IX. POLICY ISSUES

BRIEF DESCRIPTION OF ISSUE

Issue 1: Should the legislature consider revising the state's air permitting process?

DISCUSSION

Overview of Current Process

The Texas Clean Air Act (TCAA), Texas Health and Safety Code, Chapter 382, governs all air quality permitting in the state and implements provisions of the federal Clean Air Act (FCAA). The TCAA requires authorization for all air contaminants in addition to authorization of federally regulated air pollutants. The federal permitting program requires states to evaluate six pollutants for which there are National Ambient Air Quality Standards (NAAQS) and about 200 additional air toxic pollutants of concern. Currently, the state has a database of more than 8,000 contaminants that have been evaluated under the TCAA.

The TCEQ reviews and authorizes applications and registrations for facilities through two major air-permitting programs: New Source Review (NSR) Permits and Title V Federal Operating Permits (FOP). For permitting purposes a "major source" is a stationary source's annual potential to emit and is used to determine the applicability of federal NSR and Title V.

The NSR Permit Program requires stationary sources of air contaminants to obtain authorization before their construction begins. NSR is also referred to as *construction permitting* or *preconstruction permitting*. Before work begins, a person who plans to construct a new facility or to modify an existing facility must:

- satisfy the criteria of a streamlined authorization (*de minimis* facility or source, permit by rule [PBR], standard permit); or
- obtain an NSR case-by-case permit that includes an evaluation of best available control technology (BACT) and a finding that there will be no adverse off-property impacts from any air contaminants being emitted by the facility.

The Title V FOP Program requires major sources, and certain minor sources, to obtain a permit that consolidates all applicable air requirements in a single document. A Title V permit grants a source permission to operate. There are two types of operating permits: General Operating Permits (GOPs) and Site Operating Permits (SOPs). The GOP is a streamlined Title V authorization that is designed to cover numerous similar sources. The SOP documents all requirements that apply at a site, or an area for large sites.

The Texas NSR program gives the public the opportunity to comment on authorizations. For initial NSR case-by-case permits, permit amendments with significant emission increases, and permit renewals, notice is given via newspaper publication and sign posting,

both of which are also in alternate languages when certain criteria are met. The public has the opportunity to comment on the application as well as to request a contested-case hearing on initial NSR case-by-case permits, permit amendments with significant emission increases, and permit renewals. The commission's ability to grant a hearing request for a renewal with no increase in emissions and for denial of a renewal is limited by statute, more so than for other permit actions. In addition, the public is invited to comment on sources or facilities added to the *de minimis* list and on PBRs, standard permits, and GOPs during their initial development. For Title V SOPs, the public can request a notice and comment hearing and can petition the U.S. Environmental Protection Agency (EPA) objecting to the permit.

Review for Cumulative Effects (Impacts)

The TCAA authorizes the prevention and remedy of air pollution based on effects and interference from contaminants present in the atmosphere, i.e., direct effects.

For pollutants with an established NAAQS, the EPA requires, and the TCEQ conducts, a review for cumulative impacts if emissions from a new major source or major modification to an existing major source exceed *de minimis* concentrations. During the past three legislative sessions, interest has steadily increased in modifying the TCAA to require the evaluation of cumulative effects before a permit, amendment, or renewal could be issued. Over that same period, some members of Congress, the legislature, the EPA, and the public expressed concerns about the cumulative impacts on the formation of ozone from major sources such as electric generating facilities (power plants) and cement kilns, particularly in areas classified as in nonattainment or near nonattainment for the ozone NAAQS.

The term *cumulative* is usually understood to refer to the direct effects from the combined impact of multiple facilities emitting the same pollutant. For air toxics, the TCEQ uses the term *aggregate*, and reserves *cumulative* for the combined impact of multiple facilities emitting multiple pollutants. However, in this discussion, *cumulative* will be used for air toxics as well as criteria pollutants.

Cumulative-Effects Evaluation for Air Toxics

The TCEQ conducts NSR permit reviews for new and modified facilities to ensure that the operation of a proposed facility will not cause, or contribute to, a condition of air pollution. For a case-by-case NSR, permit reviews involve evaluations of best available control technology (BACT) and predicted air concentrations related to proposed emissions from the new or modified facility. To evaluate cumulative effects, the TCEQ uses effects screening levels which are chemical-specific air concentrations set to protect human health and welfare. ESLs are developed through a national process involving peer review and stakeholder input; include an adjustment factor to address cumulative exposure; and offer regulatory flexibility as comparison levels, not ambient-air standards.

The TCEQ uses ESLs in air-permit review to evaluate cumulative effects by evaluating site-

wide emissions and considering:

- input from regional investigators and the public;
- site-specific, mobile, and/or area ambient air-monitored concentrations;
- predicted magnitude and frequency of exceedance of ESLs;
- results from gas-find infrared cameras; and
- assessment of conservative worst-case modeling assumptions versus practical operation.

Modeled predictions of concentrations above an ESL would not necessarily result in adverse health or welfare effects, but would trigger a more in-depth review.

The TCEQ places increased emphasis on any site that is in an Air Pollutant Watch List area for a chemical of concern. In addition to the standard technical review process, the agency explores with the applicant ways to mitigate impacts from site-wide emissions with a goal of no net emissions increase. However, very limited increases may be allowed if a site had previous large decreases, or analysis of emissions and dispersion would not add to known or previously accepted impacts, and ambient air monitoring is acceptable.

Cumulative Effects Evaluation for Ozone

Unlike other criteria pollutants, ozone is not directly emitted but formed by complex chemical interactions that are highly dependent on daily variations in meteorological parameters and precursor emissions from mobile and biogenic as well as major and minor stationary point sources.

The TCEQ follows available federal guidance and conducts a cumulative evaluation using existing air quality data from representative ambient air monitors within the proposed area of a new or modified major source. This background information, along with the representative emissions from the facility, is used to make a scientific determination of the proposed facility's potential ozone contribution to nearby surrounding areas.

The TCEQ does not directly evaluate cumulative ozone impacts due to long-range transport for several reasons:

- there are no EPA-preferred or -recommended screening or refined photochemical models for NSR prevention of significant deterioration (PSD);
- the magnitude and complexity of modeling related to the State Implementation Plan (SIP);
- the lack of a *de minimis* ozone concentration; and
- the fact that evaluation of control strategies for multiple regions, facilities, and modeling scenarios would significantly increase air-permitting costs and delay issuance.

Benefits of Texas' Air Permitting Program

The BACT review in Texas has resulted in continual improvement in technology for controlling air pollution. The development of refined computer-modeling techniques has allowed a closer look at the impacts associated with emissions from various types of

processes, and this has resulted in new and additional controls as BACT. For example, the control of tank-loading emissions has reduced emissions of volatile organic compounds, critical to the formation of ozone, by thousands of tons per year.

Since 1994, the TCEQ has implemented a number of permitting programs that have significantly reduced emissions. The first of these, the flexible permitting program, is a voluntary authorization mechanism that an applicant may choose in lieu of obtaining a traditional NSR permit. These permits provide options through the use of emission caps, certain control technology, and other operational flexibility to achieve emission reductions with the ultimate goal of having a well-controlled facility after the final cap is implemented. Some very large emission reductions have been achieved through the flexible permitting program, resulting in improved air quality.

Many of the facilities authorized in the early days of the flexible permitting program were facilities that were previously "grandfathered" from the requirement to obtain a permit. These grandfathered facilities were constructed before September 1, 1971, and had not been modified since that time. The 1997 emissions inventory contained 898,075 tons of emissions from these sources. In addition, there were unquantified emissions from sources not required to submit an emissions inventory. In 1999, the 76th Legislature passed SB 7 (the electric utility restructuring bill) and SB 766, a voluntary program to reduce emissions from, and encourage permitting of, grandfathered facilities. In the 2001 session, the 77th Legislature made the permitting of grandfathered sources mandatory as part of the agency's sunset review in HB 2912.

SB 7 resulted in emissions reductions of 102,436 tons per year from these previously grandfathered sources. The voluntary and mandatory permitting requirements for previously grandfathered facilities reduced actual emissions from these facilities by more than 260,000 tons either through the addition of controls or shutdown.

