

II. KEY FUNCTIONS AND PERFORMANCE

Provide the following information about the overall operations of your agency. More detailed information about individual programs will be requested in a later section.

A. Provide an overview of your agency's mission, objectives, and key functions.

Mission Statement

According to its mission statement, "The Texas Commission on Environmental Quality strives to protect our state's human and natural resources consistent with sustainable economic development. Our goal is clean air, clean water, and safe management of waste."

Objectives

The TCEQ has broad objectives and goals for the protection of the state's natural resources, set out in a number of state and federal laws, as well as by the formal delegation of federal laws and programs and intergovernmental agreements. The agency's objectives include the following:

- Establish mechanisms for the public to participate in the agency's decision making process and to access information.
- Issuance of permits and other authorizations for the control of air, hazardous, radioactive, and municipal solid waste generation, and for the safe operation of water and wastewater utilities.
- Inspection of facilities that require TCEQ authorization to ensure compliance with applicable requirements.
- Pursuing appropriate and speedy enforcement to ensure an expedited return to compliance when violations are found.
- Remediation of contamination from hazardous and non-hazardous waste and from leaking underground storage tanks.
- Assuring adequate waste disposal in Texas.
- Responding to the public's complaints and environmental concerns within the agency's jurisdiction.
- Granting and reviewing surface water rights.
- Cooperation with federal, state and local agencies in enforcing state and federal environmental laws.

- Providing education, training and technical assistance to the regulated community to promote high rates of compliance with state and federal environmental laws and regulations, and voluntary efforts to conserve, reduce, reuse, and recycle materials.
- Issuance of occupational certificates to certain environmental professionals.

Key Functions

The TCEQ is a complex institution, continually performing many functions to meet its commitments and responsibilities under state and federal law. The following list gives the agency's chief functions.

Program Operation

- *Permitting and Licensing Management.* Issuing, administering, renewing and modifying permits, water rights, licenses, or certifications for organizations and individuals whose activities have some potential or actual environmental impact that must be formally authorized by the agency.
- *Public Assistance Management.* Responding to requests for information by external parties and conducting outreach with regard to agency obligations. Responding to complaints lodged by affected or interested parties including addressing the cause of complaints and notifying the complainant of action taken.
- *Evaluation of Public Health Effects.* Assessing the impact on public health of toxic substance releases, transfers, and disposal.
- *Ambient Monitoring and Sampling, Laboratory Analysis.* Monitoring the current condition of a geographic area or natural resource often through sampling or surveys.
- *Technical Data Gathering, Management and Analysis -* Providing for scientific support for the design and implementation of specific strategies to address environmental improvements.
- *Compliance Inspections and Monitoring.* Monitoring the compliance of regulated entities through such activities as reviewing submitted reports and conducting site visits and inspections.
- *Release Identification and Reporting.* Identifying and reporting of activities, processes, emissions, and environmental impacts associated with the regulated community.
- *Violation and Enforcement Management.* Identifying, verifying, and tracking violations of regulations and initiating enforcement actions in response to violations.
- *Remediation Oversight.* Overseeing cleanups made by responsible parties, local authorities and contractors, and ensuring that grants and funds authorized for cleanup reimbursements are disbursed appropriately.

- *Emergency Response.* Responding to environmental emergencies to coordinate evacuation, public-health protection and spill cleanup.

- *Homeland Security.* Assisting in the planning, development, coordination, and implementation of initiatives to promote the governor's homeland security strategy, and to detect, deter, respond to and assist with recovery from disasters, both natural and human-caused.

- *Technical Assistance and Pollution Prevention.* Overseeing agency activities focused on helping a regulated facility achieve compliance, promote conservation and reduce pollution voluntarily.

- *Administration of Air-Emissions Trading.* Tracking and verifying the trading of air emissions credits to ensure that trading is done in compliance with the program charter.

Program Administration

- *Strategic Planning.* Developing agency goals and objectives and planning the allocation of personnel and financial resources.

- *Development of Regulations, Policies, and Procedures.* Creating rules and policies to guide agency activities.

- *Program Management.* Planning, reporting, and tracking of program activities.

- *Budget Development.* Preparing, modifying, and reporting the agency budget.

- *Grant and Contract Administration.* Administering grants and contracts awarded to or by the agency.

- *Legal Support.* Analyzing and interpreting statutes and regulations, and representing the TCEQ in formal and informal settings.

- *Bankruptcy Administration.* Pursuing debtors who have filed for bankruptcy protection in federal courts to recover claims owed to the TCEQ.

Agency Administration

- *Fund Administration, Accounting, Disbursements, and Payroll.* Managing funds limited to specific uses and processing payroll.

- *Revenue Estimation.* Forecasting and monitoring agency revenues and funding.

- *Purchasing and Asset Management.* Administering the purchase, location, use, and status of all agency assets.
- *Personnel Management, Recruitment, and Training.* Providing and supporting a skilled work force for the agency.
- *Information-Resource Management.* Defining, designing, and maintaining agency information systems (automated or manual).
- *Records Management.* Managing physical documents files (maps, microfiche, manual files etc.).

B. Do each of your key functions continue to serve a clear and ongoing objective? Explain why each of these functions is still needed. What harm would come from no longer performing these functions?

Yes, each of the key functions performed by the TCEQ is designed to protect the state’s air, water and land resources, and the public health. The TCEQ has the primary responsibility for:

- assigning and guaranteeing surface water rights;
- preserve water quality and conserve water quantity;
- ensuring the safety of drinking-water supplies;
- controlling air emissions by industry and motor vehicles;
- assessing capacity and ensuring proper disposal of industrial and municipal solid waste;
- permitting the safe handling and disposal of hazardous and low level nuclear waste;
- preventing pollution through the encouragement of recycling; and
- pursuing the cleanup of hazardous waste sites and leaks from underground storage tanks and other petroleum product leaks.

Taken together, these key functions represent a comprehensive program of managing and protecting the environment and the public health in Texas. Failure to continue performing these functions would result in the inevitable degradation of the state’s natural resources, the backsliding of compliance with the federal programs delegated to the state, and the endangerment to public health by a number of contaminants currently regulated by the TCEQ.

C. What evidence can your agency provide to show your overall effectiveness and efficiency in meeting your objectives?

The statutory functions assigned to the TCEQ by the state and federal governments are designed to protect the state’s air, water and land resources and the public health. Most, if not all of these federally delegated programs require regular and continuing oversight to ensure their efficient and effective operation and administration and compliance with applicable laws and regulations.

The TCEQ has been delegated the responsibility for implementing most major federal environmental programs in Texas through several longstanding agreements. The most fundamental of these is the Performance Partnership Agreement (PPA) with the Environmental Protection Agency (EPA). Texas is eligible for major program delegation because it successfully enacts and executes environmental laws and regulations that are at least as stringent as its federal counterparts, ensuring the protection of the state's natural resources. Associated with each federally delegated program are semi-annual or quarterly meetings with the EPA to review, discuss and judge the overall effectiveness and efficiency of program implementation related to agency objectives.

In 1997, the TNRCC (predecessor agency to the TCEQ) and the EPA adopted a PPA. Texas' was one of the first state environmental agencies in the nation to enter into such an agreement with the EPA. This agreement allows for review of program implementation and operation, and adjustment of planning and funding priorities between major delegated federal programs according to the unique needs of the state. This was particularly important in Texas, which has many distinct natural regions, urban and rural areas, and widely differing environmental management needs.

To further ensure that its federally delegated programs are operated efficiently and effectively, and in a manner to meet program objectives, the EPA, in May 2005, implemented the State Review Framework (SRF). The SRF's primary objective is a highly detailed review of the agency's performance as it relates to its investigation, enforcement, and data collection functions. The review commended TCEQ on the quality and quantity of its inspection and enforcement activities.

For state environmental programs, the following processes and reports reflect the agency's efforts to determine overall effectiveness and efficiency in meeting its objectives.

A number of years ago, the agency determined it was necessary to incorporate in its rulemaking process stakeholder meetings to obtain input on rules undergoing revision, ensuring a broad spectrum of input.

Another avenue is the public discussion opportunity during commissioners' work sessions and agenda meetings. The commissioners set aside a period of time during each work session to hear the public's opinions, issues or complaints. This allows the commission to investigate and ameliorate problems, ensuring efficiency.

Additionally, the TCEQ develops its *Annual Enforcement Report*, mandated by the legislature, on a variety of inspection- and enforcement-related data. The report also includes information on emission events and complaints the agency has received and responded to, as well as a comparison between data for each of the preceding five years. As a result, this report recognizes and highlights the agency's success in meeting its objectives through data and documentation.

Two other mechanisms are the reporting of quarterly Legislative Budget Board performance

measures and annual EPA commitments. These mechanisms both track the agency's success in meeting performance numbers and give justification when those numbers vary by $\pm 5\%$ or more.

The Customer Service Survey is another source of feedback. An annual report based on information mined from the survey data gives the TCEQ both positive and negative comments upon which to base agency organizational and operational changes and decisions. Further, this process gives the agency a benchmark to determine if its objectives respond to the needs of the public and regulated community.

Finally, the TCEQ's performance-evaluation system serves as an internal check and balance for its executive management team that ensures that agency objectives receive appropriate emphasis in program administration. The TCEQ strives to be an objective and goal-driven agency and constantly seeks more efficient and effective mechanisms to achieve its objectives. Annually it reviews objectives and develops new or modified goals to challenge its management team to do more, go further, and set the bar higher through a performance-evaluation system that emphasizes and rewards creative thinking as a basis for determination of staff excellence and promotion.

D. Does your agency's enabling law continue to correctly reflect your mission, objectives, and approach to performing your functions? Have you recommended changes to the Legislature in the past to improve your agency's operations? If so, explain. Were the changes adopted?

Yes, the enabling law does continue to reflect the TCEQ's mission, objectives and approach in which it performs its functions. During the 79th, 80th and 81st legislative sessions, the TCEQ identified statutory changes that would improve program operation and its ability to function more efficiently and effectively. Following is a list, by session, of legislative recommendations proposed by the TCEQ. Also included is a short explanation of each proposed change, and whether or not the legislation was adopted.

79th Legislature

Discontinue the Texas Recycling Development Board and transfer its duties jointly to the governor's office, the TCEQ, and the Texas Building and Procurement Commission (TBPC). Amend Texas Health and Safety Code (THSC) Section 361.423 to establish joint coordination of recycling activities by the TCEQ and the TBPC with the agencies maintaining those functions and activities. Eliminate the Texas Recycling Market Development Board.

HB 2466—Passed.

Discontinue the Texas Clean Fleet Program. Eliminate the Texas Clean Fleet Program by repealing THSC Chapter 382, and the following chapters of the Texas Transportation Code: Chapter 451, Subchapter G; Chapter 452, Subchapter F; Chapter 453, Subchapter F; and Chapter 457, Subchapter E. Transit-fleet vehicles would then follow the cleaner federal guidelines known as Tier II standards.

SB 1032—Passed.

Clarify certain public meeting requirements for solid waste facilities, including those that apply to authorizations by registration. Amend THSC Chapter 361 to change certain requirements for holding public meetings on solid waste permit applications and other authorizations to grant TCEQ the authority to hold a public meeting in cases where public interest has been expressed or where a meeting has been specifically requested by state elected officials. Clarify that a public meeting is distinct from a contested case hearing. Eliminate arbitrary time limits for public meetings to ensure that the meetings are scheduled at times when TCEQ personnel have had adequate opportunity to review the technical merits of an application and can answer to interested persons' concerns.
Included in HB 1609—Passed.

Repeal restrictions on enforcement violation payment plans. Amend Texas Water Code (TWC) Section 7.052 to allow the agency the discretion to establish an installment payment plan for regulated entities after a contested case hearing.
SB 739—Passed.

Authorization for public works projects during emergencies. Amend TWC Section 5.515 to allow the commission to issue emergency orders to authorize facilities to temporarily locate and repair or reconstruct public-works projects that have been damaged or destroyed due to acts of nature or emergencies.
HB 2949—Passed.

80th Legislature

Clarify the Clean Air Interstate Rule. Amend THSC Section 382.0173 to change the number of control periods from seven to nine by shifting the allocation update from 2016 to 2018.
SB 1672—Passed.

Dispose of Desalination Concentrate and Drinking Water Treatment Residuals— Amend TWC Sections 27.014, 27.021, 27.023, 27.0511 and THSC Section 361.086 to remove impediments to the use of certain types of injection wells and expedite the authorizations for the use of injection wells for the disposal of desalination concentrate and drinking water treatment residuals.
HB 2654—Passed.

Increase Fees and Scope of Activities with the Edwards Aquifer Protection Program. Amend TWC Section 26.0461 to increase fees for Edwards Aquifer Protection Plans and to broaden the scope of activities that can be funded with those fees.
HB 3098—Passed.

Provide Incentive for Electronic Permit Submissions. Amend TWC Section 5.128 to allow the agency to adjust fees to give incentives for using the agency's e-permitting system.
HB 1254—Passed.

