

SUBJECT: Continuing the Texas Natural Resource Conservation Commission

COMMITTEE: Environmental Regulation — committee substitute recommended

VOTE: 6 ayes — Chisum, Kuempel, Uher, Bosse, Dukes, Geren
0 nays
3 absent — Bonnen, Howard, Zbranek

WITNESSES: For — Jim Allison, County Judges and Commissioners Association of Texas; Ramon Alvarez, Environmental Defense; Sparky Anderson, Clean Water Action; Rita Beving; Gene Collins, National Association for the Advancement of Colored People-Odessa; Susan Curry; Jon Fisher, Texas Chemical Council; Jeanne B. Gramstorff, United Methodist Women; William Greenway and Thebe Worden, Texas Impact; Bob Gregory, National Solid Waste Management Association, Texas Chapter; Lucille Griffith; Roland Guerrero, American Electronics Association; Kelly Haragan, Public Citizen's Texas Office; Ken Kramer, Sierra Club, Lone Star Chapter, and Alliance for a Clean Texas; Richard Lowerre, City of Del Rio, Kleberg County, Wimberley Neighbors for Healthy Water, and other organizations; Tamara Maschino; Mary Miksa, Texas Association of Business and Chambers of Commerce; Cindy Morphew, Texas Oil and Gas Association; Ed Parten, Texas Black Bass Unlimited and Texas Association of Bass Clubs; Ken Peterson, Texas Rural Water Association; Arlene L. Polewarczyk; Merle Roten; Robin Schneider, Texas Campaign for the Environment; Cathy Sisk, Harris County Pollution Control; Walter West, Texas Black Bass Unlimited and Sam Rayburn Community; Christine Wilson

Against — None

On — Shawn Glacken, Association of Electric Companies of Texas; Robert Huston and Jeff Saitas, Texas Natural Resource Conservation Commission

BACKGROUND: In 1993, the Legislature consolidated the Texas Water Commission, Texas Air Control Board, and environmental programs from the Texas Department of Health to create the Texas Natural Resource Conservation Commission

(TNRCC). In 1999, the Legislature abolished the Texas Low-Level Radioactive Waste Disposal Authority and transferred its functions and authority to TNRCC. TNRCC is charged with protecting Texas' natural resources and human health in conjunction with sustainable economic development.

TNRCC's duties fall into four primary categories. (1) TNRCC implements state and federal environmental regulatory laws, such as the Clean Air Act and Clean Water Act, primarily through permits and authorizations for air pollution control, operation of water and wastewater facilities, and treatment, storage, and disposal of hazardous, industrial, municipal, and low-level radioactive waste. (2) TNRCC ensures compliance with state and federal environmental laws and regulations by inspecting regulated facilities, monitoring air and water quality, encouraging voluntary compliance, providing technical assistance, and initiating formal enforcement proceedings against suspected violators. (3) TNRCC develops plans to clean up and reclaim contaminated industrial and abandoned hazardous waste sites. (4) TNRCC sets water rates and allocates surface water rights.

By assuming duties associated with federal requirements, TNRCC reduces the amount of federal intervention required. TNRCC is preparing long-range plans to address Texas metropolitan areas that do not meet National Ambient Air Quality Standards, as well as long-range plans to address the 200 bodies of water in Texas that do not meet federal standards.

TNRCC is governed by a three-member commission, which performs quasi-judicial functions in approving and denying permit applications and enforcement orders. TNRCC has about 2,800 employees, including more than 700 who work in 16 regional offices. For fiscal 2000-01, TNRCC received a total appropriation of \$1.5 billion, including \$703.3 million in general revenue and general revenue-dedicated funds.

This is TNRCC's first sunset review. It will be abolished September 1, 2001, unless continued by the Legislature.

DIGEST:

CSHB 2912 would continue TNRCC until September 1, 2013. The bill's provisions would take effect September 1, 2001, unless otherwise specified.

Emissions events. The bill would assign TNRCC new duties related to assessment and regulation of industrial “emissions events,” defined as upset, maintenance, startup, or shutdown activities that result in unauthorized emissions of air contaminants. An owner or operator of a facility that experienced an event would have to report to TNRCC all information necessary to evaluate the event. TNRCC would have to track events and collect information on action the commission took in response to events and on the number of events in each region. The commission would have to assess this information annually and include it in the report required under Water Code, sec. 5.123.