Currently, the TCEQ air permits staff is in the process of reviewing permit applications for the authorization of planned maintenance, startup, and shutdown (MSS) activities at petroleum refineries and chemical plants. Carbon-black facilities, electric generating facilities, and various oil and gas facilities are expected to file MSS applications over the next few years. These permits reduce emissions from planned MSS activities through the implementation of BACT and impacts review.

EPA Oversight

Title I of the FCAA requires states to develop SIPs to address attainment and maintenance of federal clean air quality standards. Title I requires a pre-construction permitting program for both major and minor NSR sources. Since 1972, Texas, through the Texas Air Control Board (TACB) and its successor agencies, has regularly submitted revisions to the SIP to address changing federal requirements as well as updates to Texas' NSR permitting program. The EPA approved the Texas NSR program in 1972 and numerous subsequent revisions, and in 1992 the EPA gave the TACB full delegation for federal PSD NSR permits. Title V of the FCAA establishes the FOP program. The EPA approved Texas' FOP program

in 2001 (commonly referred to as "Title V"). Title V requires major sources and certain minor sources to obtain a permit that consolidates all applicable air requirements in a single document. A Title V permit grants a source permission to operate. The EPA comments to the TCEQ on individual draft Title V and major NSR permits.

The EPA retains program implementation and enforcement oversight of Texas' implementation of federal requirements and can impose sanctions against the state for failure to comply with the approved SIP and federal requirements. The EPA approval of the SIP and other federal requirements is accomplished through documents submitted by the TCEQ to the EPA, and documents created by the EPA that reflect those approvals. In addition, compliance with the FCAA is documented in permits and enforcement actions by the TCEQ.

The TCEQ implements and enforces these two permitting programs established in both federal and state law. In addition to issuing permits, the TCEQ implements these programs by adopting rules with the EPA commenting on the proposed TCEQ permitting rules. The TCEQ's adopted rules are submitted to the EPA, which must review and approve TCEQ rules into the SIP to ensure compliance with federal law; the EPA then proposes its action (such as approval) in the *Federal Register*, and takes formal public comment. The EPA's final action is then published in the *Federal Register*.

Although not all rules implementing state statutes are required to be submitted as SIP revisions, where a state statute or rule potentially conflicts with, or is less stringent than, a federal requirement (or a requirement that has been approved into a SIP), federal law requires that states demonstrate that the new requirement does not backslide from existing federal law and approved SIPs. The EPA uses this standard to review rules submitted by states when determining whether approval of rules is required by federal law or would strengthen the SIP.

POSSIBLE SOLUTIONS AND IMPACT

Issues Associated with EPA Oversight

The TCEQ does not delay rule effectiveness until EPA SIP approval. To do so might arguably be an unconstitutional delegation of state authority to the federal government. If the EPA did not approve the changes, then the state would continue to be obligated to enforce the federal requirements and would be required to change the rules to make them acceptable under federal law.

Although the EPA approved the original Texas NSR permitting program and many updates, the EPA has not approved significant portions of various subsequent air permitting rules submitted to it since 1993 as revisions to the SIP, creating a "SIP gap," i.e., the difference between what is enforceable by the TCEQ and by the EPA (the approved SIP). This gap occurs during the period between the effective date of the TCEQ's adopted rules and the date the EPA approves those actions as a revision to the SIP. Often, new or amended rules adopted by the TCEQ are more stringent than, or are at least as stringent as, the existing

SIP, and therefore no problems are expected regarding the enforcement of any new requirement.

As part of the settlement of a lawsuit by the Business Coalition for Clean Air (BCCA) on the EPA's failure to act on approximately 25 rule packages the TCEQ had submitted, the EPA has agreed to a schedule to eliminate the SIP gap over the next four years. The EPA has informed the TCEQ that it does not expect to fully approve all of the TCEQ's NSR permitting rules that are pending EPA review. Although the TCEQ has a good track record in enforcing its rules and permits, the EPA's position is that it cannot enforce some TCEQ permits until rule deficiencies are corrected, allowing the EPA to approve them as part of the SIP.

In addition to the SIP-gap rulemaking issues, several environmental groups filed formal petitions with the EPA stating that Texas' air permitting program has three deficiencies, specifically, the TCEQ is:

- implementing a non SIP-approved NSR permitting program;
- implementing a SIP that is inadequate to assure compliance with the FCAA; and
- failing to adequately administer and enforce the approved Texas FOP program.

The groups seek an order against the state of Texas that:

- finds that the state is not properly implementing certain SIP requirements, including requirements relating to the construction of new sources or the modification of existing sources;
- immediately applies sanctions under FCAA section 179; and
- prohibits construction of new major stationary sources or the modification of major stationary sources subject to federal NSR PSD permitting requirements.

The petitions include, but are not limited to, NSR-related issues of which some are also SIP-gap issues. These include: public participation; issuance and enforcement of flexible permits; use of *de minimis*, permit-by-rule and standard permit authorization mechanisms (especially by major sources); permitting of emissions MSS activities; BACT; and cumulative impacts from new sources. The TCEQ's permitting programs have achieved significant benefits for air quality in Texas, and the TCEQ is committed to working with the EPA to resolve differences between state and federal rules.

The federal requirements for FOP programs originate from authority in Title V of the FCAA, which requires that these permits incorporate all other FCAA requirements, including Title I permitting requirements. Because NSR requirements are applicable requirements of FOPs, EPA disapproval of portions of Texas' NSR permitting program would affect how Texas incorporates those NSR requirements into FOPs, and potentially the continued approval of Texas' FOP program.

As allowed by the FCAA, environmental groups are filing public petitions with the EPA alleging defects with specific FOPs. The EPA partially granted two petitions, and advised the TCEQ how to revise the relevant FOPs. Petitions by environmental groups and citizens may result in additional EPA scrutiny of individual FOPs and the Title V program in general.

IX. POLICY ISSUES - continued

BRIEF DESCRIPTION OF ISSUE

Issue 2: Should the effectiveness of the current standard for evaluating compliance history in the TCEQ's permitting and enforcement procedures be evaluated?

DISCUSSION

Background

In its May 2000 report, the Sunset Commission identified the development and use of compliance history as one of the issues that the TCEQ needed to address.

In 2001, the 77th Legislature passed HB 2912 which, among other things, directed the TCEQ to develop a uniform standard for evaluating compliance history. The bill was codified in Sections 5.753 and 5.754 of the Texas Water Code (TWC).

In January 2002, the TCEQ adopted compliance history rules included in Title 30, Texas Administrative Code (TAC), Chapter 60.

Current Program

The commission considers an entity's compliance history in all permitting and enforcement matters.

The TCEQ's Office of Compliance and Enforcement calculates a numerical rating and determines a classification for each regulated entity. The compliance history of a customer, overall or with a particular regulated entity, results in a numerical rating that is converted to a general classification for the customer. A customer or a regulated entity may be classified as high, average, average-by-default, or poor. A high performer has a rating of less than 0.10 points, an average performer has a rating of 0.10 points to 45 points, and a poor performer has a rating of 45.01 or more points. Average-by-default is a classification for entities which the TCEQ has no compliance history information.

Annual compliance-history ratings and classifications are assigned to each regulated entity based on the compliance history over a period beginning September 1 of the current year and going back to August 31 five years prior. The components of a regulated entity's compliance history are categorized as positive or negative.

Positive components include:

- an environmental management system;
- performance of a self-audit pursuant to the Texas Environmental, Health, and Safety Audit Privilege Act; and

- correcting a violations disclosed pursuant to the act.

Negative components include:

- notices of violation (NOVs);
- state enforcement orders;
- state and federal court judgments;
- federal consent decrees;
- criminal convictions; and
- chronic excessive-emissions events.

A regulated entity may formally appeal its compliance-history classification only if the rating is "poor" or "average," with a score of 30 points or more. To dispute a classification, it must request an appeal within 45 days of the classification being posted on the TCEQ's Web site. Corrections to a regulated entity's compliance history, as opposed to appeals, may be requested at any time.

POSSIBLE SOLUTIONS AND IMPACT

The current compliance-history rule has been criticized by both the regulated community and environmental organizations. Those opposed to the current rule assert that:

- The current compliance equation is too complex and does not measure true performance.
- Some regulated entities (e.g., small ones) seem to be disproportionately burdened by the current compliance history calculation.
- In terms of compliance history, it is unfair to uniformly rank TCEQ's significantly diverse regulated universe. The current rule could be revised such that only similar industries and businesses are ranked relative to each other.