Revise the Permit Renewal Timeframe. Amend THSC Section 382.055 to allow permits to be renewed in conjunction with an amendment that requires public notice.
SB 1673—Passed.

Transfer Dam and Levee Safety and Flood Insurance Programs. Amend TWC Sections 12.052, 16.236, and 16.311–16.324 to transfer the National Flood Insurance Program to the Texas Water Development Board.
SB 1436—Passed.

Require Notice for Cancellation or Termination of Petroleum Underground Storage Tank (UST) Financial Assurance. Add new TWC Section 26.3521 requiring financial-assurance providers to notify the commission when a petroleum UST owner-operator cancels coverage or when the provider terminates coverage.
HB 1956—Passed.

Authorize Shutdown for Petroleum Underground Storage Tanks. Amend TWC Section 26.3475 to grant the TCEQ the authority to issue shutdown orders for UST facilities that do not have adequate financial assurance.
HB 1956—Passed.

Set Interim Rates and Recovery of Rate-Case Expenses. Amend TWC Sections 13.043, 13.185 and 13.187 to allow the executive director to set interim rates and to prohibit the recovery of rate-case expenses associated with contested rate cases.
Similar to HB 33 and SB 726—Did not pass.

81st Legislature

Amend Multiple Sections of the Texas Water Code.

- Change TWC Section 5.1175 that limits the length of payment plans for civil or administrative penalties for small business from a maximum of 12 months to 36 months.
- Revise TWC Section 7.002 to allow the commission to delegate authority to the executive director for administrative orders and penalties.
- Revise TWC Section 26.0135(h) with regard to the Clean Rivers Program to remove the annual limit on recovery cost that was removed in HB 2912, 77th Legislature, the TCEQ Sunset bill, but was inadvertently restored by SB 3, 80th Legislature.

SB 1693—Passed.

Authorize Shutdown of Certain Unregistered Dry-Cleaning Facilities—Amend THSC Chapter 374 to give the agency shutdown authority for unregistered dry-cleaning facilities and drop stations if they fail to correct a violation of the THSC Section 374.102 (regarding registration) within 30 days of receipt of a notice of violation.
HB 3827—Passed.

Clarify the New Technology Research and Development Program (NTRD)—Amend THSC Chapters 386 and 387 to (1) remove the requirement for grant funding for a diesel test center, (2) expand who could manage NTRD, (3) redirect the NTRD's focus to more economically feasible technologies and to include stationary sources, and (4) remove the

restriction that air quality research be conducted only in the Houston and Dallas–Fort Worth areas.

Included in HB 1796—Passed.

Expand e-Notice within the TCEQ—Amend TWC Section 5.028 to authorize the TCEQ to use electronic transmission for information it issues.

HB 3544—Passed.

Amend Multiple Sections of the Texas Water Code.

- Revise TWC Chapters 49 and 54 to allow the commission or the executive director to approve uncontested district dissolution and conversion applications without holding a public hearing.
- Revise TWC Section 13.248 to allow the commission or the executive director to approve uncontested service-area agreements or contracts without a public hearing.
- Revise TWC Section 13.242(c) to also exempt small sewer utilities with a potential of less than 15 connections as is currently provided for small water utilities.
- Remove a portion of TWC Section 13.187(f) which requires rate hearings for public utilities located in Harris County to be held in Harris County.
- Revise TWC Section 13.187, to give the executive director the authority to suspend, escrow or set interim rates for utility rate cases as well as extend the period for which the executive director can suspend rates (currently 150 days).

HB 3550 and SB 1836—Did not pass.

Authorize Certain Functions for the Dam Safety Program—Amend TWC Chapters 11 and 12 to (1) allow the TCEQ to assess administrative penalties up to \$10,000/day, as recommended in *Peer Review Report* and *State Auditor’s Office (SAO) Audit Report*, and (2) allow the agency to regulate the operation of dams in the State.

HB 2535—Did not pass.

Require Common Carrier Liability—Amend TWC Section 7.156 to create a criminal penalty for any person who physically delivers a regulated substance into an underground storage tank regulated under TWC Chapter 26 which has not been issued a valid, current registration and certificate of compliance. Necessary to comply with requirements contained in the Federal Energy Act of 2005.

HB 3827—Did not pass.

Extend Renewal Period—Amend TWC Section 37.006 to increase the grace period for license renewal from 30 to 60 days and rescind the late-renewal fee.

HB 2698—Did not pass.

E. Do any of your agency’s functions overlap or duplicate those of another state or federal agency? Explain if, and why, each of your key functions is most appropriately placed within your agency. How do you ensure against duplication with other related agencies?

Several TCEQ functions have the potential to overlap with and duplicate other state and federal agencies. Since many of these functions have overlapped for a number of years, the TCEQ and its sister state and federal agencies have made an effort, over time, to avoid

duplication through the development of Memorandums of Agreement (MOAs), Memorandums of Understanding (MOUs), Letters of Agreement (LOAs), or informal agreements. Through the development of these documents the TCEQ takes care to ensure that the functions or jurisdictions outlined in the document are related to key functions of the agency such as protection of the environment and public health. Following is a list of functions that have the potential to overlap with another agency's functions, the agency with which the overlap occurs, and how the overlap issue has been addressed. In many cases, the overlap occurs because federally delegated programs are split between two or more agencies in Texas. In some cases, the Texas Legislature, recognizing an overlap, directed the affected agencies to develop an MOA or MOU. While the list is a fairly complete representation of the type and variety of documents the agency has developed over the years to address jurisdictional issues, it is by no means comprehensive. Additional MOAs and MOUs are discussed in several agency program Section VII documents in response to Question (i).

State

National Pollutant Discharge Elimination System (NPDES)—TCEQ and RRC

In 1998, the EPA delegated to the TCEQ partial authority to administer the federal NPDES program. Upon delegation, the TCEQ renamed the system the Texas Pollutant Discharge Elimination System. Through the TPDES, the TCEQ has federal regulatory authority over discharges of pollutants to Texas surface water. However, certain functions related to administration of the program are regulated by the Texas Railroad Commission (RRC), including discharges associated with oil, gas, and geothermal exploration and development.

The TCEQ and RRC entered into an MOU to reflect the regulatory jurisdictions of each agency for specific types of wastes. The original MOU became effective January 1, 1982. It was revised effective December 1, 1987, to reflect legislative clarification of the RRC's jurisdiction over oil and gas wastes and the TCEQ's jurisdiction over industrial and hazardous wastes. The most current amendment to the MOU became effective August 25, 2003.

For those facilities, activities, or types of wastes not specifically addressed in the MOU, the TCEQ and RRC have agreed to enter discussions over which agency should have jurisdiction.

Resource Conservation and Recovery Act (RCRA)—TCEQ and RRC

The EPA delegated to the TCEQ partial authority over the federal RCRA program in 1982. As outlined in the MOU between the RRC and the TCEQ as amended in 2003, the TCEQ has jurisdiction over hazardous waste, that is, "waste, substance or material that results from activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants." The MOU explaining the jurisdictional split of the respective agencies as defined in Texas statute is in Title 16, Texas Administrative Code (TAC), Chapter 3.

Disposal of Naturally Occurring Radioactive Material (NORM)—TCEQ and RRC

As outlined in the MOU between the RRC and TCEQ, as amended in 2003, the RRC has jurisdiction over the disposal of NORM waste that is generated in connection with the exploration, development, or production of oil or gas. Also, NORM that is generated in connection with geothermal exploration, development, or production of solution brine mining activities is under the RRC's jurisdiction. The management and disposal of all other NORM waste is under TCEQ jurisdiction. The MOU explaining the jurisdictional split of the respective agencies as defined in Texas statute is found in Title 16 TAC Chapter 3.

Surface Casing—TCEQ and RRC

Within the TCEQ's Surface Casing Program, the agency has jurisdiction to review hydrologic data and electrical logs to determine depths of freshwater and the base of the usable-quality water. The TCEQ portion of the program recommends which hydrologic zones should be protected and the depth at which to set the surface casing for proposed drilling projects. The RRC reviews the TCEQ recommendations, accepting or modifying them. This program is not specifically addressed in the existing MOU between the TCEQ and the RRC.

Oil and Gas Waste Injection Wells—TCEQ and RRC

The TCEQ has the authority and jurisdiction to review RRC filed applications for oil and gas waste injection wells and supply advisory letters containing conclusions and recommendations regarding the protection of freshwater. The RRC has jurisdiction and authority to permit oil and gas waste injection wells.

Oil and Gas Exploration and Drilling—TCEQ and RRC

The Texas Clean Air Act, Chapter 382 of the Texas Health and Safety Code, gives the TCEQ the authority to control the quality of the state's air and to regulate the construction of and emissions from facilities as defined in statute. The RRC has primary regulatory jurisdiction over the operations of the oil and natural gas industries, pipeline transporters, the natural gas and hazardous liquid pipeline industry, natural gas utilities, the liquefied-petroleum-gas industry, and coal and uranium surface mining operations. Facilities regulated by the RRC that emit air contaminants are also subject to TCEQ jurisdiction. The TCEQ and the RRC have jurisdiction to regulate oil and gas processing and gathering plants, as well as oil and gas producing sites.

Surface Water Spills—TCEQ and RRC

Under Chapter 26 of the TWC, the TCEQ has jurisdiction over discharges of waste (spills) into or adjacent to water in the state, other than discharges regulated by the RRC. Because the TWC clearly splits the jurisdiction over spills, the TCEQ and the RRC have developed a MOU to clearly delineate the jurisdictional boundaries. As a result, the TCEQ and RRC have worked well together despite overlapping jurisdictions since the MOA was originally drafted in January 1982.

Motor Vehicle Inspection and Maintenance Program—TCEQ and DPS

In December 1999 a MOU between TCEQ and the Texas Department of Public Safety (DPS) became effective as the formal mechanism for coordinating inspection and maintenance (I/M) program planning, implementation, oversight, evaluation, and areas of primary responsibility. The TCEQ has the authority to make rules related to emissions reduction credits awarded by the EPA, computer modeling of the emissions-reduction credits available to the Texas I/M program, data collection efforts required by 40 CFR Part 51 or the Texas I/M State Implementation Plan, and other responsibilities identified in the agreement. The DPS has the authority to make rules for the implementation and operation of the I/M program.

Point and Nonpoint Source Pollution—TCEQ and TSSWCB

In August 1997, the TNRCC, predecessor agency to the TCEQ, and the Texas State Soil and Water Conservation Board (TSSWCB) were directed to develop a MOU that sets forth the coordination of jurisdictional authority, program responsibility, and procedural mechanisms for point and nonpoint pollution programs.

Aquaculture—TCEQ and TPWD and TDA

In June 1997, the TNRCC, the Texas Parks and Wildlife Department (TPWD), and the Texas Department of Agriculture (TDA) identified a need for an MOU to ensure that regulation of aquaculture is conducted in a manner that is both collaborative and responsible. It was determined that the TCEQ, the TPWD and the TDA were concerned about issues relating to the raising of non-native aquatic species and the potential for these species to escape into natural ecosystems, including the introduction of disease through these species, as well as the quality and effect of wastewater discharges from aquaculture facilities on receiving waters of Texas. The MOU seeks to establish an interagency review procedure for applications requesting authorization to discharge wastewater from aquaculture facilities.

Drinking Water State Revolving Fund (DWSRF) - TCEQ and TWDB

In July 1997, the TNRCC and the Texas Water Development Board (TWDB) entered into a MOU to outline that the TWDB will obtain TCEQ's assistance in performing the financial, managerial and technical capability assessments for applicants who are expected to apply for funding from the DWSRF. To further facilitate this fund, the TCEQ will provide to TWDB its database of Public Water Supply operators to create mailing lists about the program and funding cycles. Both agencies participate on a standing coordination team to ensure issues affecting the DWSRF Program are addressed in a timely manner.

National Flood Insurance Program (NFIP)—TCEQ, TDMHMR , TDCJ, TPWD, TA&MU, TLRWDA, and GSC

In January 1998, the TNRCC developed several MOUs with the Texas Department of Mental Health and Mental Retardation (TDMHMR), Texas Department of Criminal Justice (TDCJ), Texas Parks and Wildlife Department (TPWD), Texas A&M University System

(TA&MU), Texas Low-Level Radioactive Waste Disposal Authority (TLRWDA), and General Services Commission (GSC). The purpose of the MOUs was to coordinate program responsibilities and define the procedural mechanisms necessary to implement minimum program regulations under the National Floodplain Insurance Program and to implement the Texas State Floodplain Management Plan for State Agencies.

Radiation-Control Functions—TCEQ and DSHS

In November 1998, the TNRCC and the Texas Department of Health (TDH), predecessor agency to the Texas Department of State Health Services (DSHS), entered into an MOU regarding radiation control and mutual cooperation. The MOU lays out the transfer of licensing authority for the recovery and processing of source material and disposal of by-products from the TCEQ to the DSHS.