TNRCC would have to establish criteria for when emissions were excessive, taking into account the cause, volume, toxicity, and duration of the event; frequency of events at the facility; percentage of total annual operating hours during which emissions events occur; and the need for startup and shutdown activities. TNRCC’s executive director could require a facility to take action to reduce excessive events. Such a facility would have to file a corrective action plan specifying the control devices or measures that would prevent or minimize similar events in the future and a time line for implementation, or else apply for a permit from the commission. TNRCC would have to approve a corrective action plan and its implementation time frame, then make the plan available to the public. TNRCC would have to establish procedures for revising a plan once implementation had begun if the commission found the plan inadequate to prevent or minimize future events.

TNRCC could establish affirmative defenses to emissions events. At a minimum, the rules for doing so would have to consider the same factors used in determining when events were excessive. A person who failed to take corrective action under an approved corrective action plan within the prescribed time could not claim an affirmative defense. The burden of proof for any defense to commission enforcement action would be on the person claiming the defense.

Performance-based regulation and regulatory flexibility. CSHB 2912 would require TNRCC to develop a three-tiered regulatory structure based on incentives and compliance. The tiers would be based on relative levels of compliance — poor performers (with a continual or pervasive disregard of environmental regulations), average performers (generally comply with

environmental regulations), and high performers (above-average compliance record and voluntarily implement environmentally sound practices beyond those required). The commission would have to use these tiers to determine a facility's eligibility for innovative regulatory programs.

The bill would require a single point of contact within TNRCC to coordinate all innovative regulatory programs and incentives. The coordinator's responsibilities would include inventory, coordination, and marketing of programs and incentives; providing information and assistance to interested regulated entities; and working with the pollution-prevention advisory committee to integrate regulatory innovation and incentive and performance-based regulation into daily operations.

Compliance history. TNRCC would have to develop a set of components and standards for compliance history and apply those standards consistently. Compliance history would include notices of violations, enforcement actions, enforcement orders, court judgments, and criminal convictions relating to environmental compliance from Texas and federal courts; a determination of whether the violation was significant or minor; the period to be considered in determining compliance history; and enforcement orders, court judgments, and criminal convictions under the laws of other states, to the extent that they were readily available. Change of ownership would have to be considered in determining a facility's compliance history.

TNRCC would have to collect data on the results of inspections, the number and percentage of violations by repeat offenders, the number and percentage of enforcement orders issued to entities that had been the subject of previous enforcement orders, and whether violations were significant or minor. The commission would have to prepare an annual analysis of this information and include it in the annual enforcement report required under current law.

TNRCC would have to develop rules for performance assessment, including assessment of regulated entities not routinely required for compliance. The commission would have to use performance assessment along with the multi-tiered regulatory structure to determine eligibility for incentive-based and innovative programs and would have to deny participation to facilities with unacceptable compliance histories. The commission would have to develop guidelines for use of compliance history in permitting and enforcement,

limiting flexible permitting to entities that achieved a better than average compliance history in comparison to ordinary permit holders. TNRCC could not announce inspections of a facility until it had established a good compliance record. Also, the commission would have to review a solid waste disposal permit to assess compliance history every five to seven years.

TNRCC would have to meet these deadlines:

- ! establish the components and standards for compliance history not later than March 1, 2002;
- ! begin tracking compliance for use in establishing the multi-tiered regulatory structure not later than September 1, 2002; and
- ! adopt and implement rules governing the multi-tiered regulatory structure over a three-year period, as soon as practicable but not later than September 1, 2005.

TNRCC's use of compliance history in permitting decisions would apply to applications submitted on or after March 1, 2002. Use of compliance history in inspection and flexible permitting decisions would apply to all permit holders beginning March 1, 2002.

The commission could modify compliance-history requirements temporarily to implement the multi-tiered regulatory structure between March 1, 2002, and September 1, 2005, but could not modify existing statutory requirements relating to use of compliance history in enforcement proceedings.

Regulatory flexibility. CSHB 2912 would amend current statutes relating to regulatory flexibility. The amendments would allow TNRCC to exempt an applicant from a statutory or rule-based pollution-control requirement if the applicant proposed a pollution-control measure that was more protective of the environment than the existing standard and consistent with federal law. The applicant would have to present documentation of the environmental benefits of the proposed project. In implementing regulatory flexibility, TNRCC would have to endorse methods that clearly benefitted the environment and would have to allow businesses flexibility in meeting standards in a way that clearly enhanced the environmental outcomes. The

amendments would apply only to applications for regulatory flexibility submitted on or after September 1, 2001.

Supplemental environmental programs. The bill would forbid TNRCC from considering a preexisting supplemental environmental program as a mitigating factor for a respondent in an administrative penalty proceeding.