Bills filed in past legislative sessions have attempted to address these issues by revising the compliance history standards and classifications prescribed in statute.

Corrective-Action Orders. As written, the TWC in the components of compliance history does not differentiate between administrative orders with a penalty and corrective-action orders without an administrative penalty. Revisions to the statute to exclude from compliance histories corrective-action orders that do not include an administrative penalty would allow the agency to address a violation that does not warrant an administrative penalty and remain consistent with federal policies.

BRIEF DESCRIPTION OF ISSUE

Issue 3: Should the commissioners delegate additional authority to the executive director (ED) to further streamline the TCEQ's decision making?

DISCUSSION

The authority delegated by the commission to the ED includes authority to act on uncontested matters including all applications for a permit, license, certificate, or other authorization. This authority was originally granted by the legislature in 1995 to address a backlog of permitting matters that were awaiting commission action at its regularly scheduled agenda meetings.

Delegation has had measureable benefits for Texas. In the past six years alone, the backlog of uncontested permits has declined from 1,150 applications to 109. Additionally, the commission delegates contracting and grant-making authority to the ED by resolution before the beginning of each state biennium. Regarding enforcement matters, recent changes passed by the 81st Legislature allow for administrative orders assessing a penalty to be issued by the ED upon commission delegation.

Additional areas delegated to the ED include actions relating to emergency orders, innocent-owner certificates, the Dry Cleaner Program, municipal-setting designations, voluntary-cleanup certificates, the Petroleum Storage Tank Program, and settlements of natural-resource damages.

Recent Legislative Action

Utility matters. The TCEQ included in its legislative recommendations for the 81st Session provisions for giving the ED interim rate authority and amending Texas Water Code (TWC), Section 13.248, allowing agreements under this provision to be approved by the ED. While these recommendations were included in HB 3550 and SB 1846, neither bill passed.

POSSIBLE SOLUTIONS AND IMPACT

- *Interim rate setting.* Under TWC Subsections 5.311(a), 13.043(h), and 13.187(l), the authority to set an interim rate resides with the commissioners or by an administrative law judge after the State Office of Administrative Hearings has taken jurisdiction over the application. Pursuant to TWC Subsection 13.187(d), the ED can suspend a rate increase for defective notice or if the application was filled out incorrectly, but such suspensions are only effective until the applicant corrects the deficiency. The requirement for the ED to request commission approval to set interim rates extends by several months the actual setting of an interim rate after the filing of a rate application. Allowing the ED to set an

interim rate would significantly shorten the time required to implement this option because the ED could act shortly after the application is filed.

- *Contracts between retail public utilities:* Contracts between retail public utilities designating areas and customers to be served are typically uncontested, but must be set on the commission's agenda due to TWC Section 13.248, which requires a hearing prior to approval. Removal of the hearing requirement for uncontested contracts and allowing the ED to approve these applications would expedite processing.

- *Utility district conversions and dissolutions.* Applications for district conversions and dissolutions are usually uncontested and uncontroversial. These items have to go on the agenda due to the statutory requirements for a commission hearing in TWC Sections 49.321 and 49.324 and Subsections 54.030(b) and 54.033(a). With a statutory change, uncontested applications could be handled by the ED.

BRIEF DESCRIPTION OF ISSUE

Issue 4: Does the TCEQ's current enforcement authority allow for the expanded use of incentives and innovative projects to achieve compliance, as well as provide sufficient deterrence to protect the environment?

DISCUSSION

Background

Ensuring compliance with environmental laws and regulations is one of the TCEQ's primary functions. The TCEQ believes that enforcement is one tool among many available to protect the environment and public health. The commission's general enforcement authority is derived from Texas Water Code (TWC) Section 7.002. The commission's authority to assess administrative penalties for violations of environmental statutes, and commission rules and orders is derived from TWC Section 7.051.

Deterrence

Penalty Policy. The commission's penalty policy describes how TCEQ enforcement personnel will evaluate violations in recommending administrative penalties to the commission. It outlines the method of calculating the actual penalty, which is typically a percentage of the statutory maximum. The severity and duration of the violation and the size of the entity are heavily weighted factors used in determining the final penalty.

The commission issued 1,624 administrative orders during FY 08 and 1,756 during FY 09. The amount of an administrative penalty in any commission enforcement action depends on:

- the TCEQ's maximum statutory penalty amounts described in TWC Chapters 7, 11, 12, 13, and 16 and Texas Health and Safety Code Chapters 341 and 371; and
- application of the commission's penalty policy, which considers the nature, gravity, and extent of a violation.

Economic Benefit. Increasing penalties to offset economic benefits is another tool the TCEQ uses to discourage future noncompliance. Economic benefit is defined in the commission's penalty policy as a monetary gain derived from a failure to comply with any TCEQ regulation or state statute. Currently the commission recovers avoided costs of compliance only from for-profit and non-governmental organizations. Penalties are increased by 50 percent when a respondent has avoided more than $15,000 in the cost of compliance.

Criminal Enforcement. When the TCEQ discovers knowingly falsified documents or

knowingly caused harm to human health or the environment, the findings are referred to the TCEQ's Environmental Crimes Unit. The TCEQ's administrative enforcement process can continue while the criminal case is being investigated.

Compliance History. The commission considers an entity's compliance history in all permitting and enforcement matters. The standards for evaluating compliance history are defined in TWC Section 5.753, and the commission's compliance history rule is codified at Title 30, Texas Administrative Code (TAC), Chapter 60. If an entity accumulates negative compliance history components (e.g., violations and orders) and is classified as a "poor" performer, the following will result:

- escalation of an administrative penalty in a commission enforcement action;
- ineligibility to obtain authorization under a general or flexible permit;
- unannounced investigations by the TCEQ; and
- more stringent permit provisions.

Incentives to Achieve and Maintain Compliance

Penalty Policy. The commission, through its penalty policy, seeks to incentivize settlement of enforcement matters and corrective action completion in the most expedient manner possible. To encourage expedited settlement, the commission offers most respondents a deferral of 20 percent of the proposed penalty in return for quick settlement. The deferral is contingent upon full compliance with the terms of the administrative order. The TCEQ's penalty policy also incentivizes good-faith efforts to comply by offering a reduction on the recommended penalty based upon the timeliness and quality of a respondent's efforts to return to compliance.

The commission's penalty policy also directs the enforcement staff to recommend a reduction of a proposed administrative penalty if a respondent has:

- notified the executive director of its intent to perform an audit pursuant to the Texas Environmental, Health, and Safety Audit Privilege Act (Audit Act);
- corrected one or more violations disclosed pursuant to the Audit Act;
- had an environmental management system in place for more than one year prior to the enforcement action;
- allowed the TCEQ to perform a voluntary on-site compliance assessment under the TCEQ's special assistance program; or
- attained early compliance with a future state or federal regulatory requirement.

Compliance History. The commission's compliance history rule also gives incentives for enhanced environmental performance. The applicable statute and rule define the positive components that make up an entity's compliance history. The more positive components, the better the compliance history rating. An entity with an "average" or "high" compliance history:

- receives an administrative penalty reduction in an enforcement action;
- is eligible for a general permit (TWC Section 26.040);
- receives two weeks prior notice of a routine TCEQ investigation; and
- qualifies to participate in innovative programs.

An entity has the opportunity to improve its compliance history rating by: performing a self-audit pursuant to the Audit Act; correcting any violation disclosed pursuant to the act; and receiving TCEQ certification of an environmental management system.

Field Citations. To further streamline enforcement, the commission has implemented a field-citation program. A field citation is an alternative to the typical enforcement instrument and may be offered for certain violations that have been corrected or can be corrected within 30 days from the investigation date. The enforcement timeline is reduced by several months when a field citation is used. The commission incentivizes acceptance of the field citation by reducing the penalty relative to what it would be for the same violation addressed through the standard process. The TCEQ currently offers field citations for specific violations in the following programs: petroleum storage tanks; stage I and II vapor recovery; storm water (industrial and construction); occupational licenses; dry cleaners; on-site sewage facilities; and water rights. As of September 1, 2009, 475 field citations have been issued since the program was initiated in March 2006.

The current field-citation program is limited; only 18 violations have been approved to be addressed by a field citation. The executive director's staff is currently reviewing the program to determine whether its expansion is appropriate.