Transportation Planning— TCEQ and TxDOT

In May 2002, the TNRCC and the Texas Department of Transportation (TxDOT) developed an MOU that addresses transportation planning issues, specifically including processing of documents required by the National Environmental Policy Act. The MOU outlines the facilitation for that coordination and establishes periods for the review of documents coordinated between the agencies on road projects that could have environmental impacts.

Adoption by Reference—TCEQ and AG

In September 1999, the TNRCC and the Attorney General (AG) of Texas developed an MOU containing the TCEQ's and the AG's interpretation concerning intervention in the civil enforcement process under the Texas Solid Waste Disposal Act. This MOU is a revised version of the original MOU effective October 9, 1993.

Asbestos Demolition and Renovation—TCEQ and DSHS

In September 1999, the TNRCC and the TDH were directed to develop a MOU that outlined the agreement of the TCEQ to inspect asbestos disposal sites under its jurisdiction for conformance with federal requirements and to provide copies of the inspection and enforcement documentation to the TDH. This MOU was developed because the 73rd Legislature, in 1993, transferred the responsibility for emissions related to asbestos demolition and renovation activities to the TDH.

Health Care Related Facilities—TCEQ and DSHS

In September 1999, the TNRCC and the TDH developed an MOU to clarify their authorities regarding special waste from health care related facilities. The agencies agreed that special expertise resides in each agency related to its area of authority and responsibility. The agencies further agreed to inform each other should the need arise to amend or modify rules. Additionally the TCEQ is directed to notify the TDH of the failure of any approved treatment technologies, equipment and processes, and the resulting enforcement. Finally, the MOU specifies that the DSHS will provide TCEQ with a listing of approved alternative technologies and a listing of waste categories associated with the approved alternative

technology.

Texas Risk Reduction Rules—TCEQ and Natural Resource Trustees

In April 2001, the TNRCC and the Natural Resource Trustees, consisting of the TPWD, the Texas General Land Office (GLO), the National Oceanic and Atmospheric Administration, and the U.S. Department of the Interior entered into an MOU to facilitate the interaction between all agencies in regard to ecological risk assessments and ecological services analyses. In addition, the MOU outlines that the TCEQ has the primary responsibility for implementing the laws of the state related to conservation of natural resources and the protection of the environment.

Natural-Gas Pipelines that Cross the Border—TCEQ, RRC, THC, GLO, PUC, and Office of the Secretary of State

In October 2001, the TNRCC, the RRC, the Texas Historical Commission, the GLO, the Texas Public Utilities Commission (PUC), and the Office of the Secretary of State entered into an MOU regarding the permitting of natural gas pipelines that cross the border between Texas and Mexico. The MOU clarifies that, with respect to the building of natural gas pipelines that cross the border, the energy needs of the citizens of Texas and Mexico can be more efficiently met if permitting is organized in a manner that reduces the number of agency contacts a potential permittee must make, and assures that the permittee secures all appropriate permits. Specifically relating to the TCEQ, the MOU states that the agency is responsible for the issuing of permits to withdraw United States water from the Rio Grande for hydrostatic testing and for the permitting of operations that emit air contaminants.

Abandoned and Deteriorated Wells—TCEQ and TDLR

In March 2005, the TCEQ and the Texas Department of Licensing and Regulation (TDLR) developed an MOU regarding the coordination efforts between the TDLR and the TCEQ field offices and groundwater conservation districts concerning the investigation for referral of complaints regarding abandoned and deteriorated wells.

Food Preparation and Sales—TCEQ and DSHS

The TCEQ has the responsibility to approve permits and inspect the source and quality of water used for all food preparation and sales. This includes large operations such as food-canning facilities and retail food establishments such as restaurants and convenience stores. However, the jurisdiction is split between TCEQ and the DSHS because the permitting and inspection of actual operations (including food preparation, manufacturing, and processing) falls under the responsibility of the DSHS. The delineation of the duties and responsibilities associated with the differing jurisdictions is outlined and addressed through an informal agreement between the two agencies.

Retail Fueling Facilities—TCEQ and TDA

The TCEQ and TDA perform separate functions as a result of separate jurisdictions at retail

fueling facilities throughout Texas. The TDA conducts inspections for calibration and accuracy of fuel dispensers at the same retail fueling facilities that TCEQ inspects for compliance with state and federal regulations on petroleum storage tanks. Beginning in September 2001, the TCEQ and the TDA entered into an MOA to facilitate the exchange of information regarding certifications of compliance obtained during the separate inspections conducted at the retail fueling facilities. Due to the large number of such facilities within the state, this process allows the agencies to exchange information about individual compliance rates.

Poultry Facilities—TCEQ and TSSWCB

In 2001, the Texas Legislature passed a bill requiring all poultry operations that were not regulated under a TCEQ permit to get a Water Quality Management Plan (WQMP) certified by the TSSWCB. A WQMP describes the management of waste at a poultry operation. The passage of this legislation effectively split the jurisdiction and management responsibilities of poultry facilities in Texas between the TCEQ and the TSSWCB. Currently, approximately 94 percent of all poultry facilities in Texas operate under a WQMP.

To effectively manage the split in functions and responsibility, the TCEQ refers odor complaints from poultry operations to the TSSWCB according to a letter of agreement between the TCEQ and the TSSWCB dated August 24, 2007.

During the 81st legislative session, SB 1693 was adopted due to concerns regarding the jurisdictions of the TCEQ and the TSSWCB. As a result, the LOA will be amended to ensure consistency with the legislation. After September 1, 2009, the TSSWCB will be the first responder to odor complaints only if no other odor complaints concerning that particular farm have been received. In effect, the TSSWCB will only investigate new farms and farms that have never had a previous odor complaint. All other poultry odor complaints will be investigated by the TCEQ within the time frames established in SB 1693.

Texas Environmental Health Institute—TCEQ and DSHS

In 2001, in response to citizen concerns about the potential impact of environmental pollutants on their health, the Texas Legislature passed legislation establishing the Texas Environmental Health Institute (TEHI) as a joint venture between the TDH and the TNRCC.

In December, 2001, an MOA was entered into between the TNRCC and the TDH under the Interagency Cooperation Act, Texas Government Code Chapter 771 to describe the tasks to be performed and the duties and responsibilities of each of the agencies in enabling the institute to accomplish its purposes. The institute was established within the Environmental Epidemiology Division of the DSHS.

Toxic Substances Coordinating Committee (TSCC)—TCEQ and Multiple Agencies

The TSCC was created in 1987 by adoption of SB 537 during the 70th Legislative Session to coordinate communication among member agencies concerning each agency's jurisdiction, responsibilities, and efforts to regulate toxic substances and harmful physical agents. Participating agencies include the TCEQ, DSHS, TPWD, TDA, DPS, GLO, and

RRC.

Engineering Reviews and Analyses—TCEQ and TWDB

In June 2001, the TWDB and the TCEQ developed an LOA to delineate the jurisdiction of duties related to review of plans and specifications for water facilities funded by the TWDB. The LOA states that the TWDB will coordinate the review and processing of plans and specifications for water facilities financed by the TWDB. This will be accomplished in a manner that will satisfy TCEQ's requirements. Conversely, the TCEQ will accept the TWDB's review of plans and specifications in lieu of its own review for water facilities that involve the construction of, or improvements to, surface water treatment facilities and public water supply wells.

Spills Resulting in Fish Kills—TCEQ and TPWD

The TCEQ and Texas Parks and Wildlife Department (TPWD) work as partners to protect and respond to any type of pollution that affects fish, wildlife, and the environment of the State of Texas. While the TCEQ's primary responsibilities lie with the protection of the environment and public health, the TPWD is the agency with the primary responsibility for protecting Texas fish and wildlife, including investigating fish kills and any type of pollution that may cause loss of fish and wildlife resources and habitats. The coordination of activities between the TCEQ and TPWD is by informal agreement.

Federal

Natural Resource Protection—TCEQ and Natural Resource Trustees

In 1995, the TNRCC and the other Natural Resource Trustees (the TPWD, GLO, NOAA, and the U.S. Department of the Interior), entered into an MOA to recognize their common interests and responsibilities as designated natural resource trustees including their coordination and cooperation in the initiation and conducting of assessments of damage to natural resources, settlement negotiations, and development and support of claims for litigation for injuries to natural resources resulting from discharges of oil or releases of hazardous substances, and the application of any natural-resource damages recovered through those mechanisms toward the restoration, rehabilitation, replacement, or acquisition of equivalent natural resources.

Clean Air Act (CAA)—TCEQ and EPA

In 1971, the Texas Air Control Board (TACB) established the air permits program. In 1972, the TACB submitted the first version of the State Implementation Plan (SIP) to the EPA. The CAA requires states to develop a SIP and related permitting program. These two documents delineate jurisdictional boundaries as well as the interaction, oversight and responsibilities between the EPA and various predecessor agencies to the TCEQ. Over time, Texas, through its environmental agencies, has sought and received the authority to administer new and additional parts of the CAA or has submitted revisions to the SIP.

Safe Drinking Water Act (SDWA)—TCEQ and EPA

In 1978, the Texas Department of Water Resources (TDWR), another predecessor agency to the TCEQ, received primacy from EPA for administering the SDWA. The MOA related to SDWA defines the agency's duties and responsibilities related to all functions delegated to the State of Texas. The MOA also delineates the EPA's ongoing oversight responsibilities and TCEQ management and operation. Since the original primacy date, predecessor agencies to the TCEQ have sought and received authority over additional parts of the SDWA.

Underground Injection Control (UIC)—TCEQ and EPA

In 1982, the TDWR received primary authorization for the UIC Program. The program MOA delineates the duties and responsibilities related to delegated functions and outlines the EPA's management and oversight expectations. Further, the MOA defines the agencies' jurisdictional working relationship and lays out processes for discussion and dispute resolution.

Resource Conservation and Recovery Act—TCEQ and EPA

In 1984, the TDWR received final authority for duties related to the RCRA. The MOA defines the agency's duties and responsibilities related to all functions delegated to the State of Texas in the initial program shift from EPA oversight and implementation to agency management and operations. Further, the MOA delineates the jurisdictional division over undelegated portions of the RCRA. Since the original authorization date, predecessor agencies to the TCEQ have sought and received delegation of authority over additional parts of the RCRA.

National Pollutant Discharge Elimination System (NPDES) – TCEQ and EPA

In 1998, the TNRCC assumed authority to administer the NPDES program. Upon delegation, the TCEQ renamed the program the Texas Pollutant Discharge Elimination System (TPDES) Program. Through delegation of TPDES, the TCEQ received federal regulatory authority over discharges of pollutants to Texas surface water. However, as mentioned previously, certain functions related to administration of the program are regulated by the RRC. These functions are delineated in the RRC MOA and deal with discharges associated with oil, gas, and geothermal exploration and development activities. The EPA MOA also defines the working relationship between the TCEQ and the EPA, as well as the agency's duties and responsibilities, and the EPA's oversight authority.

Dam Safety—TCEQ and NRCS

The Natural Resources Conservation Service (NRCS) is a federal agency that provides dam safety services, primarily technical assistance, on approximately 2,000 dams in Texas that were funded and built by NRCS or the Soil Conservation Service (a predecessor) to local sponsoring organizations. These dams, owned by the local sponsoring organizations, are maintained by the NRCS but are under TCEQ Dam Safety Program jurisdiction. To avoid overlap or duplication of functions, or conflict with the NRCS assisted dams, the Dam Safety Program enters into an interagency contract annually with NRCS that enables NRCS to inspect the high- and significant-hazard dams under its management.

Coastal Water Spills— TCEQ and U.S. Coast Guard

In May 2001, the TNRCC the U.S. Coast Guard (USCG) signed an MOA delineating the assignment of functions between them as they relate to coastal and marine discharges or releases of hazardous substances requiring a rapid, efficient, and coordinated response and cleanup by various agencies and from businesses to minimize any imminent or substantial danger to the environment or public health.

F. In general, how do other states carry out similar functions?

In general, most other states maintain environmental agencies with similar powers and responsibilities, many by enforcing delegated federal programs with a base of federal funding. Organization varies from state to state, although the creation of the TCEQ several years ago followed a national trend toward the consolidation of state environmental agencies. Some agencies have additional responsibilities for maintenance of state lands, management of state parks and natural areas, and management of game resources. Some have responsibility for maintaining legislatively established ratios of farmland, open space, and land devoted to various uses. Most state environmental agencies are organized along the lines of air, water, solid waste and hazardous waste, which reflect the organization of federal programs delegated to the states.

G. What key obstacles impair your agency's ability to achieve its objectives?

The TCEQ faces a variety of challenges and obstacles that impair its ability to achieve its objectives. These include:

- The continued development by the federal government of new and expanded mandates. Some of these changes are of questionable benefit to the environment and the state is not always given additional or sufficient resources.
- The ongoing negotiations with federal agencies, such as the EPA, to secure flexibility for the state to manage the federally delegated programs.
- The capacity to educate the public about the complexity of securing environmental improvements within various limitations, including limits on resources, as well as the potential need for lifestyle changes.
- The increasing demands on the state's limited natural resources due to growth in its population and its economy.
- The ability to gather, manage, maintain and properly use the ever growing amount of data collected by the agency that serves as a tool in making make science based decisions.
- The lack of a broad-based fee to support the agency's water programs.