Executive director's role in hearings. CSHB 2912 would change the TNRCC executive director's participation in hearings. The executive director would remain a named party in enforcement hearings before the commission and could participate as a party in permit hearings and State Office of Administrative Hearings (SOAH) proceedings for the sole purpose of providing information, subject to rules formulated by the commission. The executive director could not rehabilitate a witness in a contested case hearing unless the witness was a commission employee testifying only to provide information. The executive director and his representative could not help an applicant meet its burden of proof in hearings before the commission or SOAH, except for certain categories of permit applications that TNRCC would designate by rule as eligible to receive assistance. These provisions would apply only to a hearing in which the executive director was named a party on or after September 1, 2001.

Public interest counsel. The public interest counsel could recommend legislative and regulatory changes and could obtain and use outside technical support to carry out its duties.

Initiating enforcement action based on evidence provided by private individuals. The bill would allow TNRCC to initiate an enforcement action on evidence received from a private person if the commission determined that the evidence met the requirements of the Texas Rules of Evidence. The executive director or the director's representative could evaluate evidence received from a private person and the merits of any proposed enforcement action based on that evidence. TNRCC would have to adopt rules to implement these requirements not later than December 1, 2001. These requirements would apply only to evidence of an environmental problem submitted to TNRCC on or after January 1, 2002.

Fees. CSHB 2912 would add several new fee provisions. It would require payment of fees under the Water Code and the Health and Safety Code on the date the fees were due, whether the fee was billed by the commission or was calculated and paid to the commission by the person required to pay the fee. It would require payment of a fee before the person required to pay the fee could dispute it. TNRCC could not adjust a fee before the fee had been paid or if the request for adjustment was received after the first anniversary of the date on which the fee was paid. Requests for refunds due to overpayment based on TNRCC's incorrect fee calculation or a duplicate payment would have to be submitted within four years of the date on which the excess amount was paid. A request for a refund of more than \$5,000 would have to be forwarded to the commission's fee-audit staff for approval, along with an explanation of the request. Approval would not bar a subsequent audit.

TNRCC would have to provide prompt notice of any change in fee payment procedures to each person required to pay a fee. The commission could issue a notice of violation to a person required to pay a fee for knowingly violating reporting requirements or for knowingly undercalculating a fee. The executive director could modify audit findings reported by a commission fee auditor upon written explanation of good cause.

TNRCC could collect penalties and interest on delinquent fees, except as otherwise provided by law. The penalty for failure to pay on or before the fee's due date would be 5 percent of the fee due, with an additional 5 percent penalty if the fee was not paid by the 30th day after the fee was due. Interest on unpaid fees and penalties would accrue beginning on the 61st day after a fee was due, at the interest rate established for delinquent taxes under Tax Code, sec. 111.060. The executive director could modify a penalty or interest upon written explanation of good cause. Penalties and interest collected would be deposited to the fund or account to which the fee was due. The bill's provisions regarding penalties and interest would apply only to fees due on or after September 1, 2001.

The commission could transfer a percentage of a fee revenue dedicated to one commission activity to one or more other commission activities, subject to state and federal statutory restrictions.

Advisory committee. The bill would rename the Waste Reduction Advisory Committee the Pollution Prevention Advisory Committee and would charge it with advising TNRCC on incentive and performance-based structures for regulating air quality, water quality, and solid waste management. The committee would have to submit a quarterly report to the commission.

Environmental testing laboratories. CSHB 2912 would add provisions for accreditation of environmental testing laboratories and would move current accreditation statutes from the Health and Safety Code to the Water Code. The bill would define “environmental testing laboratory” to mean a scientific lab that performs analyses of environmental media to determine the chemical, molecular, or pathogenic components for purposes of regulatory compliance.

TNRCC would have to adopt rules for voluntary lab accreditation consistent with accreditation standards approved by the National Environmental Laboratory Accreditation Conference. In addition to accrediting a lab that complied with commission requirements, TNRCC could accredit a lab that was accredited or licensed in another state by an authority that was approved by the national conference. TNRCC would have to establish a schedule of reasonable accreditation fees to cover costs associated with the accreditation program. Fees collected would be deposited to the lab accreditation account, to be appropriated to the commission only for paying costs associated with the accreditation program. Any account balance of more than \$1,000 would revert to general revenue.

TNRCC could accept lab data and analysis for use in decisions regarding any matter within TNRCC’s jurisdiction relating to permits, authorizations, compliance, enforcement, or corrective actions only if the data and analysis were prepared by a lab accredited by the commission, by an on-site or in-house lab periodically inspected by the commission, or by a federally accredited lab. If the data and analysis were necessary for an emergency response activity and were not otherwise available, TNRCC could accept them from a lab not accredited by the commission or under federal law. The commission could require data and analysis used in other decisions to be obtained from a lab accredited by the commission.