Innovative Projects

Special-Initiative Compliance Agreements. The TCEQ has used special initiatives to promote long-term compliance actions and significant capital investments. One such initiative, for sanitary sewer overflows, allows participating wastewater-treatment facilities to receive enforcement discretion for certain unauthorized discharges from a sanitary-sewer system. A participating facility enters into a compliance agreement with the TCEQ requiring it to complete a comprehensive evaluation of its operation and make improvements to its sanitary-sewer system. The agreement may span several years, depending on the size and complexity of the project undertaken by the participant. Adherence to the terms of the agreement shields the participant from administrative penalties that would normally result from minor to moderate discharges that may occur during the life of the agreement. Significant discharges from the collection system are typically not covered. Participating parties have expressed a desire that the TCEQ develop similar collaborative compliance initiatives for other media areas.

Supplemental Environmental Projects. A SEP is an agreement that becomes part of an administrative order and is intended to prevent pollution, reduce the amount of pollution reaching the environment, enhance the quality of the environment, or contribute to public awareness of environmental matters. A respondent in an enforcement action may choose to perform a SEP in return for a partial or 100 percent offset of the administrative penalty depending on the project benefits and whether the respondent is a nonprofit organization or governmental authority. Potential SEPs include a wide array of projects, including community collections of household hazardous waste and extending water and wastewater services to low-income households.

Audit Act. In 1995, the 74th Texas Legislature passed HB 2473, the Audit Act, which offers incentives for entities to conduct a voluntary audit of their compliance with environmental health and safety regulations and to implement prompt corrective action. The two primary incentives are (1) limited evidentiary privilege for certain information gathered during a self-audit; and (2) immunity from administrative and civil penalties for violations discovered, disclosed, and corrected as a result of such an audit. Many violations disclosed under the Audit Act would not have been discovered in a routine TCEQ investigation, since such environmental audits can involve expensive sampling and testing protocols, or time-consuming data reviews. The Audit Act is self-implementing and does not grant explicit rulemaking authority to the TCEQ. In 2008, TCEQ received 386 notices of intent to audit and 100 disclosures of violations.

POSSIBLE SOLUTIONS AND IMPACT

Penalty Policy. Members of environmental organizations and the regulated community, as well as the general public, have been critical of penalty amounts assessed by the commission.

The TCEQ has been limited under the current statutory maxima to appropriately address violations of short duration but that result in a significant impact to the environment or public health. For example, a major air emissions spanning one to two days it is difficult to assess an adequate penalty under the current statutory maximum of $10,000 per day. The legislature may want to increase statutory penalties for severe short-term violations.

Interested parties critical of the length of time for resolution of enforcement matters (i.e., to negotiate, settle, and issue an administrative enforcement order) have suggested that the commission adopt standard penalties, which could significantly shorten negotiations over the proposed administrative penalty and thereby shorten the overall enforcement timeline. In considering standard penalties, balancing the benefit of a shorter timeline with the possible loss of flexibility in negotiating settlements may need to be taken into account.

During its 81st session, the legislature adopted SB 1693 which revised TWC Section 7.002 to allow the commission to delegate its authority to issue administrative orders to the executive director. This revision, if implemented by the commission, also has the potential to shorten the enforcement timeline.

Compliance History. The current compliance-history rule has been widely criticized by both the regulated community and environmental organizations. Those opposed to the current rule assert that:

- the current compliance equation is too complex and does not measure true performance;
- some regulated entities, such as small entities, seem to be disproportionately impacted under the compliance history calculation; and

- in terms of compliance history ranking, it is unfair to uniformly rank TCEQ's significantly diverse regulated universe. The current rule could be revised such that only similar industries/businesses are ranked relative to each other.

Bills filed in past legislative sessions have attempted to address these impacts by revising the compliance history standards and classifications prescribed in statute.

Special Initiative Compliance Agreements. The EPA will no longer accept a TCEQ compliance agreement as a means to address unauthorized discharges from a wastewater treatment facility. However, because these agreements do not include an assessed penalty, they could be replaced with a "corrective action/no penalty" order. To ensure the incentive is preserved, the compliance history statute would have to be revised. As written, the statute does not differentiate between administrative orders with a penalty and corrective action orders without penalty. Revisions to the statute to exclude from the compliance history corrective-action orders that do not include an administrative penalty would allow the agency to address a violation that does not warrant an administrative penalty and still be consistent with federal policies. Without the statutory change, the agency will be required to address the unauthorized discharges through an order without consideration of an entity's willingness to commit to long-term compliance and significant capital investments.

SEPs. TWC Subsection 7.067(a) states that the commission may not approve a project that:

- is necessary to bring a respondent into compliance with environmental laws;
- is necessary to remediate environmental harm caused by the respondent's alleged violation; or
- the respondent has already agreed to perform under a pre-existing agreement with a governmental agency.

Interested parties have noted that many more innovative and beneficial projects could be implemented if the statute allowed more flexibility in the use of SEP funds.

Audit Act. The number of regulated entities disclosing violations pursuant to the Audit Act has decreased from 250 during FY 05 to 100 during FY 08. The TCEQ could incentivize the use of the Audit Act through a revision of its compliance history rule.

Currently, clauses 60.2(e)(1)(K)(i) and (ii) in 30 TAC require that each notice of audit and each violation disclosed and corrected under the Audit Act offset negative points in the compliance history equation. However, this offset is insignificant and rarely, if ever, results in meaningful changes to a regulated entity's compliance-history score or overall classification. Chapter 60 might be revised to more heavily weight notices and disclosures made pursuant to the Audit Act.

Additionally, Chapter 60 could be revised to include an exemption, such as for six months or one year, from routine investigations conducted by the TCEQ in return for completion of a comprehensive audit pursuant to the Audit Act.

Lastly, the TCEQ could incentivize use of the Audit Act through outreach efforts which might include presentations to industry groups, the distribution of audit-related information via the agency Web page, and the distribution of informational packets or brochures by agency investigators or mass mailings.

BRIEF DESCRIPTION OF ISSUE

Issue 5: How should the agency use monitoring activities in its regulatory processes?

DISCUSSION

As part of its mission, the TCEQ is committed to basing its decisions on the law, common sense, good science, and fiscal responsibility, while ensuring that regulations are necessary, effective, and current. To meet these commitments, monitoring is often currently used to make the link between good science, compliance determinations, and development of necessary rules. Monitoring supplies the agency with real, objective data that models can only predict.

Below are the more significant instances when the TCEQ is required to monitor.

- Some state and federal rules require that regulated entities conduct monitoring to demonstrate compliance with permit conditions or rules (e.g., operators of underground storage tank systems are required to monitor for releases per title 30, Texas Administrative Code (30 TAC), Section 334.50; wastewater-permit holders must monitor pollutant levels in effluent per 30 TAC Chapter 319; and specific types of air emissions are subject to monitoring per 30 TAC Chapter 115.
- Federal law requires the TCEQ to monitor air quality in certain areas for attainment of National Ambient Air Quality Standards (NAAQS).
- Federal law requires the TCEQ to conduct monitoring to determine which water bodies are or are not meeting the standards set for their use and which pollutants or conditions are responsible for the failure of a water body to attain water quality standards.
- Texas Water Code (TWC) Section 26.504 requires the TCEQ to sample permitted waste application fields associated with concentrated animal-feeding operations.

The TCEQ also conducts monitoring that is not specifically required by state or federal law. These efforts are conducted to support other agency objectives, such as focusing investigatory resources, verifying models used in air quality planning and permitting, and evaluating environmental conditions before issuing air and wastewater permits. Data from representative monitors are used to conduct a cumulative-impact evaluation during air-permit reviews and in assessing allowed Total Maximum Daily Loads (TMDLs).

To the extent possible, TCEQ uses advancements in monitoring technology to support regulatory processes and achieve improvements in air and water quality. In recent years, these advancements have focused primarily in two areas:

- ensuring that public access to data is available within hours of many ambient measurements; and

- Use of vapor detecting infrared (IR) cameras, a technology that can remotely detect and visualize volatile organic compounds (VOC) emissions not visible to the human eye.

As required by Texas Health and Safety Code (THSC) Section 382.401, the TCEQ is establishing incentives for voluntary use of supplemental leak-detection methods approved by the EPA.

