to construct the first facility for disposal of compact-generated LLRW (Chapter 403, Health and Safety Code). The first application for a Texas LLRW disposal facility was submitted in 1992 and was formally denied by TNRCC commissioners in October 1998. Recent debate in the legislature has reopened the issue, with an emphasis on privatization; however, no guidance was given in the final legislation.

(2) Disposal Versus Assured Isolation: The 76th Texas Legislature, along with a number of states across

the country, considered “assured isolation” as an alternative to disposal. Assured isolation involves long-term storage of LLRW in above-ground concrete vaults with a high level of monitoring and maintenance. It may be more acceptable to the general public than disposal (because of the higher level of monitoring and maintenance), and to potential permit holders (because it requires a less stringent site selection process). The current Chapter 401, Health and Safety Code, does not address assured isolation. At the federal level also there are no existing regulations that address assured isolation as an alternative to disposal.

(3) DOE Waste: There was intense interest by the 76th Legislature regarding granting legislative approval for disposal in Texas of LLRW generated by the U.S. Department of Energy (DOE) at its various facilities around the country. A bill that would have allowed such disposal failed narrowly in the Legislature. The volume of DOE LLRW generated around the country is much larger than that from the Texas compact LLRW. Legislative approval of disposal of DOE LLRW in Texas must include consideration of the volumes of DOE and compact wastes, the potential for issuance of two or more licenses, and the impact of the requirement that the state must assume liability for the DOE waste.

(4) Conflicts of Interest: The 76th Texas Legislature, at the end of its regular session, passed HB2954 abolishing the Texas Low-Level Radioactive Waste Disposal Authority (TLLRWDA) on September 1, 1999, and transferring its powers, duties, obligations, rights, contracts, records, personnel, property, and unspent appropriations to the TNRCC. The TNRCC must incorporate the TLLRWDA’s responsibilities and functions without causing (or even leading to a perception of) conflict of interest between its LLRW facility *development* functions and its *licensing* functions. If disposal is selected as a LLRW management option, the TNRCC will be required to license the facility.

Resolution of these issues will affect Texas’ status under the compact, as well as large private entities such as TXU and Reliant Energy, public research institutions including UT and MD Anderson Hospital, and thousands of small businesses with equipment using radioactive material.

Options.

- The Legislature could consolidate all authority over non-exploration and production low level radioactive material and waste in TDH.
- The Legislature could establish by statute whether disposal or assured isolation is the preferred method for dealing with compact waste.
- The Legislature could establish by statute whether entities within Texas should be able to accept non-compact and/or DOE waste.
- The Legislature could establish by statute whether a private entity may hold a license in Texas and should fully address the policy and liability issues relating to approval of DOE LLRW disposal in Texas.
- If the Legislature decides that disposal is the preferred method for disposal of compact waste, and that a public entity should hold the license, the Legislature could either assign responsibility for seeking and holding the license to another entity or transfer jurisdiction to the TDH. If assured isolation is selected, the Legislature could clarify under which agency’s jurisdiction that practice should be regulated.
- If authority is not consolidated, the Legislature should clarify the TNRCC’s and TDH’s jurisdiction over exemption of radioactive materials.

Pros/Cons

Pros:

Consolidation of the radioactive waste program now housed in the TNRCC with the radioactive materials program located in TDH would be much more efficient. In addition, by reducing the number of regulators from three to two, it will make the regulatory system clearer than is presently the case. This would address overlaps such as the TNRCC being required to enforce TDH exemptions. In addition, it would make clear that TDH is the sole regulator of radioactive materials. Guidance as to disposal method, role of private entities, and acceptance of non-compact waste will assist regulators and generators of waste to understand their responsibilities. This guidance also may help to make the compact operational. This type of guidance should also help the public in understanding the state's role in radioactive materials and waste.

Cons:

Some types of clarification may be unpopular. Consolidation of waste disposal regulatory authority in TDH would mean that radioactive waste will be one of the few areas outside of exploration and production waste for which TNRCC is not responsible. In addition, environmental regulation is one of TNRCC's core functions.

POLICY ISSUE 4. SHOULD THE NOTICE PROVISIONS FOR THE PERMITTING PROCESSES AT TNRCC BE CONSOLIDATED AND MADE CONSISTENT?