Certification of water-treatment specialists. CSHB 2912 would transfer the Plumbing License Law from the Water Code to the Health and Safety

Code and revise it. Its provisions would apply to installation of water-treatment appliances — equipment to alter or purify water or to alter a mineral, chemical, or bacterial content or substance — in residential, commercial, or industrial facilities. TNRCC would have to establish a certification program for installation of water-treatment appliances. The rules would have to include standards for certification, classes of certification, duration of certification, and reasonable annual certification fees of up to \$150 per year to pay administrative costs of the certification program. The fees would be deposited to the credit of general revenue. An applicant would have to file a form prescribed by the commission and pay the certification fee. TNRCC would have certify applicants who met the commission's requirements and paid the fee. The bill would forbid an uncertified person from engaging in water treatment.

Eligibility for commission membership. CSHB 2912 would prohibit a person from serving on the commission if that person or the person's spouse was registered, certified, licensed, permitted, or otherwise authorized by the commission.

Registration of irrigators and on-site sewage disposal system installers. TNRCC could waive any prerequisite for obtaining registration for a person registered as a licensed irrigator or installer in a jurisdiction with which Texas had a reciprocity agreement. The commission could enter into reciprocity agreements, subject to the governor's approval.

Regulation of certain solid waste facilities. CSHB 2912 would require the commission to ensure by rule that a facility that primarily transferred solid waste was regulated as a solid waste facility and not allowed to operate as an unregulated recycling facility. A facility would not be subject to regulation as a solid waste facility if it could demonstrate that its primary function was to process materials with a resale value greater than the processing cost and that solid waste generated by the facility was disposed of in an authorized solid waste facility. TNRCC would have to adopt rules necessary to implement these provisions as soon as practicable after the bill's effective date.

Advisory committees, work groups, and task forces. The bill would amend current provisions for advisory councils to include advisory

committees, work groups, and task forces. TNRCC's executive director could create and consult with such groups. TNRCC would have to identify interested parties and make a reasonable effort to balance the composition of each group, but the bill would not allow a challenge to a commission action based on the composition of a group. TNRCC would have to monitor composition and activities of groups appointed by the commission and would have to maintain the information in a form and location easily accessible to the public.

Record of outside contacts by commission member or staff. Commission members and staff with discretionary authority over any aspect of a regulatory matter pending before or within the jurisdiction of the commission would have to keep a written record of communications with anyone other than a commission member or employee regarding that matter. The bill would define "discretionary authority" as authority to make a final decision on that matter. Written records would be subject to disclosure pursuant to public information laws. The record requirement would not apply to an unplanned communication occurring outside of commission offices.

Research. CSHB 2912 would require TNRCC to facilitate research regarding practical regulatory needs by coordinating the efforts of the commission and academic and scientific communities and existing state initiatives. TNRCC would have to seek private and federal research funding. While TNRCC could not initiate or direct research by other entities, the commission would have to use research expertise of state agencies and the U.S. Department of Agriculture to the maximum possible extent.

TNRCC could appoint a research advisory board that would have to include representatives of the academic community, regulated community, and the public. The board's purpose would be to help the commission provide appropriate incentives to encourage various interest groups to recommend Texas-specific research topics.

The commission would have to create a research model identifying research needs and would have to obtain funding for research projects. The model would have to provide for commission staff to work with state and federal agencies and the regulated community to develop long-range plans and to identify and pursue specific projects.

Reporting. TNRCC would have to encourage use of electronic reporting via the Internet, to the extent practicable, for required reports. The commission could consult with the Department of Information Resources in developing a format. The bill would direct the commission to strive to reduce duplicative reporting requirements.

Summary for public notices. Every public notice by TNRCC or a person under the commission's jurisdiction, whether required by commission rule or law, would have to include a summary statement designed to inform the reader of the subject matter of the notice. The summary could not be grounds for challenging the validity of the proposed action for which the notice was published.

Summary of changes to permit applications. TNRCC's executive director would have to prepare a summary of changes made in the application review and permit drafting process.

Publication and notice of complaint procedures and policies. TNRCC would have to establish a process for educating the public about complaint procedures and policies. The commission would have to make available to the public a pamphlet explaining its procedures and policies, including information on standards for members of the public to collect and preserve credible evidence of environmental problems.

TNRCC would have to provide a copy of its policies and procedures relating to complaint investigation and resolution to each person who filed a complaint or was the subject of a complaint. The commission would have to provide investigation status updates to each person who filed a complaint or was the subject of a complaint, but it would not have to provide either the policies and procedures or the investigation status update to an anonymous complainant or to one who provided inaccurate contact information.