Legislative Interest in Monitoring

As introduced in the 81st legislative session, HB 4085 and SB 173 would have required regulated entities meeting certain conditions (i.e., "major sources" under the Clean Air Act) to conduct fence-line monitoring for hazardous air pollutants (HAPs). HB 3119 of the 81st legislative session would have allowed franchise tax credit for the acquisition and installation of fence-line monitors at major sources. Technological limits are a consideration with source-related ambient monitoring, as there are currently no approved sampling or analysis methods for some HAPs. None of those bills were adopted.

Although Texas has an extensive number of air monitoring sites and instruments around the state, additional monitoring data could be used to further evaluate and track air quality, identify significant emission releases and potential contributing sources, and study specific pollutants or chemicals of interest. However, the significant costs associated with additional fence-line or ambient monitoring has historically been an obstacle.

Monitoring and Enforcement

The TCEQ has encouraged industry to collect more ambient air monitoring data through voluntary emission-reduction agreements and enforcement agreed orders that resulted from negotiated settlements. In cases where monitors have been used, companies have been able to act on detections immediately, significantly improving air quality.

Monitoring and Health-Effects Evaluations of Air Quality

Air monitoring data collected by the regional offices, the ambient air monitoring network, during mobile monitoring trips, and from some industry-sponsored air monitors are evaluated by the Toxicology Division to determine the potential for the measured levels to adversely affect human health and welfare. An overall health-effects evaluation of all air monitoring data is performed annually for each TCEQ region for which data are available. Ambient data are also reviewed and additional health effects evaluations are completed as required, case by case. These health-effects evaluations are used to qualify areas for the Air Pollutant Watch List (APWL), discussed below. If imminent or more serious health or welfare impacts are identified, the Toxicology Division will use the information to advise more immediate actions, such as investigations, enforcement, or solicitation of assistance from other agencies, like the Department of State Health Services.

Monitoring and the Air Pollutant Watch List

Monitoring is a cornerstone for decisions regarding the APWL, which identifies areas where specific pollutants have been measured at levels of concern. The APWL is used to heighten awareness, encourage efforts to reduce emissions, and focus TCEQ investigatory, enforcement, pollution prevention, and permitting resources.

An area or pollutant is added to the APWL when monitoring reflects persistent elevated pollutant concentrations such that the TCEQ determines there is a potential for adverse health effects or odor.

Monitoring and Air Permitting

Ambient air monitoring data are used in air-permits technical review. Federal permitting rules for major new source review (NSR) require ambient air monitoring before construction to determine existing air quality and to project future compliance with national air-quality standards in the area affected by the source. Per federal rule, the TCEQ waives the preconstruction monitoring requirement and uses representative or conservative monitoring from counties with similar or greater emissions to evaluate cumulative impacts. This process balances air quality with economic-development objectives.

Monitoring is not required for minor NSR, including applications involving federal and state air quality standards and air toxics. However, available monitoring data are used in air-permit technical review to assess cumulative impacts of a single pollutant from multiple facilities at a site or in areas of concentrated operations, particularly for projects in APWL areas. In addition, the TCEQ requires monitoring, at applicant expense, if an applicant believes that permit emission limits based on modeled predictions may not be representative and wants the limits increased. The monitoring results are used to corroborate modeled predictions.

Use of Emerging Technologies to Improve Air Quality

New technologies can present policy challenges alongside opportunities. A paradigm shift is occurring as the VOC-detecting capabilities of IR cameras make visible previously unknown or underreported emissions. In particular, the TCEQ has developed a unique side-by-side IR–visible light display that creates compelling images of emissions from sources of numerous types, simultaneously displayed with standard video scenes showing no visible emissions.

It is essential to note that IR cameras cannot speciate or quantify detected emissions. Follow-up is necessary to obtain information to attempt any speciation or quantification of plumes observed via IR cameras. In addition, the camera presents unique operational challenges, because both camera settings and environmental factors—such as background temperature, clouds, distance, and wind speed—can greatly affect the appearance of the emissions or even the camera's ability to image them.

The camera assists in identifying the exact operations with emissions, thus expediting the ability to focus resources on appropriate controls or pollution prevention measures. Images are shown to the operators of emission sources, who also receive technical assistance on emission-reduction strategies and regulatory requirements. Using IR cameras to identify emission sources for more intensive review allows the TCEQ and the regulated community to extend limited resources and maximize investments in emission control or pollution prevention.

The IR cameras are used to:

- assist in identifying potential emission sources when monitoring results indicate elevated concentrations,
- augment and bolster compliance investigations,
- identify control or prevention options by sharing images with the relevant company,
- identify the potential effectiveness of source control strategies,
- screen potential sources in an attempt to identify potential unreported or underreported emissions or emissions-source categories as related to the emissions inventory and modeling used during SIP development,
- screen sources for potential permitting and emissions inventory issues,
- improve and validate emissions inventory estimates, and
- identify source categories for additional research and investigation.

With recent EPA adoption of IR cameras as an approved alternative leak-detection methodology, this technology is moving beyond application as a screening device into a new role and in certain applications as a primary means of detecting VOC emissions.

State-of-the-art technology such as differential-absorption light detection and ranging (DIAL) can create unique opportunities to monitor and calculate mass emissions rates. The DIAL technology is capable of measuring emissions from sources that are very difficult to capture using conventional sampling. The TCEQ conducted measurements of industrial sources in the Houston area using DIAL technology during the summer of 2007 to compare DIAL emissions measurement with currently accepted emissions calculation methods. This project identified source categories where emissions may be underrepresented and warrant additional research. However, cost and availability are currently major limiting factors for regular use of this technology.

Monitoring and Water Quality

Surface water quality monitoring is a key component of the TCEQ's overall strategy for managing water quality. Data produced by this program are used extensively for regulatory activities, including setting water quality standards, developing TMDLs for water bodies that do not meet standards, and evaluating wastewater-permit applications. New technology has been employed in the TCEQ's water quality monitoring network. Approximately 65 continuous monitoring systems are now in place to supply rapid, real-time information on water quality.

POSSIBLE SOLUTIONS AND IMPACT

As better monitoring technology becomes available for lower cost, the increased use of monitoring can better inform policy decisions with information about actual environmental effects.

Monitoring and Enforcement

Currently, the TCEQ has broad authority to require air monitoring under THSC Section 382.016. This broad authority states that the commission may prescribe "reasonable requirements" for monitoring. While this gives the agency broad authority to require the monitoring, in the enforcement process the agency is usually left negotiating what "reasonable" is and this can significantly lengthen the process and cause the agency to enter into more negotiated agreements rather than unilaterally requiring the monitoring.

Also, the TCEQ has encouraged regulatory entities to offset their enforcement penalties by agreeing to a Supplemental Environmental Project (SEP) designed to collect fence line and other ambient air quality data. Greater flexibility in allocation of SEP moneys could also result in expansion of the ambient monitoring networks.

Monitoring and the Air Pollutant Watch List

Several bills introduced in the 81st legislative session (HB 557, HB 1447, HB 2912, HB 3428, SB 173, and SB 1541) would have codified the procedures for the APWL process; however, none of these bills were adopted. The APWL is used primarily as a means to link monitoring data to various agency actions, like more stringent review of air quality permit applications, and enforcement actions, and as leverage in compelling industry to reduce emissions and improve processes through voluntary agreements with the TCEQ. A key aspect of the APWL process is that monitoring data can be used to make rapid decisions. To quickly and effectively react to monitoring data, the TCEQ needs to maintain its current statutory authority.

Monitoring and Air Permitting

As part of some federal permit applications, citizens, government officials, and the EPA have requested monitors to determine air quality locally and adjacent to ozone nonattainment and near-nonattainment areas. Most concerns are related to the formation of ozone due to emission transport from existing and proposed major sources, such as cement kilns and power plants.

Responding to these requests presents technical and administrative challenges because:

- it is difficult to monitor how a particular permit applicant influences ozone levels as ozone is not directly emitted, but instead formed by complex chemical interactions that are dependent on variations in precursor emissions and meteorological parameters, and

- the permitting process could be extended a year or longer if pre-construction monitoring is required in response to these requests.

Use of Emerging Technologies

The TCEQ will balance various factors—such as public expectations, cost, and benefit—when considering whether to expand the use of emerging technology to improve air quality and to expand its use of water quality monitoring technologies.