- The options for developing and effectively implementing enforcement related processes, as well as an appropriate penalty policy, that will achieve faster compliance.
- The need to address land use issues and the resulting competition between local and state needs and benefits.
- The availability of sufficient resources to secure and retain a highly advanced and educated work force.
- Responding to ever changing demands and priorities on the organization structure of the agency to ensure that it continues to operate in an effective and efficient manner.

H. Discuss any changes that could impact your agency’s key functions in the future (e.g., changes in federal law or outstanding court cases).

Federal Legislation, Statutes, and Regulations

Proposed Legislation Concerning Regulation of Greenhouse Gases

Summary: The American Clean Energy and Security Act of 2009 (H.R. 2454) passed the House on June 26, 2009. The legislation creates an economy-wide cap and trade program for greenhouse gases (GHG). It designates carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons (HFCs) from a chemical manufacturing process at an industrial stationary source, perfluorocarbons, and nitrogen trifluoride as GHGs. It also emphasizes increased energy efficiency and low-carbon energy consumption.

Impact on the TCEQ: Any final GHG legislation is anticipated to require rulemaking by the EPA, as well as legislation by the state and rulemaking by the TCEQ, depending on specifics. While the Texas Legislature has already given the TCEQ the authority to, by rule, “control air contaminants as necessary to protect against adverse effects related to ... climatic changes, including global warming”, this authority is constrained by the specific statutory language “consistent with applicable federal law,” (THSC Section 382.0205). This law is consistent with the TCEQ’s belief that regulation of GHGs is such an issue of global significance that it should be handled on a national or even international scale rather than at the state level. The EPA has also proposed a rule that would require mandatory reporting of GHG emissions for the development of a GHG registry. The EPA plans to use such data for policy decisions in this area and any final rule is anticipated to impact the future regulation of GHGs. *See 74 Federal Register 16448 (April 10, 2009).*

Proposed Dam-Rehabilitation Grant Program

Summary: On March 26, 2009, U.S. Representative Salazar filed H.R. 1770, known as the Dam Rehabilitation and Repair Act of 2009. The bill creates a program to assist states with grants to rehabilitate publicly owned deficient dams. The bill is currently pending.

Impact on the TCEQ: If the bill passes, Texas could apply for funding to assist with the repair or replacement of dams that do not meet state safety and security standards.

Proposed Clean Water Restoration Act

Summary: Representative Oberstar introduced the 2007 Clean Water Restoration Act (CWRA) with the intent of returning jurisdiction to the coverage prior to the court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001). A companion bill was introduced in the U.S. Senate by Senator Feingold. Neither bill made it through committee. On April 2, 2009, Senator Feingold and 23 cosponsors reintroduced the 2009 Clean Water Restoration Act (S. 787). According to Senator Feingold's press release, the bill aims to restore the protections to isolated wetlands and headwater streams that have been reduced as a result of the United States Supreme Court decisions in *SWANCC* and *Rapanos vs. United States*, 547 U.S. 715 (2006).

Impact on the TCEQ: To facilitate EPA's delegation of NPDES permitting, the Texas statutory definition of water in the state was modified in the 1990s to include wetlands upon delegation (TWC Code Section 26.001). Discharge permits and water quality certifications (Clean Water Act Section 401) of U.S. Army Corps of Engineers Section 404 permits are reviewed in accordance with the Texas Water Quality Standards, which are based on the statutory definition of surface water in the state. Accordingly, Texas law grants the authority necessary to protect its water quality.

Federal Energy Policy Act of 2005 (Public Law 109-058, August 8, 2005)

Summary: The Act (more specifically, Title XV, Subtitle B, the Underground Storage Tank Compliance Act of 2005, which contains amendments to Subtitle I of the federal Solid Waste Disposal Act) requires that states implement a number of significant changes to their approved underground storage tank (UST) programs. The Act requires mandatory recurring inspection of all UST facilities every three years (initial completion deadline August 8, 2011); secondary containment or manufacturer financial assurance for all new UST systems (deadline Feb. 8, 2007); delivery prohibition for ineligible USTs with administrative penalties applicable to owners-operators and common carriers; and mandatory training for all UST facility operators (completion deadline August 8, 2012).

Impact on the TCEQ: The TCEQ will need additional inspectors to adequately perform the numerous recurring inspections of all UST facilities every three years. The TCEQ met the financial assurance requirement with a rule change in January 2009. The TCEQ is still assessing options for addressing the delivery prohibition and is investigating the mandatory training requirement by communicating with accrediting organizations and training providers.

Electronic Reporting

Summary: The EPA published a final regulation (*70 Federal Register* 59848, October 13, 2005) establishing a framework by which it will accept electronic reports from regulated entities. The Cross-Media Electronic Reporting Regulation (CROMERR) could apply to any document submissions required by or permitted under any EPA or authorized program governed by EPA regulations in 40 CFR if it is submitted electronically.

Impact on the TCEQ: Under CROMERR, both new and existing electronic reporting systems require EPA approval. The regulation provides a framework for applying for and obtaining such approval. The TCEQ applied for and, in 2009, received approval for its electronic reporting systems.

Changes to Definition of “Solid Waste” Under RCRA Regulations

Summary: In October of 2008, the EPA issued a new final rule that creates exclusions from the definition of *solid waste* to streamline regulation of hazardous secondary materials to encourage beneficial recycling and help conserve resources. The final rule was effective on December 29, 2008. *Solid waste* is defined in 40 CFR Part 261. As explained at 73 *Federal Register* 64668 (October 30, 2008), the EPA promulgated the regulations in response to seven decisions by the U.S. Court of Appeals for the D.C. Circuit (1987–2000), which, taken together, gave the EPA additional direction regarding the proper regulatory definition of *solid waste* for purposes of Subtitle C of the RCRA. The EPA explains that a second purpose for the changes is to clarify the RCRA concept of “legitimate recycling,” which is a key component of the EPA’s approach to recycling hazardous secondary materials.

Impact on the TCEQ: This change will affect hazardous waste permits, legal services, and enforcement as the agency verifies how the rules apply in the field and addresses any sham recycling. The Industrial and Hazardous Waste Permits Program proposes to adopt the exclusions during the 2009–10 RCRA Cluster rulemaking.

Coal-Ash Regulation

Summary: The EPA is considering several options to regulate coal combustion by-products (CCBs) after a large spill in Tennessee. EPA Administrator Lisa Jackson issued an information request letter dated March 9, 2009, citing Section 104(c) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) as authority to review and assess the stability of coal-ash impoundments and units. EPA is considering regulating CCBs under Subtitle C of the RCRA (relating to hazardous waste) or Subtitle D (relating to municipal solid waste) and is also evaluating whether to require closure of all active surface impoundments managing CCBs.

Impact on the TCEQ: A change in the federal regulation of CCBs could have a substantial impact on the management of CCBs in Texas and on the workload of the TCEQ. Texas currently regulates the management and disposal of CCBs, just as it regulates all by-product wastes from industrial facilities. Coal combustion wastes in Texas have not exhibited the characteristics of a hazardous waste, based on analytical testing required by TCEQ industrial waste regulations. Coal ash is typically classified as a Class 2 or 3 non-hazardous waste, which means it could be disposed of in a municipal landfill. However, most CCBs are disposed of on the site of the power plant generator in accordance with THSC Section 361.090. TCEQ intends to formally comment to EPA that Texas believes CCBs should be regulated under Subtitle D, rather than Subtitle C, of the RCRA, if the EPA proceeds with rulemaking.

2008 Eight-Hour Ozone Standard

Summary: Effective May 27, 2008, the EPA promulgated a new eight-hour ozone National Ambient Air Quality Standard (NAAQS). The EPA is expected to designate areas as in attainment, in nonattainment, or unclassifiable for the 2008 eight-hour ozone NAAQS in March 2010.

Impact on the TCEQ: This change will require states, including Texas, to submit revisions to their state implementation plans (SIP) by 2011 to demonstrate attainment and maintenance of the new standard.

Changes to References to Arsenic-Testing Methods for Drinking Water

Summary: The EPA published a final regulation in June 2009, which changed references to analytical methods for arsenic testing, removing references to methods that are no longer approved. The EPA is updating its list of approved arsenic methods and revising and deleting verbiage in its regulations to remove references to methods no longer approved.

Impact on the TCEQ: Once the final list of approved methods is issued by the EPA, the TCEQ may be required to incorporate the changes into the agency's rules.

Court Cases (Decided)

***Burlington Northern & Santa Fe Railway Co. v. United States et al.*, 129 S. Ct. 1870 (2009)**

Case Summary: The U.S. Supreme Court held that under CERCLA, 42 USC Sections 9601 *et seq.*, the EPA cannot hold parties liable as “arrangers” when those parties are selling an unused, useful product and did not intend to dispose of it at the contaminated site. The court additionally held that liable parties at a multiparty federal Superfund site can defeat the application of joint and several liability if there exists a “reasonable basis” to apportion liability.

Impact on the TCEQ: While this case was not decided under the Texas Superfund law (THSC Chapter 361, Subchapters F and I), the decision will likely affect TCEQ remediation functions because parties will analogize to this case even though CERCLA and the Texas Superfund law have significant differences in verbiage. Since the decision was issued, some parties potentially responsible for contamination at state Superfund sites have argued that this case relieves them of their liability to the state for cleanup of certain sites, and those parties have refused to fund or perform cleanups on that basis. It is possible that fewer parties will conduct voluntary cleanups for contaminated sites, and the TCEQ will expend more state resources for both cleanups and the pursuit of cost recovery via litigation and administrative settlements. Additionally, the TCEQ cost shares (10 percent) with EPA on many federal Superfund sites and this case would directly affect the agency's ability to recover some of those costs under CERCLA.

***Massachusetts v. E.P.A.*, 549 U.S. 497, 127 S.Ct. 1438 (2007)**

Case Summary: This case challenged the EPA's denial of a petition for rulemaking requesting that the EPA issue standards to regulate greenhouse gas emissions from motor vehicles pursuant to Section 202 of the Federal Clean Air Act. Under Section 202, the EPA is required to prescribe standards applicable to emissions of any air pollutants from new motor vehicles and their engines if they cause or contribute to air pollution that may reasonably be anticipated to endanger the public health or welfare. The EPA denied the petition. The D.C. Circuit Court of Appeals upheld the EPA's contention that it lacked statutory authority to regulate greenhouse gas emissions from motor vehicles. The United States Supreme Court reversed and remanded to the D.C. Circuit Court, finding that greenhouse gases fit within the Federal Clean Air Act's definition of “air pollutant” and that the EPA does have statutory authority to regulate greenhouse gas emissions from new motor vehicles.

Impact on the TCEQ: Though action by the EPA to regulate greenhouse gases from motor vehicles would have little impact on the TCEQ—since states (except California) are preempted from regulating motor vehicles—if the EPA were to finalize broader regulations

in the future relating to greenhouse gas emissions, then the TCEQ would potentially be required to implement the new regulations. Before the EPA may issue standards addressing emissions of greenhouse gases from new motor vehicles or engines under Section 202, it must first decide whether the air pollutant under consideration may reasonably be anticipated to endanger the public health or welfare. Then it must decide whether emissions of an air pollutant from new motor vehicles or engines cause or contribute to said air pollution. The EPA issued its proposed endangerment findings and “cause or contribute” determination on April 24, 2009 (74 *Federal Register* 18886); comments were due June 23, 2009. EPA made the finding with respect to six greenhouse gases that it has determined together constitute the root of the climate change problem: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. However, in the determination, the EPA recognizes that only four of the six greenhouse gases are emitted by Section 202 sources.

Examples of Post-Massachusetts Cases: In continued nationwide challenges to coal-fired power plants, environmental groups have used the *Massachusetts* opinion to support claims that carbon dioxide should be regulated through air quality permitting. None of the following cases have direct precedential effect on Texas but they are indicative of how the issue is unfolding nationally and may affect TCEQ in the future.

- ***In re Deseret Power Electric Cooperative*, PSD Permit No. PSD-OU-0002-4.00, PSD Appeal No. 07-03 (November 13, 2008)**

In the *Deseret* application, the EPA Environmental Appeals Board (EAB) found that the record developed during the permitting process did not support the EPA region’s reason for not including a best available control technology (BACT) limit for carbon dioxide. Under the EPA’s Prevention of Significant Deterioration program, new and certain modified facilities in areas designated as in attainment or unclassifiable must undergo a BACT review for each regulated pollutant the facility has the potential to emit in a significant amount. The EAB remanded the matter to the EPA region to develop an adequate record on its reconsideration of whether to include a BACT limit for carbon dioxide. The decision does not require the installation of BACT to limit carbon dioxide.