Coordinating complaint investigations with local enforcement officials. TNRCC would have to share complaint information with local officials authorized to act on the complaint in the county or municipality in which the act or omission that was the subject of the complaint had occurred or would occur. The commission also would have to train local enforcement officials upon request. The training would have to cover complaint investigation and

environmental law enforcement and would have to include procedures for addressing a complaint if the commission was unavailable or unable to respond and an explanation of local government authority to enforce environmental laws and regulations. The commission could charge a fee for this service to cover the costs of the training.

After-hours response to complaints. CSHB 2912 would require TNRCC to adopt and implement a response policy for complaints received outside of regular business hours. The bill would not authorize additional use of overtime and would not require permanent availability of field inspectors in all parts of the state.

Notice provisions. The bill would consolidate provisions for notice of intent to obtain a preconstruction permit or permit review and would exempt from notice requirements the relocation or change of location of a portable facility or of a facility temporarily located in or contiguous to the right-of-way of a public works project.

The bill would add notice provisions for a hearing on issuance or renewal of a license to dispose of low-level radioactive waste and for amendment of such a license.

Name change. Effective January 1, 2004, TNRCC would be renamed the Texas Department of Environmental Quality (TDEQ). All TNRCC powers, duties, rights, obligations, commission members, personnel, equipment, data, documents, facilities, other items, appropriations, and statutory references would be transferred to TDEQ. TNRCC would have to adopt a plan to phase in the new name to minimize fiscal impact.

Transfer of program authority to TNRCC. CSHB 2912 would transfer the following programs from the Texas Department of Health to TNRCC:

- ! safe drinking water laboratory certification program;
- ! environmental testing laboratory certification program; and
- ! certification of water-treatment specialists under the Plumbing License Law.

Across-the-board recommendations. The bill would add standard sunset provisions governing public membership on policymaking bodies; conflicts of interest; training and grounds for removal of members; maintenance of complaint information; equal employment opportunity; licensing of applicants; and deceptive or misleading trade practices. TNRCC would have to implement the training provisions for commission members as soon as practicable after September 1, 2001, but not later than December 1, 2001. Training requirements would apply only to commission members appointed on or after January 1, 2002.

SUPPORTERS
SAY:

Emissions events. CSHB 2912 would require stricter regulation of emissions events. Some facilities report a small number of these events but experience hundreds of excess events each year because of startup, shutdown, and maintenance. These emissions, though not covered by the facilities' permits, still create pollution. In essence, current law makes these emissions "free." Each facility emitting pollution should shoulder its fair share of the burden of environmental compliance and should emit only its fair share of pollution.

Performance-based regulation and regulatory flexibility. Providing incentives to permit holders would increase the likelihood of compliance. Incentives based on the top tier, containing entities that have gone beyond the required environmental protections, would encourage businesses to innovate and reduce pollution further. Also, as more regulated facilities voluntarily reduced pollution to earn top tier incentives, TNRCC would have to spend fewer resources on regulating those facilities.

Use of complaints and notices of violation in developing compliance history would show a more complete picture of a regulated entity's environmental record. TNRCC does not have the resources to identify and investigate every infraction and sometimes must rely on complaints and information from the public. Notices of violation address many types of rule infractions. Consideration of notices of violation would allow TNRCC to ensure that all regulated entities followed the rules and regulations.

Executive director's role in hearings. CSHB 2912 would allow the executive director to take a less adversarial role in contested hearings while still participating to the extent necessary to safeguard the permitting process.

Permitted parties are often not in the best position to defend their permits, because TNRCC adds to and modifies a permit during the application and permit drafting process. The final permit may contain technology, requirements, or strategies with which the permittee is not familiar. Allowing the executive director to participate in a hearing could be crucial to the commission's understanding of modifications to an application or final requirements of a permit. The executive director's participation in permit hearings is essential to preserve changes made during the permitting process. A permittee, left to defend the permit without supervision, might try to "defend" the permit back to its original application.

Public interest counsel. The public interest counsel's role is to help people gain access to the permitting process. Greater access to technical resources and the ability to make suggestions for legislative changes would help the public interest counsel fulfill its duties better. The counsel cannot adopt a truly adversarial role because there is no single identifiable "public interest." Some members of the public may oppose a permit, while others may support it. The counsel's role is appropriately limited to assisting the public with access to hearings and proceedings during the application and permitting process. The counsel should not have the right to appeal, as that essentially would authorize the counsel to second-guess the commission's decisions.

Initiating enforcement action based on evidence provided by private individuals. The bill would allow the commission to initiate enforcement action only on the basis of credible evidence. Ensuring credibility of evidence is crucial to the fairness and accuracy of enforcement proceedings. Applying the Texas Rules of Evidence would protect the scientific integrity of the evidence, encourage scientific procedure, and reduce the likelihood of enforcement actions based on contaminated samples or other misleading information. Applying the Rules of Evidence also would conserve resources, as TNRCC would not spend time and effort on patently meritless evidence.