BRIEF DESCRIPTION OF ISSUE

Issue 6: Are there any additional avenues, including technological advances, that should be considered to enhance the public's participation in the TCEQ's regulatory activities?

DISCUSSION

To afford the public ample opportunities to participate in matters administered by the TCEQ, the agency has employed multiple means of communication and continues to research new methods for enhancing interaction through its current technologies. The agency has invested significant time and resources in an effort to manage the deployment of rapidly developing technological improvements to increase its efficiency and expand its ability to interact with its customers. The TCEQ is committed to providing information, including online, to both the public and the regulated community using means that are participatory, collaborative, and transparent.

Current Public Outreach and Participation
The TCEQ reaches out to its customers through a variety of mechanisms, using both traditional and electronic means, depending on what best serves the needs of particular communities in Texas and what is required by statute or rule. Members of the public can access a wide variety of information from the TCEQ about what is going on across the street, or across the state, via the agency's Web site and many other user-friendly methods appropriate to their needs and interests.

Traditional Methods. The agency has relied on traditional means of communication for many years and still finds it an effective way to reach out to its varied group of customers with differing levels of access to and familiarity with technology. Some of the traditional methods the TCEQ uses to communicate with the public include:

- *Mail.* Sending of notices, fact sheets and other material via first-class, express, or certified mail.

- Public meetings, held in communities around the state, give the public a chance both to hear information from agency staff and to comment.

- *Toll-free numbers.* In addition to toll-free hot lines for reporting complaints and suspected violations, the agency also has additional toll-free numbers for the public to obtain information on a wide variety of topics.

- *Publication* of information in the *Texas Register* or in local newspapers (in English and alternative languages where required).

- *Newsletters and other printed items.* The TCEQ has a quarterly newsletter (*Natural Outlook*) that covers an array of environmental issues affecting Texas. Additionally, the agency produces brochures on a variety of topics as well as over 300 publications (many of them in both English and Spanish) on topics ranging from air permitting to rainwater harvesting.

- *Presentations and trainings* convey information to the public as well as regulated entities concerning specific programs of the TCEQ.

- *Spanish-language materials.* The TCEQ has developed a strategy for reaching its Spanish-speaking customers. The strategy began as a plan to fulfill the previous Sunset Commission recommendation that the TCEQ make more of its Web content available in Spanish. Additionally, Senator Eliot Shapleigh authored a bill in 2005 (SB 213, 79th Session) that requires agencies to make a reasonable effort to ensure that Spanish speakers have meaningful access to information posted online.

- *Accessibility.* The TCEQ is a leader among state agencies in working to make its communications accessible to all Texans, including those with disabilities. The agency has developed and implemented policies and procedures to meet federal guidelines on accessibility.

- *Sign posting.* For permit applications the agency may require the applicant to post a sign at the site of the proposed new or existing facility notifying the public of the opportunity to submit comments to the agency in the permit application. Under certain circumstances the posting may be in alterative languages.

- *Broadcasting.* On a limited basis, the agency may use radio or television broadcasts to communicate to the public such information as the designation of ozone action days.

Electronic Methods. The best place for finding a wide range of information on the agency and those it regulates is the TCEQ's Web site. The site gives general information such as agency structure and contact numbers, as well as information specific to certain programs. The home page has a topical search function and links to many other items including:

- databases that allow customers to track complaints and enforcement actions
- proposed and adopted rules
- the status of permits
- daily air-quality reports

The agenda for the commission's public meetings is now posted with links to the supporting documents for each item on the same day that printed materials become available through the Office of the Chief Clerk. The public can also follow proceedings for commission agenda meetings and work sessions in real time through a link to <www.texasadmin.com>, and find archived meetings for the last six months. Webcasts are also available at the TCEQ Web site for meetings of several agency advisory groups. The following are additional avenues for the public to gain information or participate on

specific issues via the agency's Web site:

- *E-comments.* The agency has an e-comments system for both rulemaking and permit matters. The rulemaking system has been operational since September 2006, and allows the public an electronic mechanism to submit comments on proposed TCEQ rules. The agency recently launched its e-comments system for permits, which allows the electronic filing of comments on pending permit applications with the chief clerk as well as for requests for hearings, public meetings, and reconsideration.

- *E-mail subscription service.* The public can sign up to receive e-mail updates from the agency through a free service called GovDelivery, whenever information is modified on select Web pages. At the end of FY 09, there were over 80 different subscriptions to choose from and over 180,000 subscribers.

- *Shared e-mail boxes* employ e-mail addresses for a variety of agency programs and topics (e.g., Superfund sites). These e-mail boxes are monitored regularly for communications from the public, which are forwarded to the best available staff member for response.

- *Webinars.* The TCEQ has conducted several successful webinars (online interactive seminars). The agency continues to enhance the enabling technology for its staff and the public.

- *Central Registry* allows the public to access information about the sites, individuals, organizations, and entities regulated by the TCEQ. To better serve its customers, the TCEQ redesigned the home page and upper-level navigation pages of its Web site in September 2008, and extended the capabilities of its Central Registry database into a series of simplified Web pages in September 2009. The year-long project included extensive testing—involving more than 100 customers from both the regulated community and the general public—to best meet the needs of the many audiences the agency serves. The public can now search the TCEQ Web site for orders pertaining to permit applications, enforcement orders, resolutions, and other items issued by the commission.

Required Public Notice: In addition to the outreach and opportunity for public participation outlined above, the TCEQ is also required by statute or rule to ensure notice in certain circumstances involving permitting, enforcement, rulemaking, and public meetings. Recent amendments to Section 5.128 of the Texas Water Code authorize the commission to transmit information electronically, including information on notices, orders, and decisions. Other methods of notice for these areas are as follows.

- *Permits.* There are both state and federal requirements for notice, depending on the permit at issue and the program. State requirements for notice delivery in the TCEQ's air, water and waste permitting programs include hand delivery, first-class mail; publication in a newspaper meeting certain publication specifications (including alternative-language newspapers in certain instances), sign posting, publication in the *Texas Register*, radio broadcast, posting on the county courthouse door, and posting at the TCEQ's Web site.

Federal requirements for federal permitting programs administered by the TCEQ include notice by mail, newspaper, and—in limited circumstances—radio broadcast. Additionally, federal rules ensure public notice of the opportunity to be put on the mailing list through periodic publication in the press and in such publications as regional and state-funded newsletters, environmental bulletins, or state law journals. In recent years, the EPA has approved states' use of electronic notification in certain instances.

- *Enforcement.* Under TWC Section 7.075, the commission is required to allow the public to comment on proposed administrative orders or settlement agreements regarding enforcement actions. The notice of the opportunity to comment must be published in the *Texas Register*.

- *Rulemaking* Under the Administrative Procedures Act (Chapter 2001, Texas Government Code), an agency is required to give at least thirty days' notice of its intent to adopt a rule and the notice is required to be published in the *Texas Register*. Additionally, under Section 2001.026, advance notice of the rulemaking proceedings must be mailed to persons who make a timely request. Agencies are also required to give all interested persons an opportunity to submit comments orally or in writing prior to adopting a rule. The agency develops responses to all comments and publishes the responses.

- *Commissioners' public meetings.* - For commission agenda meetings, the Open Meetings Act (Chapter 551, Texas Government Code) requires the agency to give notice to the Secretary of State's Office for posting on the internet. The Act also requires that a computer terminal be provided in the Secretary of State's office for public access to the notice.

POSSIBLE SOLUTIONS AND IMPACT

Emerging Opportunities for Enhancing Public Participation

Enhancing public participation is inherent to the TCEQ's mission. There are a range of possible options for doing so, though some are longer term due to cost and logistics associated with implementation. As the agency looks to the future, measures for consideration include:

- Undertaking an across-the-board evaluation of TCEQ data to determine the most cost-effective ways to make more data available to the public in formats that are useful and easily accessible.

- Exploring today's emerging technology and communication options to determine the most appropriate avenues for the TCEQ to pursue. Some examples of possible options include:

    - Really Simple Syndication, which—if the customer is signed up to receive it—would push out TCEQ updates to the public automatically versus the public

having to check TCEQ Web sites for updates or click on links in emails from the agency;

- the development of small software programs called widgets; which, when downloaded by the public, could allow easy access to meaningful information with respect to complex data sets such as air and water monitoring data; and

- Applets, another small software program specifically designed for smart phones, which would provide similar high level results to the public in a convenient and readily available manner.