- ***In re Northern Michigan University Ripley Heating Plant*, PSD Permit No. 60-07; PSD Appeal No. 08-02 (February 18, 2009)**

The EPA Environmental Appeals Board remanded the permit for, inter alia, analysis of whether carbon dioxide emissions should include BACT limitations.

- ***Longleaf Energy Associates, LLC v. Friends of the Chattahoochee, Inc.*, 2009 WL 1929192, (Ga.App. 2009)**

In the application of Longleaf Energy Associates, LLC, the Georgia Court of Appeals reversed the Fulton County Superior Court findings that, inter alia, the Georgia State Implementation Plan “required the EPD [Environmental Protection Division of the Georgia Department of Natural Resources] to control the power plant’s CO₂ emissions using BACT,” and concluded that *Massachusetts v. EPA* did not mandate the superior court’s ruling, the EPA had not issued any findings pursuant to its proposed endangerment finding, and the EPA had not “exercised its authority pursuant to

Massachusetts v. EPA to regulate CO₂ emissions.”

- ***Appalachian Voices, et al. v. State Air Pollution Control Board, et al., Case No. CL08-3530, Circuit Court of the City of Richmond, letter ruling, (August 10, 2009)***

On the appeal of the issuance of a Prevention of Significant Deterioration permit by the Virginia State Air Pollution Control Board, the Circuit Court of the City of Richmond concluded that no state or federal regulations have been established for carbon dioxide, and therefore there was no authority to claim best available control technology was required for carbon dioxide.

South Coast Air Quality Management District v. E.P.A., 472 F.3d 882 (D.C. Cir. 2006), amended by 489 F.3d 1245 (D.C. Cir. 2007), cert denied, 128 S.Ct. 1065 (2008)

Case Summary: This case challenged EPA’s final eight-hour ozone National Ambient Air Quality Standards (NAAQS) Phase I Implementation Rule regarding implementation of the eight-hour ozone NAAQS. Phase I addressed classifications, anti-backsliding requirements, one-hour ozone revocation, and other requirements for mandatory and discretionary control measures for the eight-hour ozone NAAQS. The court issued an opinion on December 22, 2006, vacating and remanding the Phase I Rule. The court upheld the revocation of the one-hour ozone standard, but rejected the EPA’s classification of certain areas under Subpart 1 of the Federal Clean Air Act. Additionally, the court found that the anti-backsliding provisions of the FCAA require that new-source-review provisions that applied under the one-hour ozone standard continue to apply under the eight-hour standard; fees under Section 185 of the FCAA must be enforced under the one-hour standard; contingency plans under the one-hour standard must remain in place; and motor-vehicle emission budgets for the one-hour standard must be retained under the eight-hour standard. Upon rehearing, this opinion was limited to a partial vacatur and remand on June 7, 2007. The U.S. Supreme Court denied a petition for further review on January 14, 2008.

Impact on the TCEQ: The decision partially vacating and remanding the EPA final rule will potentially require the TCEQ to develop and submit revised plans for attainment and maintenance of the eight-hour ozone NAAQS once the EPA responds to the vacatur and remand with additional guidance or rulemaking. Finally, since the Houston-Galveston-Brazoria area did not attain the one-hour ozone standard by its attainment date of November 15, 2007, Section 185 of the Federal Clean Air Act requires penalty fees to be paid by major sources of volatile organic compounds and nitrogen oxides in the Houston-Galveston-Brazoria area (referred to as Section 185 fees).

New Jersey v. E.P.A., 517 F.3d 574 (D.C. Cir. 2008), cert. dismissed, 129 S.Ct. 1313 (2009), and cert. denied, 129 S. Ct. 1308 (2009)

Case Summary: This case challenged both the delisting of power plants as subject to the hazardous air pollutant program and the creation of the Clean Air Mercury Rule (CAMR) that established standards of performance for mercury emissions from coal-fired power plants and created a cap and trade program to reduce mercury emissions. The court issued an opinion vacating both the delisting rule (finding that the delisting of coal and oil fired power plants from the list of source categories was improper) and the CAMR (finding that the EPA’s justification for rulemaking was unfounded). Since this ruling, EPA has decided

to develop emissions standards for power plants pursuant to the Federal Clean Air Act, Section 112. Accordingly, on February 6, 2009, the Department of Justice, on behalf of the EPA, requested that the U.S. Supreme Court dismiss EPA's petition for certiorari in this case, which was granted on February 23, 2009. Additionally on February 23, 2009, the Supreme Court denied the Utility Air Regulatory Group's request to review the D.C. Circuit Court decision.

Impact on the TCEQ: The vacatur of both the delisting rule and the CAMR will procedurally affect the process for air quality permit application and review for power plants in Texas related to mercury. Applicants will be required to submit for review a case-by-case demonstration of maximum achievable control technology for mercury until the EPA finalizes mercury regulations for power plants on a source-category basis. Additionally, since the CAMR was vacated, the TCEQ will not be implementing the rule in Texas.

Blue Skies Alliance v. Johnson, 2008 WL 344750 (5th Cir. 2008)

Case Summary: This case challenged the EPA's failure to determine whether the Dallas-Fort Worth (DFW) area failed to attain the one-hour ozone standard. Several environmental groups including the Blue Skies Alliance, Downwinders at Risk, Public Citizen, and Sierra Club filed a citizen suit against the EPA. The plaintiffs alleged that the EPA failed to fulfill its nondiscretionary duties to (1) find that DFW did not achieve attainment by the deadline of November 15, 1999 for serious areas; (2) reclassify the DFW area to "severe" status; (3) act to disapprove all pending SIP submissions including rate-of-progress and attainment demonstrations; and (4) identify obligations to meet all SIP requirements within 12 months. The State of Texas was an intervener and the case was settled except for the remaining issue, raised by the plaintiffs, regarding the state's liability for attorneys' fees incurred in the filing and settlement of the case. The fee request was nonspecific; however, the amount ranged between \$50,000 and \$75,000. On August 10, 2006, the District Court awarded attorneys' fees against the TCEQ, which appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit issued an unpublished opinion on February 7, 2008, reversing the award of attorneys' fees to Blue Skies Alliance because that organization did not achieve success against TCEQ on the merits of the underlying case against the EPA.

Impact on the TCEQ: The state will not pay attorneys' fees to plaintiffs in this case, and was also awarded its costs of appeal. Future decisions regarding intervention should still be made cautiously, to mitigate the potential for attorney's-fee awards.

North Carolina v. E.P.A., 531 F.3d 896 (D.C. Cir. 2008)

Case Summary: This case remanded the EPA's final Clean Air Interstate Rule (CAIR) that established a regional cap-and-trade program nitrogen oxides and sulfur dioxide from electric-generating units to reduce emissions in 28 eastern states (including Texas) and the District of Columbia.

Impact on the TCEQ: The decision remanding the CAIR will affect how Texas develops and submits plans for demonstrating how the state is addressing the transport of fine particulate matter (PM_{2.5}) and ozone pollution to other states.

Texas Commission on Environmental Quality v. The City of Uncertain, Texas, 206 S.W.3d 97 (Tex. 2006)

Case Summary: The executive director issued an amended certificate of adjudication to the City of Marshall without public notice to add industrial use to its municipal use for its authorized diversion of 16,000 acre-feet from Cypress Creek. The City of Uncertain and other persons appealed to the Travis County District Court arguing that they were affected persons and notice and an opportunity for hearing should be provided. The City of Marshall and the commission argued that, based on Texas Water Code Section 11.122(b), no notice was required because Marshall did not request to take more water, to take water at a faster diversion rate, or to change the location of the diversion point. The district court reversed in favor of the plaintiffs and the Austin Court of Appeals affirmed. The City of Marshall and the commission filed a petition for review with the Texas Supreme Court. The Supreme Court issued an opinion on June 9, 2006, affirming in part and reversing in part. The court held that the TCEQ must make a record of its rulings on notice, and must consider the public interest in making this determination. The court stated that, without the record, it could not decide whether notice had to be issued for this case, and remanded to the agency for further proceedings consistent with the opinion. The parties subsequently settled the case, so the TCEQ did not have to decide the notice issue as to this specific case.

Impact on the TCEQ: In January 2008, the commission held a work session to determine how to proceed after the Texas Supreme Court's decision. The commission decided to hear all of the applications that have been affected by this opinion in order to approve or disapprove the ED's decision on notice. Several applications have been heard by the commission concerning notice, and several others are being placed on future TCEQ commissioner agendas.

National Cotton Council of America v. E.P.A., 553 F.3d 927 (6th Cir. 2009)

Case Summary: On November 27, 2006, the EPA issued a Final Aquatic Pesticides Rule concluding that pesticides applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) are exempt from the permitting requirements under the Clean Water Act (CWA). The FIFRA program regulates labeling and sale of pesticides. The rule clarified two specific circumstances in which a permit was not required to apply pesticides to or around water: (1) the application of pesticides directly to water to control pests, (2) the application of pesticides to control pests that are present over or near water, where a portion of the pesticides will unavoidably be deposited to the water to target the pest. Environmental and industry groups filed petitions for review in every federal circuit, including the Fifth. The case was assigned to the Sixth Circuit Court of Appeals. On January 7, 2009 the court held that the final rule was not a reasonable interpretation of the CWA and vacated the rule. The EPA had argued that the residue from the application of pesticides was not discharged from a point source, meaning the residue cannot be subject to the permitting program because by the time it becomes a pollutant it is no longer from a point source. The court disagreed and said the pesticides originate from an applicator which is a point source, and therefore a permit is required. The Sixth Circuit held that CWA permits are required for all applications of biological and chemical pesticides that leave a residue in water when such applications are made in or over, or near, U.S. waters. The EPA estimates that the ruling will affect approximately 365,000 applicators that perform 5.6 million pesticide applications annually. On April 9, 2009, the EPA chose not to seek rehearing on the case. Instead, it filed a motion to stay issuance of the court's mandate for

two years to allow the EPA time to develop, propose and issue a final NPDES general permit for pesticide applications, for states to develop permits, and to reach out to and educate the regulated community.

Impact on the TCEQ: Since Texas is an NPDES delegated state, the outcome of the case may require the TCEQ to regulate pesticide application under the Texas program. Currently the Texas Department of Agriculture has authority for pesticide use and application in Texas and issues licenses to private and commercial applicators.

***American Petroleum Institute v. Johnson*, 541 F.Supp.2d 165 (D.D.C. 2008)**

Case Summary: The U.S. District Court for the District of Columbia vacated the EPA's definition of *navigable waters* in the Spill Prevention, Control, and Countermeasure regulations (SPCC Rule), 40 CFR Section 112. The regulations require certain oil-processing facilities to prepare a plan to prevent oil spills and provide countermeasures to address discharges of oil into "navigable waters." When the EPA amended the SPCC Rule in 2002, it adopted a broad definition of "navigable waters" that included all waters that "could affect interstate or foreign commerce," tributaries to those waters, and adjacent wetlands.

Impact on the TCEQ: The case has potentially broader implications under the Clean Water Act (CWA) since the EPA's regulatory definition of "navigable waters" under Sections 402 and 404 of the CWA is the same language as the definition in the now-vacated SPCC Rule.

***Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S.Ct. 2458 (2009)**

Case Summary: The issue in this case was whether the U.S. Army Corps of Engineers had the authority to issue Section 404(b) permits for discharge of dredge or fill material into waterways, without satisfying the effluent requirements of Section 301(e) and Section 306(e) of the Clean Water Act. A divided U.S. Supreme Court held that the Corps has the authority to issue permits for discharging dredge or fill material into a waterway, without establishing effluent limits.

Impact on the TCEQ: The TCEQ is responsible for Section 401 certification reviews of Corps Section 404 permits. This decision will potentially affect the TCEQ's Section 401 water quality certifications, especially where the Corps' attempts to impose effluent limits are inconsistent with either state or EPA requirements.

***Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498 (2009)**

Case Summary: This case involves the EPA's Phase II regulations governing cooling-water intake structures at certain large existing facilities. The EPA sets national performance standards requiring most Phase II facilities to reduce "impingement mortality for [aquatic organisms] by 80 to 95 percent from the calculation baseline," and requiring a subset of facilities to reduce entrainment of such organisms by "60 to 90 percent from [that] baseline." However—

[The] EPA expressly declined to mandate closed-cycle cooling systems, or equivalent reductions in impingement and entrainment, as it had done in its Phase I rules, in part because the cost of rendering existing facilities closed-cycle compliant would be nine times the estimated cost of compliance with the Phase II performance standards, and because other technologies could approach the performance of closed-cycle operation. The Phase II rules also permit site-specific variances from

the national performance standards, provided that the permit-issuing authority imposes remedial measures that yield results as close as practicable to the applicable performance standards.