Discussion. The provisions governing notice are scattered throughout the Health and Safety Code and Water Code. These provisions often contain very different requirements. For instance, one section may require the publication of notice in "a newspaper of general circulation in the county in which the facility is located or proposed to be located." In another, the requirement may be for publication in "the newspaper of largest circulation in the county in which the facility is located or proposed to be located." Some of these distinctions may be driven by federal requirements or differences between the likely affected population for air, water, and waste permits. However, some distinctions have little basis between media and are found strictly in state law. These varying requirements create confusion on the part of the regulated community and the public. This confusion may unintentionally have been heightened by passage of House Bill 801 during the 76th Legislature, Regular Session. House Bill 801 attempted to make the public participation process more predictable by creating a uniform practice. That legislation failed to repeal any of the existing provisions, however. As a result, a person seeking to understand the requirements for notice on a landfill might believe that the provisions contained in Chapter 361 of the Health and Safety Code controlled, unaware that Chapter 5 of the Water Code might contain different or additional requirements.

In addition, as a result of the recommendations in the Business Process Review, the TNRCC is implementing a standardized approach to permitting across all programs under which a given application will be processed on a path consistent with the complexity and environmental significance of the permit. One barrier to this consolidation is the divergent notice requirements contained in organic statutes which may or may not be based on the environmental significance of the authorization sought.

Options.

- The notice provisions found in Chapters 361 and 382, Health and Safety Code and Chapters 26 and 27, Water Code, could be repealed and/or harmonized so that, to the extent permitted by federal law and the need to adequately inform the public, they are clear and consistent with each other and Chapter 5 of the Water Code.
- As an initial step towards aligning notice with environmental significance, the statute could provide for the streamlining or elimination of notice requirements where the application will result in an environmental benefit.

Pros/Cons

Pros: Repeal of duplicate or conflicting notice provisions would make it easier for the public and the regulated community to understand exactly where and how notice should occur. In addition, harmonizing provisions so that they do not conflict with each other or House Bill 801 would make the agency's public participation process more consistent, and thus, more comprehensible. Finally, streamlining notice requirements where an environmental benefit will result should provide an incentive for applicants to do more to protect the environment.

Cons: Most notice provisions were the result of delicately balanced agreements, and elimination or harmonizing of the language could be perceived as upsetting such agreements. Some provisions cannot be made consistent without being inconsistent with federal notice requirements. Some inconsistencies are the result of differences between the nature of the media (i.e., publication may be more suitable for air emissions due to the larger group of potentially affected persons). Streamlining or eliminating notice requirements, even where a benefit is anticipated, may deprive the public of the opportunity to determine whether a benefit will indeed accrue.

POLICY ISSUE 5. HOW CAN THE TNRCC ENCOURAGE IMPROVED MANAGEMENT WATER AND WASTEWATER TREATMENT AND SOLID WASTE?

Discussion. Drinking water and wastewater facilities are facing an ever increasing demand on their resources to stay in compliance with provisions of the federal Safe Drinking Water Act and federal Clean Water Act. The costs associated with compliance are higher per person as the system size decreases. There is a serious concern that an increasing number of Texans are being served by systems that are unable to sustain the financial, managerial, and technical capability necessary to provide continuous and adequate service. Texas is facing a steady increase in new, small systems which will likely present the same financial, managerial, and technical capabilities problems being faced by existing systems.

In a similar vein, the development of regional solid waste facilities, transfer stations, and recycling drop-off locations may provide a more affordable alternative for county and municipal governments and special service districts charged with providing services to both rural areas and rapidly growing population centers beyond major urban centers.

Several options are available for improving financial, managerial, and technical capability in water systems. In many cases, regionalization may be the least cost, long-term solution for providing quality service. One of the goals of Senate Bill 1, passed by the 75th Legislature, was to encourage the use of the regionalization option so that existing managerial and technical resources would be used. However, the explicit recognition

of the role of regionalization contained in Senate Bill 1 was limited to the area of water utilities. That legislation also attempted to address deficiencies in management capability by requiring that an applicant for a certificate of convenience and necessity demonstrate that he or she had the financial, managerial, and technical capability necessary to provide continuous and adequate service.

In the case of solid waste facilities, technical assistance is available to local governments and special districts from the TNRCC and regional councils of government, and regional councils have grant funds available for helping to developing improved solid waste management systems and programs.

Options.