- Continuing to image TCEQ records and making those images available to the public online in a timely manner.

- Identifying those technologies best suited to increasing the TCEQ's ability to communicate with its varied population of customers while enhancing the public's ability to interact with the agency.

- Accomplishing the TCEQ's communication objectives in the most cost-effective manner for the state within budgetary limits.

- Enhancing the TCEQ's public outreach capabilities in such a way that the agency can keep pace with the resulting increase in public demand for information.

- Taking into account the needs of customers—such as small businesses and individuals—without online access.

- Ensuring continued compliance with laws concerning privacy, record retention, and accessibility.

BRIEF DESCRIPTION OF ISSUE

Issue 7: What is the state's responsibility in remediating aging dams identified across the state?

DISCUSSION

The TCEQ is charged with the regulation, not remediation, of dams. The agency inspects existing dams, and dams under construction, for compliance. The TCEQ recently received additional inspection-related resources for its dam-safety program which will enhance the identification of compliance issues relating to the safety of existing dams. Though an effective dam-inspection program can identify deficiencies, inspections alone will not address the safety concerns posed by inadequately maintained dams, dams with outdated engineering, or deficient dams, all of which will need to be rehabilitated or repaired.

Under TWC Section 12.052, the TCEQ has authority to enforce related rules and regulations through civil penalties, but not the authority for administrative penalties under this program. Further, the TCEQ does not fund the repair or rehabilitation of dams.

Texas does not have a state program specifically designed to assist private dam owners to pay for needed repairs and rehabilitation. However, Texas now has 969 high-hazard dams, whose estimated cost for repair and rehabilitation exceeds $1 billion. Some public dam-repair projects have received financial assistance from the Texas Water Development Board in the past; however, none have been funded in recent years. Certain public dam repair projects may be eligible for assistance from the Texas Community Development Program Disaster Relief / Urgent Need Fund at the Office of Rural and Community Affairs.

In Texas, approximately 93 percent of all the dams in the Inventory of Dams are over 25 years old. The inspections conducted over the last five years revealed that approximately 50 percent of the 817 dams inspected are either in fair or poor condition, confirming their deterioration over the years, primarily from lack of maintenance and repair. In addition, approximately 65 percent of the high-hazard dams are identified as either hydraulically inadequate or of undetermined hydraulic adequacy. Therefore, thousands of people in the state may be at risk from dam failure.

The 81st Legislature appropriated $3 million to Bexar-Medina-Atascosa Water Control and Improvement District No. 1 for structural improvements to Lake Medina Dam. At the same time they also appropriated $15 million to the Texas State Soil and Water Conservation Board for the maintenance and repair of Natural Resource Conservation Service (NRCS) dams. A local match is required receive the state funds.

The NRCS has received federal stimulus dollars to fund in Texas repairs for 24 NRCS-assisted dams at a cost of $21.54 million, and rehabilitation of 6 NRCS-assisted dams at a

cost of $1.2 million.

POSSIBLE SOLUTIONS AND IMPACT

Without proper maintenance, repair, and rehabilitation a dam may, over time, become unable to serve its intended purpose and could be at risk for failure. Such dams need to be repaired or rehabilitated, yet for most public and private dam owners, finding the funds is nearly impossible. Owners of public and private dams need a funding source to make dam repairs and resolve safety issues.

BRIEF DESCRIPTION OF ISSUE

Issue 8: Does the TCEQ have sufficient authority and funding to coordinate the management and use of the limited water resources of the state?

The following issues regarding the TCEQ's authority to manage water resources statewide are discussed: drought contingency plans, watermaster programs, surface water use reports, groundwater conservation districts, and receivership.

Drought Contingency Plans

BRIEF DESCRIPTION OF ISSUE

One significant impediment to TCEQ efforts to ensure continuous water service to Texas consumers is a lack of statutory authority to require water suppliers to implement a drought-contingency plan. A DCP requires ever more stringent water-conservation measures as drought worsens. The TCEQ finds that many suppliers are hesitant to voluntarily implement a DCP and thereby curtail water usage by customers. As a result, water-conservation efforts often come too late to prevent service interruptions resulting from diminished supplies.

DISCUSSION

In response to persistent drought conditions across the state in 1997, the 75th Texas Legislature directed the TCEQ to adopt rules establishing common drought plan requirements for water suppliers. As a result, the TCEQ adopted title 30, Texas Administrative Code (30 TAC), Chapter 288, Subchapter B. Chapter 288 specifically describes the scope and content of the DCP and requires water suppliers to either submit the DCP to the TCEQ or, depending upon the number of customers served, retain the DCP on site and make it available to TCEQ upon request.

POSSIBLE SOLUTIONS AND IMPACT

A statutory change to allow the TCEQ to mandate consistent, enforceable, and timely DCP implementation would further maximize water-conservation efforts throughout the state.

Establish Watermaster Programs Statewide

BRIEF DESCRIPTION OF ISSUE

In June 2009, the TCEQ received a priority call in the Brazos River Basin located outside established watermaster-program areas. The TCEQ's efforts to protect this senior call have, and continue to, consume resources including personnel, vehicles, equipment, and travel expenses redirected from other agency programs to protect the senior call. As drought conditions persist throughout areas of the state, the redirection of resources could negatively affect the TCEQ's ability to meet federal and state performance metrics.

DISCUSSION

For the appropriations of water, senior or older, water rights must be satisfied before later or junior water rights. The priority date of a water right establishes the place in line for holders of junior and senior water rights. A water right holder with a senior priority date may call on junior water right holders if the senior right is not receiving the flows authorized in their water right. The junior water right holder(s) being called upon must allow flows to pass their location and flow to the senior water right holder until the senior right is satisfied.

Pursuant to Texas Water Code (TWC) Section 11.325, the TCEQ has divided the state into water divisions for the purpose of administering adjudicated water rights. The water divisions are to secure the best protection to water rights holders and to provide for the most economical supervision on the part of the state. The executive director may then appoint one watermaster for each water division or service area.

The TCEQ currently has three watermaster programs: the Rio Grande program, which serves the Rio Grande Basin, as well as a portion of the Nueces–Rio Grande River Basin; the South Texas program which serves the Nueces, San Antonio, and Guadalupe River Basins, as well as the adjacent coastal basins; and the Concho River program, which serves a portion of the Concho River segment of the Colorado River Basin.

The watermaster programs are responsible for allocating, monitoring, and controlling the use of surface water within their respective service areas. The TCEQ personnel assigned to the three programs authorize diversions, monitor stream flows, and oversee pumping operations on a daily basis. This oversight allows TCEQ to anticipate problems and develop regional responses before surface water availability issues become severe.

Each watermaster program is entirely funded by the water-right holders within its service area through the assessment of annual fees. These fees are based on the water-use types for which each water right is permitted and calculated to ensure the minimum revenues necessary for each program to be self-sufficient.

In droughts, watermasters have the authority to allocate available surface water in accordance with the priority doctrine that states, "first in time, first in right." However, this

doctrine does not apply to the middle and lower Rio Grande, which use allocations based on authorized type of use and on water in the usable storage of Falcon and Amistad reservoirs. With detailed knowledge of water-right permits in relation to each other, watermasters are equipped to negotiate surface water use to minimize impacts on all water-right holders they serve. Actual water management of available surface water reduces the potential for senior water-right holders to make a priority call. A priority call requires that junior water-right holders curtail or suspend all diversions of surface water until the needs of the senior water-right holder are met.

Further, pursuant to 30 TAC Subsection 303.22(h) and Section 304.41, watermasters may take any appropriate actions to prevent the waste of water or to alleviate emergencies. Emergencies may include, for example, situations of extreme or exceptional drought, danger to public water supplies or homeland security, or imminent threat to public health and safety or the environment.

POSSIBLE SOLUTIONS AND IMPACT

The TCEQ is responsible for protection of a senior call, regardless of whether a watermaster program has been established in the affected area. For those 15 remaining major river basins in the state without a watermaster program, the TCEQ uses existing staff resources to address water-right issues as they arise.

Perhaps additional watermasters in other areas of the state should be considered. Changes to TWC Chapter 11, which sets forth three mechanisms by which a watermaster program can be established, would be needed. If authorized, the TCEQ would request additional personnel to ensure adequate resources for the operation and management of additional watermaster programs.