Fees. CSHB 2912 appropriately would leave the determination of specific fees to the legislative appropriations process. Allowing transfer of funds among programs would allow TNRCC to operate more efficiently, using surplus funds unneeded for one purpose to reach another performance goal.

Environmental testing laboratories. Because companies have a vested interest in ensuring that their on-site and in-house labs provide accurate results, they would be likely to participate in a voluntary accreditation process. Many companies base their business decisions, including decisions about pollution control, on lab results. Accreditation also would allow TNRCC to rely on on-site and in-house lab results. This would benefit regulated entities, because independent laboratories have nothing at stake if their results are inaccurate, while the regulated entities do.

Eligibility for commission membership. The bill's additional restrictions on commission membership would help preserve the impartiality of commission members. These reasonable limitations would reduce conflicts of interest without excluding extremely knowledgeable people from membership.

Regulation of certain solid waste facilities. These provisions would allow TNRCC and local enforcement authorities to shut down sham "recycling" facilities, which accumulate solid waste and charge fees for haulers to dump on their property but do not actually dispose of the waste. The bill would not penalize legitimate recycling facilities.

Record of outside contacts by commission member or staff. The public has a right to know whether commission members or staff are making decisions based on information provided by outside sources. Requiring documentation of these contacts would allow the public to watch TNRCC's activities and would strengthen confidence in the decision-making process.

Summary for public notices; publication and notice of complaint procedures and policies. These required notices would make TNRCC proceedings more accessible to the public. Educating the public about TNRCC proceedings and providing notice of upcoming proceedings would help instill public confidence in TNRCC activities while increasing public participation in the decision-making process.

Summary of changes to permit applications. Requiring publication of information about changes made to a permit during the drafting process would educate the public and raise awareness about the permitting process.

It would further the development of uniform standards and equalize access to the permitting process.

Coordinating complaint investigations with local enforcement officials. Training local enforcement officials would enable them to help TNRCC enforce environmental regulations.

OPPONENTS
SAY:

Emissions events. The emissions events provision is meant to address “upsets,” or sudden, unanticipated emissions, but would go too far. Upsets include failure of pollution-control equipment, leaking apparatus, or faulty parts. Scheduled maintenance is necessary to maintain industrial equipment and pollution-control equipment and should not be lumped with upsets. Also, startup and shutdown operations should not be included in upset regulations.

This provision would harm electric power generators in particular. Electric power is generated according to consumer demand and may have a large number of startup and shutdown events as companies balance supply with demand and preserve the integrity of the power grid. Major source emitters, including electric plants, already are subject to federal regulations that require equipment for continuous monitoring of emissions. Concerns about upsets and about unscrupulous companies that deliberately pollute and then claim the event was an upset are understandable. This provision, however, would not address the problem appropriately.

Additional upset reporting requirements would not solve the problem because the problem is enforcement, not reporting. Polluters who do not follow current reporting requirements are unlikely to comply with additional requirements. Instead, the bill should provide stiffer penalties for failure to report true upsets — not maintenance, shutdown, or startup emissions — and give TNRCC additional resources to enforce existing requirements.

Performance-based regulation and regulatory flexibility. The use of notices of violation and complaints in compliance history would be highly problematic. Complaints and notices of violation are unsubstantiated allegations, many of which later prove to be meritless. No other agency regulates or makes decisions based on unsubstantiated allegations. It would be easy for a person or group to organize a “smear” campaign based on

complaints — for example, by writing hundreds of unjustified complaint letters to prevent a local business from modifying its permit or operations.

Current practices regarding notices of violation should be discontinued, not expanded. More than 14,000 notices of violation are issued each year. A notice of violation may be issued for an infraction that has no environmental impact, such as misdating a paper or filing a document in the wrong building. Errors by TNRCC inspectors in completing inspection paperwork also can result in a notice of violation. A regulated entity should not be judged on these notices of violation, because they do not present an accurate picture of that entity's environmental protection record. Furthermore, once a notice of violation is placed in a regulated entity's record, it cannot be removed, even if it is later proven meritless. There is no requirement that the record be updated to reflect the meritless status of the notice of violation. Even if the case manager assigned to that entity is aware that a notice of violation has been disproven, high turnover rates in TNRCC staff result in a very short institutional memory. The new case manager may see only the notice of violation, not its eventual reconciliation. A regulated entity should not be penalized for a meritless complaint.