The court in this case determined that Section 316(b) of the Clean Water Act, which authorizes the EPA to regulate cooling-water intake structures at power plants, does not prohibit the EPA from engaging in cost-benefit analysis. The court held that the EPA permissibly relied on cost-benefit analysis in setting the national performance standards for cooling-water intake structures at power plants and in allowing for cost-benefit variances from the standards for existing power plants.

Impact on the TCEQ: The ruling in this case offers guidance regarding the use of cost-benefit analysis by environmental agencies, such as the TCEQ. It suggests that agencies may consider the costs and benefits of various technologies in setting best-available-technology standards for minimizing adverse environmental impacts, unless the applicable statute explicitly instructs otherwise.

***Friends of the Earth, Inc. v. EPA et al.*, 446 F.3d 140 (C.A.D.C. 2006)**

Case Summary: This case poses the question whether the word *daily*, as used in the Clean Water Act, is sufficiently pliant to mean a measure of time other than once per day. Specifically, the EPA took the position that Congress, in requiring the establishment of “total maximum daily loads” (TMDLs) to cap effluent discharges of “suitable” pollutants into highly polluted waters, left room for the EPA to establish seasonal or annual loads for those same pollutants. The U.S. Court of Appeals for the District of Columbia held that “daily means daily, nothing else.” The EPA has since produced a memorandum titled “Establishing TMDL ‘Daily’ Loads in Light of the Decision by the U.S. Court of Appeals for the D.C. Circuit in *Friends of the Earth, Inc. v. EPA, et al.*, No. 05-5015 (April 25, 2006) and Implications, for NPDES Permits,” to clarify the EPA’s expectations in light of the court’s decision.

Impact on the TCEQ: The TCEQ is responsible for the development and adoption of TMDLs in Texas and will need to ensure that future TMDLs meet all applicable requirements. The TCEQ is also the agency responsible for administering the National Pollutant Discharge Elimination System in Texas and for issuing TPDES permits pursuant to that program, and thus will need to ensure that future permits meet the applicable TMDL requirements.

***Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009)**

Case Summary: The issue was whether the transfer of water from one navigable body of water to another is a “discharge of a pollutant” within the meaning of the Clean Water Act, requiring an NPDES permit. While the case was still pending, the EPA promulgated its NPDES Water Transfers Rule, which directly addressed the question presented in the case. In promulgating that rule, the EPA explained that it wanted to clarify that water transfers are not subject to regulation under the NPDES permitting program. The rule defines water transfers as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use [NPDES Water Transfers Rule, 73 *Fed. Reg.* 33,697–708 (June 13, 2008) [codified at 40 C.F.R. Section 122.3(i)]. The Court of Appeals noted that the EPA’s regulation was entitled to deference if it was a reasonable construction of an ambiguous statute. The court

concluded that the statutory language was ambiguous and moved on to consider whether the EPA's regulation, which accepts the "unitary waters theory" that transferring pollutants between navigable waters is not an "addition ... to navigable waters," was a permissible construction of that verbiage. The court concluded that the EPA's regulation adopting the "unitary waters theory" was reasonable, and therefore a permissible construction, and that unless the EPA rescinds or Congress overrides the regulation, the court must give effect to it.

Impact on the TCEQ: Based on current regulation, the agency will not be required to issue TPDES permits to persons who wish to move water from one stream to another. However, it is anticipated that this case will be appealed to the U.S. Supreme Court.

***South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S.Ct. 1537 (2004)**

Case Summary: The case involved the flood control and pumping operations of a water-management district within Florida's Everglades. The Eleventh Circuit Court of Appeals had affirmed the district court's ruling that the pumping station between two canals required an NPDES permit. The case was appealed to the United States Supreme Court and in 2003, the State of Texas filed an amicus brief supporting the South Florida Water Management District based on the premise that state law controls water-right allocations. The U.S. Supreme Court held that a point source as defined by the Clean Water Act would not be exempt from NPDES permit requirements because it did not itself add pollutants. The Supreme Court remanded the case to the district court and invited the parties to address the "unitary water theory," which suggests that the discharge of unaltered water from one navigable water body to another would not require an NPDES permit because the definition of *navigable waters* includes all waters of the United States. The proceedings in this case were stayed pending appeal of the judgment in *Friends of the Everglades v. South Florida Water Management District* (a related action described above involving similar parties). The stay order was appealed, but the court ruled that it lacked jurisdiction to hear the appeal of the district court's stay order.

Impact on the TCEQ: The TCEQ is monitoring the *Friends of the Everglades* case to assess the impact of this issue on TPDES permitting.

***Natural Resources Defense Council v. U.S. E.P.A.*, 542 F.3d 1235 (9th Cir. 2008)**

Case Summary: The issue in this case was whether the EPA has a "nondiscretionary duty" to promulgate effluent limitation guidelines (ELGs) (which could include numerical limits on the sediment in storm water runoff) and new source performance standards (NSPSs) for storm water pollution discharges caused by the construction and development industry. The Ninth Circuit held that the language of the Clean Water Act, when viewed in its entirety, makes it clear that the Congress intended the promulgation of ELGs and NSPSs to be mandatory once a point-source category was listed in a plan published in the Federal Register.

Impact on the TCEQ: This could potentially affect how the agency currently regulates storm water related to construction and development activities. Runoffs from construction are currently regulated under the TCEQ's construction general permit. When the EPA adopts ELGs and NSPS for construction storm water, TCEQ may be required to update its rules and revise its construction general permit to be consistent with the EPA's standards.

***Northern Plains Resource Council v. Fidelity Exploration and Development Corp.*, 325 F.3d 1155 (9th Cir. 2003)**

Case Summary: In this case, the Ninth Circuit held that the discharge of unaltered groundwater into surface water required an NPDES permit, reasoning that, because the groundwater altered the quality of the receiving water, it was a pollutant. At issue was whether unaltered groundwater produced from the coal bed methane extraction process was a “pollutant” under the Clean Water Act, and, if so, whether Montana state law could exempt that water from the CWA’s permitting requirements for discharge of a pollutant. The Ninth Circuit concluded that the water was a pollutant subject to regulation under the CWA. Looking at the plain language of the statute, the court reasoned that the water was a pollutant because it was an industrial waste, even though it was unaltered groundwater, since *industrial waste* includes “any useless byproduct derived from the commercial production and sale of goods and services.” The court also determined that the water was a “pollutant” under EPA regulations governing “produced water,” even if extraction did not add any pollutants to the water. The court focused on the effect of the discharge on the receiving water, citing the CWA’s “antidegradation policy,” and found that discharge of the water caused pollution under the CWA because it altered the quality of the receiving water. The court explained that the CWA’s requirement that the physical, biological, or chemical integrity of the water be a “man-induced” alteration refers to the effect of the discharge on the receiving water; it does not require that the discharged water itself be altered by humans. After concluding that the discharge of unaltered groundwater was subject to regulation under the CWA, the court concluded that neither the EPA nor the state of Montana had authority to exempt discharges otherwise subject to the CWA because only Congress may amend the CWA to create exemptions from regulation.

Impact on the TCEQ: This case has the potential to affect the types of discharges that require authorization under a TPDES permit issued by the TCEQ. Although the RRC regulates discharges associated with oil, gas, and geothermal exploration and development in Texas, this opinion is broad enough to encompass discharges of unaltered groundwater into surface water. Parties whose operations involve infiltrated or extracted groundwater that will be discharged into waters of the state may need to obtain a TPDES permit if the discharge affects the chemical, physical, or biological integrity of the receiving waters. This could become an issue if the agency receives an application from a regulated entity, not subject to RRC jurisdiction, for a permit to discharge unaltered groundwater into surface water.

***Northwest Environmental Advocates v. U.S. E.P.A.*, 537 F.3d 1006 (9th Cir. 2008)**

Case Summary: This case involved a challenge to a regulation promulgated by the EPA in 1973, which exempted certain marine discharges from the permitting scheme of Clean Water Act Sections 301(a) and 402. The district court concluded that the EPA had exceeded its authority under the CWA in exempting these discharges from permitting requirements and vacated the rule. The Ninth Circuit Court of Appeals affirmed the decision of the district court. In response to the court’s decision, the EPA issued its 2008 Vessel General Permit (VGP), which regulates discharges incidental to the normal operation of vessels operating as means of transportation.

Impact on the TCEQ: The impact of this case and the EPA VGP will be considered in the rulemaking to implement SB 2445 (81st legislative session) relating to boat-sewage

disposal and designation of no-discharge zones. The VGP may have implications for vessels operating in state waters in the Gulf of Mexico.

***The Piney Run Ass'n v. The County Com'rs of Carroll County, Md.*, 523 F.3d 453 (4th Cir. 2008), cert. denied, 129 S.Ct. 258 (U.S. Oct. 6, 2008) (No. 08-96)**

Case Summary: The association filed suit alleging that county commissioners violated the Clean Water Act by discharging treated wastewater into a stream which exceeded the thermal limitation set forth in the county's NPDES permit. The Fourth Circuit Court of Appeals held that, because the Maryland Department of the Environment was diligently pursuing an enforcement action against a county for violating the thermal limitation set forth in its NPDES permit for its wastewater treatment plant, the association was precluded from bringing a citizen suit against the county under the CWA. In its analysis of the arguments, the court noted that the CWA enforcement prosecutions will ordinarily be considered "diligent" if the judicial action "is capable of requiring compliance with [the CWA] and is in good faith calculated to do so," and further observed that there is a presumption of diligence arising from an agency enforcement action.

Impact on the TCEQ: The ability to file a citizen suit under the CWA where the TCEQ is diligently pursuing an enforcement action for the same violation is precluded by this case.

***Rapanos v. U.S.*, 547 U.S. 715, 126 S.Ct. 2208 (2006)**

Case Summary: This case addressed the scope of the U.S. Army Corps of Engineers' authority to regulate navigable waters under Section 404 of the Clean Water Act. The case resulted in a plurality opinion, with two tests for determining whether certain waters are jurisdictional waters for purposes of Section 404(b) of the CWA. The plurality held that, due to the difficulty involved in drawing the line between wetlands and traditional navigable waters, "waters of the United States" includes those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right. Justice Kennedy's concurring opinion set forth a "significant nexus" test, which states that if a water body substantially affects the physical, chemical, and biological integrity of the navigable water body, then it is jurisdictional.

Impact on the TCEQ: This holding addresses the scope of waters covered under the definition of *waters of the united states*. The TCEQ is the agency charged with implementing Texas' Surface Water Quality Standards, as required by the CWA. Texas wetlands play an important role in protecting surface water quality in Texas. Many of Texas' streams and associated wetlands are non-navigable and as such may not be federal jurisdictional water depending on whether they are adjacent to jurisdictional wetlands. Corps of Engineers jurisdictional determinations for wetlands may affect the chemical, physical, and biological integrity of downstream navigable waters, and may require adjustments to TCEQ water quality planning. The TCEQ is responsible for conducting Section 401 water quality certifications of the Corps Section 404 permits for discharge of dredged or fill material into waters of the U.S, including wetlands. The purpose of these reviews is to determine whether a proposed discharge will comply with state water quality standards. The determination of whether certain waters are jurisdictional will determine which permits require these certifications.

Examples of Post-Rapanos Interpretations: With the exception of the first two cases below and the referenced EPA guidance, none of the following have direct precedential

effect on Texas but they are indicative of how the issue is being addressed on a national level.

- ***United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008)**

The court used Justice Kennedy’s “significant nexus” test from *Rapanos* as the standard for determining whether the wetlands were jurisdictional, but did not opine on which *Rapanos* test was controlling.

- ***United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605 (N.D. Tex. June 28, 2006)**

The district court explained that because Justice Kennedy failed to elaborate on the “significant nexus” required in *Rapanos*, the court had to look to the prior reasoning in the Fifth Circuit. The court observed that the Fifth Circuit had interpreted “the waters of the United States” narrowly under the Oil Pollution Act, and explained that, without any clear direction on determining a significant nexus, the district court would do exactly as Chief Justice Roberts declared and “feel [its] way on a case-by-case basis.” The district court then held that, as a matter of law in the Fifth Circuit, the connection of generally dry channels and creek beds will not suffice to create a “significant nexus” to navigable water simply because one feeds into the next during rare times of actual flow.

- ***Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007)**

The court concluded that the controlling opinion in *Rapanos* is that of Justice Kennedy—to qualify as a navigable water under the CWA, the body of water itself need not be continuously flowing, but that there must be a “significant nexus” to a waterway that is in fact navigable.

- ***San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700 (9th Cir. 2007)**

The court reasoned that, under the controlling regulations, the only areas that are defined as waters of the United States by reason of adjacency to other such waters are “wetlands,” and found improper the lower court’s finding that the pond at issue in the case was a jurisdictional water because the same characteristics that justified protection of adjacent wetlands applied to adjacent ponds.

- ***United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009)**

The court determined that jurisdiction over certain wetlands was proper under each of the primary *Rapanos* opinions and therefore did not decide which test controls in all future cases.