- Regionalization could be extended to the TNRCC's jurisdiction over wastewater permitting.
- Chapter 322, Community Wastewater Planning Rules, could be reviewed for use as a possible tool to encourage regionalization.
- The TNRCC could pursue formal agreements with the Texas Water Development Board, Texas Department of Housing and Community Affairs, and possibly other state, federal, and international agencies regarding facilitating water and wastewater regionalization initiatives.
- Chapter 26 of the Water Code, relating to wastewater treatment systems, could be amended so that it is consistent with the amendments made by Senate Bill 1 to Chapter 13. This would require applicants for wastewater treatment systems to demonstrate financial, managerial, and technical capability to provide continuous and adequate service before obtaining a permit for a wastewater treatment system and that regionalization is not feasible.
- The TNRCC could continue to encourage the development of regional solid waste facilities, transfer stations, and recycling drop off centers as cost-effective measures for providing solid waste services in rural areas of the state, as well as in rapidly urbanizing areas.

Pros / Cons

Pros: Promoting regionalization for water and wastewater facilities, to the extent permitted by statute, should heighten awareness of the opportunities for improvements in service and compliance with environmental regulations available through this option. In addition, seeking agreements with other entities may provide unexpected opportunities for regionalization or improved management. Clarification of the need for financial, managerial, and technical expertise for wastewater treatment systems and for a showing of impracticability of regionalization would help at the outset to reduce the chances that unqualified operators will run facilities.

Cons: The addition of regionalization and financial, managerial, and technical requirements would add another requirement in obtaining wastewater permits. This in turn could add time to the permitting process. Such a process could also increase some short-term development costs.

POLICY ISSUE 6. SHOULD VARIOUS SECTIONS OF THE HEALTH AND SAFETY AND WATER CODES BE REVIEWED TO CLARIFY AGENCY AUTHORITY AND TO STREAMLINE AGENCY PROCEDURES?

Discussion. The TNRCC has responsibility for executing programs created under several state and federal codes that were in existence prior to the creation of the agency in 1993. Consolidation of environmental programs has greatly improved the efficiency of service delivery and is intended to improve protection of the environment through elimination of overlaps and gaps in environmental programs. Nevertheless, several gaps and inconsistencies remain. There is a need to address a further cleanup of state environmental and health codes in order to improve the operating efficiency of TNRCC programs. The following recommendations deal with various instances of gaps and overlaps remaining in state law.

Options.

- Chapter 5 of the Water Code could be amended to clarify that TNRCC should provide compliance assistance to local government, small business, and agriculture without regard to media.
- The role that compliance history should play in agency permitting procedures could be clarified and made consistent across media.
- Requirements relating to closed containers and special routes could be eliminated from the limitations on Type IV landfills.
- Some remediation contract documents could be exempted from General Services Commission review.
- Subchapter F of Chapter 361 could be amended to allow a more streamlined approach for non-lead state Superfund sites.
- If the Legislature determines that TNRCC should retain authority over occupational licensing, it could consolidate that authority in a single, flexible statute.
- The 401 certification program could be streamlined.
- The TNRCC could work with the U.S. Environmental Protection Agency through its Performance Partnership Agreement and other means to provide the flexibility to administer federally delegated programs in a more coordinated and consistent fashion. This may include seeking national legislative relief from inconsistent, conflicting, redundant, or other provisions of federal law that hinder the effective implementation and enforcement of a unified state statute (or coordinated state statutes.)

Pros/Cons

Pros:

- Providing consistent statutory authorization for compliance assistance in all media would provide better criteria by which to judge the agency's performance and provide for more consistent expectations.
- Making compliance history provisions consistent would provide uniformity across media and predictability of results for the public and the regulated community.
- Streamlining of the remediation process would allow quicker cleanups of contaminated sites and better protection of public health with a minimal risk of wasting state funds.
- Reducing some special requirements for Type IV landfills would eliminate provision that add little to the protection of public health and increase costs to the public and the agency.

- Consolidation of the occupational licensing statutes would provide ease of use and consistency to the regulated community and the public.
- Working with the federal government to obtain flexibility could provide opportunities for additional consistency in delegated programs.

Cons:

- Providing a unified compliance assistance statute could be construed as an expansion of the program.
- Making compliance history provisions consistent could introduce delays in permit issuance in some programs.
- Streamlining requirements for remediation of contaminated sites would eliminate additional checks now present in the system.
- Consolidation of the occupational licensing statutes would mean that a particular set of requirements would no longer be found in the statute most directly related to the occupation and could change the requirements in some occupations.