Reliance on notices of violation and complaints as a basis for compliance history also would deprive the regulated entity of due process and an opportunity to disprove the veracity of the allegations.

Using the number of upsets as a compliance history indicator would tend to penalize larger companies. A larger company may have multiple sites throughout the state, whereas a small company might have one site equal in size to one of the larger company's sites. It would be incongruous and illogical to require the larger company's multiple sites to have a number of upsets equal to that of the smaller company's single site.

Some of the contemplated incentives would not encourage compliance. Many regulated entities are governed largely by federal law and U.S. Environmental Protection Agency requirements, implemented and enforced by TNRCC. The commission cannot provide an incentive that would violate a federal law or regulation.

Unannounced inspections would have unanticipated consequences. A smaller company might have only one employee responsible for environmental compliance, and that employee could be part-time, sick, attending a seminar, or otherwise absent the day of an unannounced inspection. The appropriate records might not be kept on the site to be inspected. Such circumstances would force TNRCC to return to the site to inspect on another day, raising inspection costs. Also, unannounced inspections could result in additional notices of violation for minor paperwork infractions with no environmental impact when a company was not prepared for the inspection.

Executive director's role in hearings. It would be odd for TNRCC to issue a permit and then not defend the issuance. Even with the executive director's participation limited to certain cases by commission-promulgated rules, the public would perceive the director's participation as arbitrary. None of the proposed changes to the executive director's participation would educate the public or correct existing misperceptions.

Public interest counsel. The public interest counsel should be a separate entity, not part of TNRCC, and should have adequate funding and resources. The definition of "public interest" should be placed in statute to reduce ambiguity. The public interest counsel cannot fulfill its role as an advocate for the public in an adversarial proceeding when the adversary is the counsel's employer. The counsel should have the right to appeal decisions of the commission. Most people effectively are foreclosed from pursuing an appeal due to lack of knowledge and resources. The counsel cannot truly advocate for the public interest without the right to appeal.

Fees. The bill should remove the 4,000-ton cap on air-pollution fees, which effectively serves as a "volume discount" for large scale polluters and provides no incentive for those polluters to reduce their emissions. If the cap were removed, the additional fee revenue generated could cover the cost of some of the additional duties that this bill would assign to TNRCC.

Certification of water-treatment specialists. These provisions would burden the TNRCC with additional work and cost while providing no tangible environmental benefit. As written, the bill would require almost every employee in some industrial facilities to obtain a license. This is not a public health issue. Water treated in industrial and commercial facilities is

not destined to become potable drinking water. Water discharged from industrial and commercial facilities already is regulated by the permitting process.

Eligibility for commission membership. Ideally, commission members should have experience and scientific and technical knowledge related to the performance of their duties. Adding more restrictions would reduce the number of willing and qualified people able to serve on the commission.

Advisory committees, work groups, and task forces. The bill's provision requiring the commission to make a "reasonable effort" to ensure balance in each group is vague and insufficient. The Sunset Advisory Commission recommended requiring the commission to have balanced groups.

Record of outside contacts by commission member or staff. These provisions would discourage TNRCC from seeking outside advice concerning pending matters. Because of the increased paperwork, staff would be less likely to solicit outside opinions. Also, people outside the agency could be less willing to make their personal opinions known if they knew that they would be recorded and subject to open-records laws.

Reporting. The bill's reporting requirements would not go far enough. The bill should require TNRCC to use the Internet to make information about complaints and notices of violation available to the public.

After-hours response to complaints. The bill would not require TNRCC to make someone available to investigate complaints at all times. This would leave open the possibility that illegal polluters, aware that TNRCC did not provide 24-hour response, would choose to conduct illegal dumpings and emissions at hours when it was unlikely that TNRCC would respond.

Miscellaneous concerns. CSHB 2912 should address TNRCC's mission. The current mission causes a conflict of interest because TNRCC is supposed to protect public health and the environment while promoting economic development — two goals that often conflict. TNRCC should be charged only with protecting public health and the environment.

TNRCC should have to consider evidence of the cumulative effects of pollution when issuing, renewing, or modifying permits. Under the current system, each polluter is treated as the only polluter. In reality, the effects of pollution on the environment and public health are cumulative.

Many of CSHB 2912's provisions would create additional paperwork or regulatory work for TNRCC — for example, increasing paperwork related to reporting emissions events. TNRCC is underfunded and understaffed. Without additional funding and other resources, the mandates in this bill could not be accomplished. For example, the delay in permit processing has been increasing steadily even without the additional responsibilities that TNRCC would bear under this bill. Each change in a section of the bill might be slight, but when added together, the proposed changes would have a significant impact on TNRCC operations.