- ***United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006)**

The court noted that, when a majority of the United States Supreme Court agrees only on the outcome of a case and not on the grounds for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the justices would have assented if forced to choose, observing that in *Rapanos* the narrowest ground was Justice Kennedy’s “significant nexus” test.

- ***United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006)**

The Court of Appeals held that the United States could assert jurisdiction over the sites at issue in the case by meeting either the standard set forth by Justice Kennedy in *Rapanos* or by meeting the standard set forth by the plurality in the same case.

- ***United States v. Moses*, 496 F.3d 984 (9th Cir. 2007)**

The issue in this case was whether an intermittently running creek (water flowing for two months per year) was a jurisdictional wetland for purposes of Section 404(b) dredge and fill permitting. The Ninth Circuit reviewed the plurality opinion, Kennedy's concurring opinion, and the dissent in *Rapanos*, and determined that seasonally intermittent streams can be "waters of the United States."

- ***United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007)**

Concluded that Justice Kennedy's "significant nexus" test provides the governing rule in *Rapanos*.

EPA Guidance

On June 5, 2007, the EPA and the Corps issued guidance clarifying CWA jurisdiction following the decision in *Rapanos*. The EPA and the Corps jointly reviewed the comments received about the guidance and released a revised version on December 2, 2008. According to this guidance, when there is no majority opinion in a U.S. Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices, and thus regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied. The guidance sets forth criteria to be used to determine which waters will be considered jurisdictional.

***S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370 (2006)**

Case Summary: Under Section 401 of the federal Clean Water Act, companies must obtain state approval of any activity that may result in a discharge into navigable waters. In this case, the U.S. Supreme Court ruled that operation of a dam to produce hydroelectricity may result in a "discharge" into the navigable waters of the United States for purposes of Section 401 of the Clean Water Act, and accordingly a federal license for such a dam requires state certification that the dam will not violate water-protection laws.

Impact on the TCEQ: The TCEQ is the agency responsible for conducting Section 401 water quality certification reviews. This case requires the TCEQ to perform certification reviews for dam operations. Note that, under TCEQ rules, Section 401 certification may be waived.

***Waterkeeper Alliance, Inc. v. E.P.A.*, 399 F.3d 486 (2d Cir. 2005)**

Case Summary: The case involved an environmental group's challenge to EPA rules regarding confined animal-feeding operations (CAFOs). The Second Circuit vacated a portion of EPA rules that allowed a permitting authority to issue CAFO permits without reviewing the nutrient management plans (NMPs) and without including the NMP terms in the permit. Also, the Second Circuit found that the rules must expressly allow for a public meeting and for public input on the NMPs. In addition, the Second Circuit found that the Clean Water Act prevents the EPA from imposing on CAFOs the obligation to seek an NPDES permit or to demonstrate there is no potential for discharge.

Impact on the TCEQ: Currently, all CAFO operations are required to have NMPs. TCEQ

reviews the NMPs prior to issuing authorization under the CAFO general permit and for individual CAFO permits. In addition, the current general permit allows for a public meeting for new or expanding CAFOs if significant public interest exists, but not for existing CAFOs. The EPA promulgated revised regulations addressing the court's decisions in *Waterkeeper*, which became effective on December 22, 2008. These regulations revised the NPDES permitting requirements (40 CFR Part 122) and Effluent Limitations Guidelines and Standards (40 CFR Part 412) for CAFOs. The executive director is proposing rules to address the outcome in the *Waterkeeper's* case that would require (1) an NMP to be included in permit applications; (2) permitting authorities to review the NMPs and give the public an opportunity for meaningful review and comment; (3) incorporation of the terms of the NMP into the NPDES permit; and (4) establishment of a list of substantial changes to the terms of facilities' NMPs, thus triggering permit modification and public notice. The rules would change the provision that allowed CAFOs to use a 100-year, 24-hour containment structure to fulfill the "no discharge" requirement for new-source swine, veal-calf, and poultry operations. This was replaced with a requirement that the facility demonstrate through a rigorous modeling analysis that it has designed a containment system that will comply with the "no discharge" requirement. The agency is currently working with stakeholders to develop language for a proposed rule addressing the voluntary superior performance new source performance standard for new swine, veal-calf, and poultry operations.

Court Cases (Pending)

***Edwards Aquifer Authority v. Day*, 274 S.W.3d 742 (Tex. App.–San Antonio 2008, writ requested)**

Case Summary: This case is an appeal of the denial of an application to the Edwards Aquifer Authority (EAA) to pump water for irrigation. The Days had requested approximately 700 acre-feet of groundwater for irrigation. An administrative law judge recommended that a permit be issued for only 14 acre-feet of groundwater because the groundwater that was pumped from the well, to a ditch, and then sent into a lake before it was pumped out on the fields became state water not regulated by the EAA. The 14 acre-feet of groundwater that was allowed went from the well, to a ditch, straight to the fields. The EAA issued this ruling in a final order. The issues were whether the groundwater became state water when it entered the watercourse, and whether Day had a vested right in the groundwater that could be the subject of a "taking." In the trial court, both sides filed motions for summary judgment. The trial court granted the Days' motion and reversed and remanded to the EAA to issue permits in a larger amount (the amount to irrigate 150 acres of land), finding that the groundwater that went in the lake was still groundwater. The trial court did not grant the EAA's motion for summary judgment on the Days' "takings claims" in which it had argued that the Days did not have a vested right to the groundwater. The court of appeals held that the water became surface water when it entered the watercourse and that the Days did have a vested right to the groundwater under their land. The court remanded to the EAA to render judgment affirming the EAA's final order. Both parties filed a petition for review in the Texas Supreme Court in February, 2009. Additionally, the State of Texas filed a Response to the Petition for Review on May 20, 2009 on the specific issue of the legal status of groundwater and when it is considered state surface water for the purpose of administering water rights.

Impact on the TCEQ: If the Texas Supreme Court reverses the court of appeals' ruling that the groundwater became surface water when it enters the watercourse, that outcome could affect the TCEQ. Current policy is that groundwater becomes surface water when it enters a watercourse, except for groundwater based effluent being reused pursuant to the Texas Water Code.

U.S. Bureau of Reclamation v. Elephant Butte Irrigation District, No. CV 97-0803 (D.N.M. filed 1997)

Case Summary: The U.S. Bureau of Reclamation sued the State of New Mexico, Elephant Butte Irrigation District, El Paso County Water Improvement District No. 1, and the City of El Paso, claiming that the water in Elephant Butte Reservoir belongs to the Bureau. The State of Texas moved to intervene. The federal district court dismissed the case and all counterclaims. The Bureau and the El Paso Water Improvement District No. 1 appealed, and the case was heard in November of 2001. The Tenth Circuit, in *United States v. City of Las Cruces* (2002), abated the Bureau's suit and held that the states should have adjudicated this issue first before the federal court became involved. The TCEQ has completed adjudicating the Upper Rio Grande Basin. However, New Mexico's adjudication is ongoing.

Impact on the TCEQ: An agreement or court ruling that limits the State of Texas' ownership or right to regulate water in the Bureau's reservoirs could make the state subject to federal administration of water rights in Elephant Butte.

Southeast Region and Southwest Region v. Texas Commission on Environmental Quality, No. D1-GN-08-004466 (353rd Dist. Ct. Travis County, Tex. filed December 12, 2008)

Case Summary: The petition challenges the TCEQ's final decision in the AquaTexas rate case. The petition alleges that the commission erred when it found that AquaTexas had adequately demonstrated that its water and wastewater systems were substantially similar within the meaning of Section 13.145 of the Texas Water Code.

Impact on the TCEQ: A reversal of the TCEQ's interpretation of TWC Section 13.145 could limit the ability of multisystem utilities to consolidate systems for rate making and could increase the number of rate applications filed with the TCEQ each year.

Flagship Hotel, Ltd. v. City of Galveston, No. D-1-GN-09-000651 (250th Dist. Ct., Travis County, Tex. filed March 12, 2009)

Case Summary: Flagship appealed the commission's decision to dismiss its attempt to seek refund of payments made to the City of Galveston for water service. Flagship is an in-city customer of the Galveston municipally owned water system. The TCEQ has historically maintained that it has no jurisdiction to review billing disputes involving in-city customers of municipally owned utilities.

Impact on the TCEQ: A reversal of the TCEQ's dismissal by this court could result in a significant number of billing disputes filed with the TCEQ by in-city customers.

NWEA v. Gutierrez, No. 3:09-cv-17 (D. Or. filed January 6, 2009)

Case Summary: This case relates to Oregon's coastal nonpoint source pollution control plan under the Coastal Zone Act Reauthorization Amendments of 1990. On December 19, 2008, the Northwest Environmental Advocates submitted to the National Oceanic and

Atmospheric Administration (NOAA) and the EPA a notice of intent to sue if the agencies could not prove that they consulted under Section 7 of the Endangered Species Act when conditionally approving and fully funding Oregon's Coastal Nonpoint Pollution Control Program. On January 6, 2009, the NWEA filed suit against NOAA and the EPA for, among other things: (1) not having the authority to conditionally approve Oregon's program and (2) failing to penalize Oregon for not developing an approved program by withholding funding under Section 306 of the Coastal Zone Management Act and Section 319 of the Clean Water Act. The CZMA is the enabling statute which encourages the protection, development, restoration and enhancement of natural coastal resources, while the Coastal Zone Reauthorization Act reauthorizes the CZMA and adds a new requirement that for states that have approved coastal-zone management programs to develop and implement coastal nonpoint control programs (CNP).

Impact on the TCEQ: As a result of this lawsuit, the court could force NOAA and the EPA to formally disapprove Oregon's program and administer penalties. This lawsuit will affect the other 12 states with conditional approvals, including Texas. The court could also require NOAA and the EPA to undergo formal consultation on the Endangered Species Act for Oregon's CNP, which would set a precedent for all 34 other states with CNPs, including Texas.

Hays Community Action Network and Barbara Stroud v TCEQ, No. D-1-GN-09-001773 (201st Dist. Ct., Travis County, Tex. filed June 3, 2009)

Case Summary: In June 2009, the Hays Community Action Network (CAN) and Barbara Stroud sued the TCEQ, alleging that the commission should not have adopted the administrative law judge's proposal for decision on the application by Hays County WCID No. 1 for a wastewater permit and should not have issued the permit. Specifically, Hays CAN and Barbara Stroud (a downstream landowner) filed a petition for review alleging that (1) the commission made its decision to issue the permit as a result of an unlawful procedure by permitting the applicant to introduce previously undisclosed expert opinion evidence and calculations in support of the permit as modified by the non-unanimous settlement agreement; (2) the commission's decision to issue the permit is not supported by evidence in the record; (3) the commission made an error of law by allowing the applicant to introduce evidence of settlement negotiations; (4) the commission committed an error of law and procedure by failing to require the applicant to establish an important social or economic justification for degradation; and (5) the commission employed the incorrect aquatic-life use for the receiving water.

Impact on the TCEQ: The outcome of this case will affect how the agency determines who is an "affected person" for purposes of referring a case to the State Office of Administrative Hearings for contested case proceeding. Additionally, the TCEQ's interpretation and implementation of the anti-degradation requirements in the Texas Surface Water Quality Standards are being challenged in this case as well. Anti-degradation review is central to water quality permitting at the TCEQ. Currently, the agency uses narrative criteria for nutrients such as phosphorus. In *Hays CAN*, the protestants are urging the court to require the agency to use quantitative (numeric) criteria for nutrients. If the court agrees with the argument, it would affect the way the agency has historically implemented the Texas Surface Water Quality Standards.

City of Aspermont v. Rolling Plains Groundwater Conservation Dist., 258 S.W. 3d 231 (Tex. App.–Eastland 2008, writ requested)

Case Summary: Rolling Plains filed suit against Aspermont after the city failed to file monthly reports and refused to pay export fees for the water that it transported out of the district. Rolling Plains sought to recover monetary damages in the form of fees and penalties for each day of violation as well as attorney’s fees and costs. It also sought declaratory relief from the court to order that Aspermont was subject to and must comply with the water conservation rules and regulations. Aspermont filed a plea to the jurisdiction and urged sovereign immunity. The trial court denied the plea to the jurisdiction. In the sole issue on appeal, Aspermont argued that the trial court erred in denying its plea to the jurisdiction and again urged its claim of sovereign immunity. Sovereign immunity bars a suit against the state or its political subdivisions unless immunity has been waived or the legislature has expressly consented to the suit, which it may do by statute or resolution. Rolling Plains contended that immunity was waived by statute and by the regulatory nature of the case. In deciding the case, the court looked to the enabling statutes and subsequent legislation and found that there were no provisions in TWC Chapter 36 or in the enabling statutes for the groundwater conservation district that clearly and unambiguously waived the immunity of a municipality from suit for monetary damages. However, the Court also found that the city was not immune from a suit that sought prospective relief in the form of a declaratory judgment, injunction, or mandamus relief that would force the city to comply with statutory regulations in the future. In so holding, the court reversed the trial court’s order denying the plea to the jurisdiction regarding money damages for past-due fees, penalties, attorney’s fees, and costs, but affirmed that portion of the order denying the plea to the jurisdiction as to the causes of action seeking a construction of the applicable legislation and a declaration that the city was subject to and must comply with the applicable rules and regulations.