Reports of Surface Water Use

BRIEF DESCRIPTION OF ISSUE

Pursuant to TWC Section 11.031, each person who has a water-use permit or has impounded, diverted, or otherwise used state water must file a written report to the TCEQ by March 1 of each year to assist the agency in making an inventory of the water resources in the state. Domestic and livestock uses exempt from permitting do not entail the filing of an annual use report. In accordance with the TWC, failure to submit a report could result in a penalty of $25, plus $1 per day for each day that the report is late, with a maximum penalty of $150. The annual reporting requirement may be waived in areas of the state where watermaster operations are established.

DISCUSSION

As currently written, the requirement to report annually to the TCEQ on the previous year's water use significantly hinders the TCEQ's ability to properly plan and allocate water resources to meet the demand of all water-right holders on an ongoing basis. Specifically, the annual report requirement does not offer the TCEQ access to the most current data in negotiating surface water use. In contrast, watermasters have the authority to require monthly water-use reports as a condition of continued use. Evaluating the most current information allows the negotiation of surface water use to minimize the impacts on all water-rights holders during shortages.

POSSIBLE SOLUTIONS AND IMPACT

The TCEQ would be assisted by revising the reporting requirement as outlined in TWC Section 11.032 to require permit holders to not only submit annual reports but also maintain monthly reports and make those reports available within 10 days of a request by the TCEQ. More frequent and current records would allow the TCEQ to make timely compliance determinations and more readily address unauthorized and excess water usage if necessary.

In addition, the statutory penalties for failure to submit the report are not sufficient to encourage compliance. The TCEQ feels that explicit administrative-penalty authority would ensure efficient and timely resolution of reporting violations.

Groundwater Conservation Districts

BRIEF DESCRIPTION OF ISSUE

Groundwater-conservation districts (GCDs) are the state's current preferred method of groundwater management. They are the only entities in Texas explicitly granted the authority to regulate the spacing of water wells and groundwater withdrawals. The GCDs are charged to manage groundwater by providing for its conservation, preservation, protection, and recharging, and preventing its waste. Each GCD is governed by a locally selected board of directors. Because of the actions of some GCDs, some interests are calling for enhanced state oversight of them.

DISCUSSION

The GCDs are created by one of four methods:

1. The majority are created by action of the legislature.
2. Some are created administratively by the TCEQ) responding to a landowner petition.

3. A GCD can be created by the TCEQ on its own motion in a designated Priority Groundwater Management Area (PGMA). This method of creation is only authorized when local actions are not taken to create a GCD following the designation of a PGMA.
4. Individuals or groups of landowners can petition an existing district to have their territory administratively added to the district.

The GCDs are authorized under TWC Chapter 36 with powers and duties that enable them to manage groundwater resources. The three primary GCD authorities are permitting water wells, developing a comprehensive management plan, and adopting the rules necessary to implement the management plan. The plan must be readopted and approved at least once every five years.

State-Agency Roles Related to GCD Management Plans

The TCEQ is responsible for enforcing GCD management-plan adoption, approval, and implementation, and joint planning requirements of TWC Chapter 36, and for technical assistance to GCDs when requested. The GCDs must also register board members with the TCEQ and keep the agency apprised of any changes to district boundaries.

The Texas Water Development Board (TWBD) provides technical and administrative support to groundwater districts in the development of their groundwater management plans, reviews and approves district management plans, and is responsible for the delineation and designation of groundwater management areas (GMAs). For planning purposes, the TWDB determines values for managed available groundwater based on desired aquifer conditions developed by GCDs in common GMAs.

Desired Future Conditions

TWC Section 36.108 mandates regional decisions on groundwater availability, requires regional water planning groups to use groundwater availability numbers from the groundwater conservation districts, and defines a permitting target or cap for groundwater production.

The GCDs are required to work together in each of the 16 TWDB-delineated groundwater management areas to develop "desired future conditions" for their groundwater resources. During planning, the districts deliver these desired future conditions to the TWDB, which, in turn, provides estimates of "managed available groundwater" (a new term relating to groundwater availability) to the districts for inclusion in their groundwater management plans and to the regional water-planning groups for inclusion in their plans. Because managed available groundwater is defined by the desired future conditions, GCDs work collectively within each GMA to define groundwater availability for regional water planning.

Desired future conditions are essentially a management goal. The philosophy and policies addressing how an aquifer will be managed and identifying what the districts want the aquifer to look like in the future. This can be stated in terms of water levels, water quality, spring flows, or volumes at specified times in the future or in perpetuity. Statements of desired future conditions must be adopted by a two-thirds vote of the GCDs located in

whole or in part in the GMA. GCDs are encouraged to actively seek the involvement of stakeholders in joint planning in order to consider all perspectives before deciding on desired future conditions.

In its rules, the TWDB requires desired future conditions to be physically possible. Also, if there are multiple desired future conditions in the same aquifer in a GMA, the TWDB requires them to be compatible. This TWDB requirement, however, does not apply across groundwater management areas in the same aquifer.

POSSIBLE SOLUTIONS AND IMPACT

Proponents of local control generally note the state's long history under the case law rule of capture and the variation in groundwater resources across the state. These stakeholders generally note that most of the stronger provisions of TWC Chapter 36 that can limit the impact of the rule of capture (imposition of pumping limits, well-spacing requirements, etc.) allow the locally elected GCD board to determine which of these requirements to use in the local situation. These stakeholders are generally protective of groundwater resources for local use for future generations.

Proponents of more state control often suggest that the best way to manage a common resource is to have political control that coincides with the aquifer boundary. These stakeholders note that GCD management goals, projected availability, and projected use of groundwater resources may vary greatly between GCDs in a common groundwater management area. These stakeholders prefer a more structured, region- and aquifer-specific approach to groundwater management and generally view groundwater resources as a marketable commodity that should be used as availability, demand, and economics dictate. Stakeholders who feel they have been treated arbitrarily or on a different basis than other applicants generally seek enhanced oversight from either the TCEQ or the TWBD.

Receivership Water Policy Issue

BRIEF DESCRIPTION OF ISSUE

The Texas Water Code authorizes the TCEQ to seek receivership or temporary management only for a water or sewer utility. These are *investor-owned utilities* (IOUs). Problems arise with the high legal standard needed to appoint a receiver for an investor-owned utility.

Additionally, the TCEQ does not have the authority to seek receivership or temporary management for nonprofit water-supply corporations (WSCs) or sewer service corporations, water districts, cities, or counties. This lack of authority is an issue when one of those corporations or political subdivisions demonstrates a complete failure to provide services that meet state and federal standards.

DISCUSSION

Under TWC Section 13.4132, a temporary manager may be appointed to manage an IOU if the utility:

- has discontinued or abandoned operations,
- has discontinued or abandoned providing services, or
- has been, or is being, referred to the Office of the Attorney General for the appointment of a receiver.

Under TWC Section 13.412, the Office of the Attorney General may bring suit for a receiver to be appointed to carry on the business of an IOU if the utility has:

- abandoned operations of its facilities,
- informed the commission that the owner is abandoning the system,
- violated a final order of the commission, or
- allowed any property it owns or controls to be used in violation of a final order of the commission.

A temporary manager for an IOU is appointed by the executive director with the appointment later affirmed, modified, or set aside by the commission. Appointment of a permanent receiver for an IOU is by a district court after the TCEQ refers an enforcement case to the Office of the Attorney General for receivership.

POSSIBLE SOLUTIONS AND IMPACT

Increased authority to appoint temporary managers and receivers could pose challenges for the TCEQ. A receivership is really a last-ditch effort to keep a utility system in operation and move it toward compliance. Receiverships always take longer than anticipated.

More flexibility in the criteria under the statute could perhaps allow the TCEQ to appoint a temporary manager or receiver to prevent situations from deteriorating till there is a threat to health, safety, and welfare.

The TCEQ's authority to appoint temporary managers or receivers could be expanded to nonprofit water-supply or sewer-service corporations and possibly to political subdivisions, such as municipal utility districts.

Some very troubled water systems are WSCs and districts which under current laws are not eligible for receivership. The ability to appoint a receiver would be particularly helpful in situations where all the water-district board members resign and a vacancy appointment is difficult or impossible.