The sunset provision regarding the complaint file should be comprehensive. This bill would require only a file of written complaints. Most complaints are made by telephone, however, and would not be retained in this file.

OTHER
OPPONENTS
SAY:

Executive director's role in hearings. CSHB 2912 should limit the executive director's participation more sharply and should define clearly when the director could participate in a hearing. Allowing the commission to make rules concerning the executive director's participation would continue the present ambiguity regarding the director's role. Without strict guidelines, the director functions as an adversary, supporting the permit applicant, who, more often than not, possesses more resources and knowledge than members of the public. The executive director should be a party only in contested hearings on applications by municipalities and in water rate cases.

Fees. TNRCC is funded largely by fees based on emissions and output of waste. As emissions and waste output decrease, so does the amount of revenue to TNRCC. This funding shortage would be felt even more acutely as the bill required additional work for TNRCC without providing additional resources. The bill would not address this problem.

Over the years, TNRCC has become more and more dependent on fee revenue and less dependent on general revenue. The percentage of TNRCC's budget coming from fees has increased to more than 80 percent. Other state

agencies are not nearly as dependent on fee income. Fees are supposed to cover costs associated with specific TNRCC activities. If TNRCC were allowed to transfer those fees among accounts, regulated industries such as solid waste would have to pick up the tab for the cost of TNRCC's non-regulatory activities, such as public water programs, that should be funded by the public. The bill should address this issue.

Eligibility for commission membership. To prevent conflicts of interest, people who have received significant payments or income from regulated entities during the past two (or preferably five) years should not be eligible to serve on the commission.

NOTES:

The committee substitute differs from the bill as filed in that it would:

- ! change the standard sunset language regarding training of commission members to specify that they would receive the results of significant internal and external audits;
- ! allow the executive director, not the commission, to create and consult with advisory committees, work groups, and task forces;
- ! narrow the required recording of outside contacts to the specific regulatory matter before that member or employee, specify that discretionary authority means final decision-making authority for that regulatory matter, and simplify record-keeping requirements for presentations to a group or association;
- ! clarify TNRCC's authority to accept data from on-site laboratories instead of exempting these labs from accreditation if inspected by the commission;
- ! allow TNRCC to accept data from a laboratory that is accredited under federal law and from an unaccredited lab in emergency situations;
- ! require data from accredited labs for use in commission decisions other than permits, compliance matters, and enforcement and corrective actions;
- ! require TNRCC to encourage electronic reporting through the Internet and to make efforts to reduce duplication in reporting requirements;
- ! require a summary caption for each public notice on a matter before the commission;
- ! amend the standard sunset language on complaint files to exclude notice to a complainant who filed an anonymous complaint or provided

inaccurate contact information;

- ! specify that TNRCC must provide training for local officials only on request;
 - ! expand options for TNRCC to provide after-hours response to complaints by deleting the specific reference in the original bill to field inspectors working flexible hours;
 - ! modify the provision regarding the executive director's participation in commission hearings to cover permit hearings only and make no change in the executive director's current role in agency enforcement actions;
 - ! require the executive director, in preparing a draft permit, to document changes ordered to the applicant's proposal;
 - ! specify that citizen-gathered evidence would be subject to TNRCC's protocols for handling evidence if it was the sole basis of an agency enforcement action;
 - ! exempt from notice requirements a facility relocated to a site where a facility already was permitted or a facility temporarily located on the right-of-way of a public works project;
 - ! apply the same "knowing culpability" standard to the calculation of fee amounts and reporting requirements and allow the executive director to modify findings of fee auditors with a written explanation showing good cause for the modification;
 - ! specify the factors to be considered in developing compliance history standards and allows TNRCC to include readily available information on violations in other states;
 - ! define "emissions event" to include emissions from an upset, startup, shutdown, or maintenance action and remove references to allowable numbers of emissions events and exemptions from enforcement;
 - ! require TNRCC to establish criteria to determine when emissions events are excessive, triggering either a corrective action plan or a permit;
 - ! establish an affirmative defense to commission enforcement for certain emissions events if the responsible party took corrective action prescribed by the commission;
 - ! delete specific media descriptions from the definition of "environmental testing laboratory" and delete references to commercial laboratories, making all labs eligible for the voluntary certification;
 - ! regulate a facility that transferred solid waste as a solid waste facility and not allow it to operate unregulated as a so-called recycling facility;
- and

! change the name of the agency to the Texas Department of Environmental Quality as of January 1, 2004.

The fiscal note for CSHB 2912 estimates that it would result in a net loss of \$1.1 million in general revenue during fiscal 2002-03.

The companion bill, SB 318 by Harris, was referred to the Senate Natural Resources Committee on March 8.