Impact on the TCEQ: If the Texas Supreme Court decides to grant the writ for review of the Eastland court’s decision, the outcome of that holding could affect the TCEQ’s authority to seek administrative or civil penalties against municipalities, although the TCEQ would assert that its statutory authority to pursue enforcement is distinguishable.

State of Texas v. Michael Joseph Rhine, 255 S.W.3d 745, (Tex.App.–Fort Worth 2008, pet. granted)

Case Summary: This case is a constitutional challenge to a provision of the Texas Water Code that creates criminal penalties for violating TCEQ rules adopted under the Texas Clean Air Act. The challenge alleged that this provision of the TWC is void as a result of the legislature’s unconstitutional delegation of its authority to an executive-branch agency in violation under the Texas Constitution’s nondelegation doctrine. The trial court found that the provision was void as an unconstitutional delegation of authority and the state appealed. The Fort Worth Court of Appeals held that the TCEQ is a public entity for purposes of the nondelegation doctrine; the legislature could not practically and efficiently have exercised the powers delegated to the TCEQ to control outdoor burning of waste and combustible materials; and the statute included adequate limitations and guidelines such that it was not an unconstitutional delegation of power. The Court of Criminal Appeals granted a petition for discretionary review and oral arguments were heard in February of 2009. On September 23, 2009 the Court of Criminal Appeals affirmed the judgment of the Court of Appeals and remanded the case to the trial court for further proceedings. The

Court held that the legislature declared a policy and set standards and limitations on the authority delegated to the TCEQ that are capable of reasonable application, provide guidance, and limit discretion, it has not unconstitutionally delegated to the TCEQ authority more "properly attached to" the legislature and, therefore, there is no violation of the separation of powers principle of Art. II, Section I, of the Texas Constitution. Mr. Rhine may still appeal the ruling to the U.S. Supreme Court.

Impact on the TCEQ: If the provision is found to be an unconstitutional delegation of the legislature's authority, the TCEQ would be unable to obtain criminal prosecution for an intentional or knowing violation of TCEQ rules adopted under the Texas Clean Air Act. Additionally there are other criminal statutes in the Texas Water Code which also create criminal penalties for intentional or knowing violations of TCEQ rules adopted under legislative authority. These statutes may also face similar constitutional challenges.

I. What are your agency's biggest opportunities for improvement in the future?

The TCEQ has several opportunities to improve on its ability to constructively engage with the public, elected and appointed officials, and the regulated community. These opportunities will be driven by such challenges as addressing the needs of a growing population and increasing scrutiny from the federal government, while maintaining both environmental protection and economic prosperity.

These challenges are not faced by Texans alone. National and even international concerns will add further demands for effective environmental management. The answers to these challenges will be found in proactive, innovative responses and creative solutions by the TCEQ and its partners. The TCEQ will face these challenges and others by building on the environmental successes already achieved in Texas.

Building Relationships and Partnerships

The need to address ever changing federal laws and regulations presents the TCEQ with the opportunity to work in partnership with the federal government on the goal of improving Texas' environment.

The agency has worked over many years with various authorities across the state in developing required federal clean-air plans and these relations will continue as the need for revisions to those plans are needed. These partnerships are especially relevant in light of the EPA's questioning the state's implementation of components of the federal Clean Air Act.

There will be more demand for the state's water resources. Pressure on the state's water supply is further intensified by an ongoing drought and driving need to ensure sufficient resources and authority to manage limited resources. The agency has worked to maintain a safe and adequate drinking water supply. The state's growing water needs will facilitate the TCEQ's effort to actively engage in discussions with citizens, regulated entities, sister state agencies and the legislature about the future direction of the state's water policy.

TCEQ is encouraged by the public's interest in the environment and will draw on this interest to educate citizens about how potential lifestyle changes involving conservation and

practical alternatives can improve the environment. For example, turning off unneeded lights or switching to energy-efficient bulbs, using rainwater to irrigate landscapes, and proper disposal of electronic waste can protect the environment.

The TCEQ will also take the opportunity to build on its successes with Mexico (including Mexican border states) to address joint environmental problems and find common solutions.

Technologies

Mobile emissions across the state, as well as ever changing federal clean air standards, represent additional challenges today and into the future. Existing state programs have decreased the ozone levels in many communities while other programs have reduced emissions of nitrogen oxides from older heavy-duty vehicles and equipment by over 100,000 tons since 2002. In a world of increasing emissions, the challenge to meet federal clean-air standards represents an opportunity for the TCEQ to advance the use of emerging technologies in emission reductions and controls so that the state's air quality can continue to improve.

There will also be more rigorous scrutiny of how TCEQ maintains the quality of the state's water. The population of the state is expected to double by 2050. With more people come more regulated entities and both bring the possibility of additional pollutants entering the state's waterways. Existing programs have demonstrated a reduction in pollutant loading to Texas streams as measured by a reduction in biochemical oxygen demand. However, the demand for clean, usable water will require the TCEQ to engage in discussions with its stakeholders regarding water policy. Additionally, the challenge to keep the state's water clean and usable affords the TCEQ the opportunity to aggressively promote the use of emerging water-related technologies.

Monitoring

Increasing the use of monitoring technologies will position the agency to make determinations based on the most current scientific data derived from the most advanced tools available. For example, Harris County and the surrounding area is one of the most heavily monitored areas in the state and indeed the nation. Information from all these monitors indicates where progress has been made and where more work is needed.

Information Technology

In response to the public's interest in the environment, and the demand for ever increasing amounts of information, the TCEQ will use emerging information technologies to communicate dynamically with interested parties.

Agency Staffing

While meeting the external challenges of the environment, the TCEQ must also answer an internal challenge: maintaining and deploying its professional and highly technically skilled workforce in a manner that most effectively and efficiently meets the needs of the state. Additionally, the TCEQ will need to ensure it has adequate resources to maintain and build upon the need for personnel across the state.

By retaining skilled professionals in Austin and around the state, TCEQ ensures that it has

the appropriate professional and technical staff to thoughtfully, consistently, and timely respond to a complex array of issues. However, staffing challenges also provide an opportunity to continually evaluate the use of agency resources to determine the best combination of personnel to address the needs of both the public and the regulated community.

As shown, the TCEQ faces many challenges over the coming years. However, by building on current policies that have afforded environmental benefits, the agency has positioned itself to offer the best possible protection of the state's human and natural resources consistent with sustainable economic development.

J. In the following chart, provide information regarding your agency's key performance measures included in your appropriations bill pattern, including outcome, input, efficiency, and explanatory measures. See Example 2 or [click here to link directly to the example.](#)

Texas Commission on Environmental Quality Exhibit 2: Key Performance Measures — Fiscal Year 2008			
Key Performance Measures	FY 2008 Target	FY 2008 Actual Performance	FY 2008 % of Annual Target
GOAL A: Assessment, Planning and Permitting			
OUTCOMES:			
Annual percentage of stationary and mobile source pollution reductions in non-attainment areas	6%	3%	50%
Nitrogen oxides (NO _x) emissions reduced through the Texas Emissions Reduction Plan (TERP)	70	18.50	26.43%
Annual percentage reduction in pollution from permitted wastewater facilities discharging to the waters of the state	0.10%	0.36%	360%
Percentage of Texas surface waters meeting or exceeding water quality standards	67%	64.30%	95.97%
Annual percentage reduction in disposal of municipal solid waste (MSW) per capita	-0.02%	-7%	35,000%
Annual percentage decrease in the toxic releases in Texas	2%	3%	150%
Percentage of scheduled licensing activities complete	100%	90%	90%
A.1.1 Strategy: Air Quality Assessment and Planning			
OUTPUTS:			
Number of point source air quality assessments	2,000	1,965	98.25%
Number of area source air quality assessments	2,500	2,577	103.08%
Number of mobile source air quality assessments	1,250	1,268	101.44%
Tons of NO _x reduced through TERP	28,611	18,218	63.67%
Number of new technology grant proposals reviewed	62	74	119.35%

Number of vehicles repaired or replaced through LIRAP assistance	15,000	18,492	123.28%
EFFICIENCIES:			
Average cost of LIRAP vehicle emissions repairs and retrofits	\$525	\$504.61	96.12%
Average cost/ton of NO _x reduced through TERP	\$5,000	\$7,816	156.32%
Average number of days to review a grant proposal	1	1.50	150%
A.1.2 Strategy: Water Assessment and Planning			
OUTPUT:			
Number of surface water assessments	67	65	97.01%
Number of groundwater assessments	60	59	98.33%
A.1.3 Strategy: Waste Assessment and Planning			
OUTPUT:			
Number of MSW facility capacity assessments	250	246	98.40%
EFFICIENCIES:			
Average cost per MSW facility capacity assessment	\$35	\$32.30	92.29%
A.2.1 Strategy: Air Quality Permitting			
OUTPUT:			
Number of state and federal new-source-review air quality permit applications reviewed	5,800	4,744	81.79%
Number of federal air quality operating permits reviewed	1,100	868	78.91%
A.2.2 Strategy: Water Resource Permitting			
OUTPUT:			
Number of applications to address water quality impacts reviewed	18,158	20,221	111.36%
Number of CAFO authorizations reviewed	90	123	136.67%
A.2.3 Strategy: Waste Management and Permitting			
OUTPUT:			
Number of non-hazardous waste permit applications reviewed	236	232	98.31%
Number of hazardous waste permit applications reviewed	160	198	123.75%
A.2.4 Strategy: Occupational Licensing			
OUTPUT:			
Number of examinations administered	10,500	11,681	111.25%
GOAL B: Drinking Water and Water Utilities			
OUTCOMES:			
Percentage of Texas population served by public water systems which meet drinking water standards	94%	96%	102.13%
B.1.1 Strategy: Safe Drinking Water			
OUTPUT:			
Number of public drinking water systems which meet primary drinking water standards	6,200	6,341	102.27%
Number of drinking water samples collected	36,051	46,657	129.42%
B.1.2 Strategy: Water Utilities Oversight			
OUTPUT:			
Number of utility rate reviews performed	100	97	97%
GOAL C: Enforcement and Compliance Support			

OUTCOME:			
Percentage of inspected or investigated air sites in compliance	98%	94.70%	96.63%
Percent of inspected or investigated water sites and facilities in compliance	97%	99.30%	102.37%
Percentage of inspected or investigated waste sites in compliance	97%	93.70%	96.60%
Percentage of identified noncompliant sites and facilities for which timely and appropriate enforcement action is taken	85%	82.90%	97.53%
Percentage of administrative penalties collected	88%	87.40%	99.32%
C.1.1 Strategy: Field Inspections and Complaints			
OUTPUTS:			
Number of inspections and investigations of air sites	13,000	11,280	86.77%
Number of inspections and investigations of water rights sites	34,000	36,446	107.19%
Number of inspections and investigations of water sites and facilities	8,500	8,705	102.41%
Number of inspections and investigations of livestock and poultry operation sites	700	628	89.71%
Number of inspections and investigations of waste sites	7,358	8,511	115.67%
C.1.2 Strategy: Enforcement and Compliance Support			
OUTPUTS:			
Number of environmental laboratories accredited	300	248	82.67%
Number of small business and local governments assisted	54,000	108,623	201.15%
GOAL D: Pollution Cleanup			
OUTCOME:			
Percentage of leaking petroleum storage tank sites cleaned up	88%	90%	102.27%
Percentage of Superfund sites cleaned up	57%	63.57%	111.53%
Percent of voluntary and brownfield cleanup properties made available for commercial or industrial redevelopment, community, or other economic reuse	65%	67.20%	103.38%
D.1.1 Strategy: Storage Tank Administration and Cleanup			
OUTPUTS:			
Number of Petroleum Storage Tank Reimbursement Fund applications processed	3,500	2,673	76.37%
D.1.2 Strategy: Hazardous Materials Cleanup			
OUTPUTS:			
Number of voluntary and brownfield cleanups completed	80	109	136.25%
Number of Superfund sites in Texas undergoing evaluation and cleanup	67	48	71.64%
Number of Superfund cleanups completed	4	4	100%
Number of Dry Cleaner Remediation program applications received	30	31	103.33%
GOAL E: River Compact Commissions			
OUTCOMES:			

Percentage received of Texas' equitable share of quality water annually as apportioned by the Canadian River Compact	100%	35%	35%
Percentage received of Texas' equitable share of quality water annually as apportioned by the Pecos River Compact	100%	217%	217%
Percentage received of Texas' equitable share of quality water annually as apportioned by the Red River Compact	100%	100%	100%
Percentage received of Texas' equitable share of quality water annually as apportioned by Rio Grande Compact	100%	94%	94%
Percentage received of Texas' equitable share of quality water annually as apportioned by the Sabine River Compact	100%	98%	98%