

SUBJECT: Continuing the Texas Commission on Environmental Quality

COMMITTEE: Environmental Regulation — committee substitute recommended

VOTE: 7 ayes — Landgraf, Guerra, K. Bell, Dean, Kuempel, J. Lopez, Morales Shaw
0 nays
2 absent — Meza, Reynolds

SENATE VOTE: On final passage (April 17) — 31-0

WITNESSES: None (*considered in formal meeting on April 25*)

BACKGROUND: The Texas Commission on Environmental Quality (TCEQ) was created by the Legislature in 1913 and was originally called the Texas Board of Water Engineers. The commission's charge is to promote public health and safety, protect the state's natural resources and environment, and foster economic growth.

Functions. TCEQ performs the following activities:

- issues permits, registrations, and licenses to entities or individuals whose activities could affect public health or the environment, including facilities that release contaminants into the environment;
- monitors air quality and develops plans to maintain and improve air quality to meet federal and state pollution level targets;
- monitors water quality and oversees programs to prevent and address water contamination, issues surface water permits to manage water quantity, ensures the safety of public drinking water systems, and provides oversight of water districts;
- oversees safe management and disposal of waste, including industrial, municipal, hazardous and low-level radioactive waste, and oversees remediation of sites contaminated by toxic release;

- ensures compliance with federal and state environmental laws and state nuisance laws by inspecting regulated entities, investigating complaints, and taking enforcement action when necessary; and
- provides technical assistance and grants to promote voluntary practices aimed at reducing pollution and conserving water.

Governing structure. TCEQ is led by three full-time commissioners appointed by the governor, who also designates the chair. Commissioners must come from different areas of the state and serve staggered, six-year terms but are limited to serving two terms. Commissioners set the agency direction and policy, adopt rules, and make final determinations on contested permitting and administrative enforcement matters.

Funding. In fiscal 2021, TCEQ activities generated over \$653 million in revenue to the state, including \$43 million in federal funds and \$590 million from regulatory fees. The commission's operating revenue totaled nearly \$430 million in fiscal 2021, and its expenditures totaled nearly \$420 million.

Staffing. TCEQ employed over 2,600 staff in fiscal year 2021, about 1,800 of which were located in TCEQ's headquarters in Austin, and about 800 were located in its 22 regional and satellite offices around the state.

TCEQ is abolished September 1, 2023, unless continued in statute.

DIGEST:

CSSB 1397 would revise various provisions related to operations of the Texas Commission on Environmental Quality (TCEQ) and would continue TCEQ until September 1, 2035. The bill also would remove a reference to TCEQ's authorizing statute from provisions subject to the Sunset date. Revisions to TCEQ provisions would include:

- specifying commission roles, responsibilities, and training requirements;
- revising provisions related to repeat violators and penalties;
- requiring development of a diversion program for small businesses and local governments;

- requiring development of requirements for review of environmental flow standards and a corresponding work plan and timeline; and
- establishing a new standard permit for temporary concrete plants.

Commission and staff. Under the bill, the commission would be required to develop and implement policies that separated the policy-making responsibilities of the commission and the management responsibilities of the executive director and staff of the commission.

Training requirements for new commissioners would be revised to ensure that training included:

- the law governing commission operations;
- the functions, rules, and budget of the commission;
- the scope and limitation of the commission's rulemaking authority;
- the results of the most recent formal audit of the commission;
- laws related to open meetings;
- disclosure of conflicts of interest; and
- other laws applicable to members of a state policy-making body in performing their duties.

Commission members who had completed required training prior to the effective date of the bill would be required to complete additional training on subjects added by the bill. No commission member could vote, deliberate, or be counted as a member in attendance at a meeting of the commission held on or after December 1, 2023, until the member completed the required training.

The commission executive director would be required to create a training manual of all information required to be included in training and distribute the manual to all commission members each year. Each commission member would be required to sign and submit to the executive director a statement acknowledging that the member received and had reviewed the training manual.

Permits. Once a permit application for a program administered by the

commission became administratively complete, the commission would be required to post the application and any associated materials, including any maps required for the permit, on its website. If a permit application was revised or amended after the application became administratively complete, the commission would be required to post the revised or amended permit application on the website.

The commission could exempt application materials from being posted on the website if it determined that posting the materials would be overly burdensome or the materials were too large to be posted.

The commission would have to require each applicant for a permit, permit amendment, or permit renewal that required a published notice to include in the notice the address of the website where the public could access information about the permit.

The commission would be required to consider and accommodate residents of each area affected by a proposed permit, permit amendment, or permit renewal who may need assistance accessing the internet in order to review permit materials.

The commission would be required to send notice of receipt of an application for a permit that would require public notice to each state representative and state senator who represented an area in which the facility or activity to which the application related or would be located.

The commission could request that an applicant for a permit that was the subject of a public meeting or public hearing provide uniformed security at the meeting sufficient enough to provide for the safety of all attendees and orderly conduct at the meeting.

Public notices. The commission would require that each public notice issued or published by the commission or a person under the jurisdiction of the commission included, to the extent possible, the name of the permit applicant, the type of permit applied for, and the location of each proposed or existing site subject to the proposed permit.

Community outreach. The commission would be required to provide outreach and education to the public on participating in the permitting process for air, waste, and water programs within the commission's jurisdiction.

Electronic notices. For permits issued under the commission's air, waste, and water programs, the commission would be required to publish notice of a permit application on its website and could provide additional electronic notice through other means, including direct e-mail. The posting of permit information on the commission's website would be in addition to any other notice requirements.

The commission would be required to consider and accommodate residents of each area affected by a proposed permit, permit amendment, or permit renewal who may need assistance accessing the Internet in order to review permit materials.

If an applicant for a permit was required to publish notice in a newspaper, the applicant would be required to provide the commission with a copy of the published notice and an affidavit from the publisher certifying that the notice had been published and the publication met all applicable requirements, including newspaper circulation criteria.

Repeat violators and penalties. TCEQ would be required to set the number of major, moderate, and minor violations within its jurisdiction that would classify a person as a repeat violator. The executive director could review, suspend, or reclassify a person's compliance history under certain circumstances.

The bill would increase the maximum penalty for violations from \$25,000 per day to \$40,000 per day if:

- a violation involved an actual release of pollutants into the air, water, or land that exceeded levels protective of human health or environmental receptors or an actual unauthorized diversion,

taking, or storage of state water or unauthorized change in the flood elevation of a stream that deprived others of water, severely affected aquatic life, or resulted in a safety hazard, property damage or economic loss;

- the person previously committed a violation of the same nature that resulted in the assessment of an administrative penalty; and
- the commission determined that the person could have reasonably anticipated and avoided the violation.

Small business and local government enforcement diversion program.

The commission would be required to establish an enforcement diversion program for small businesses and local governments. The program would have to include:

- resources developed for the existing small business compliance assistance program;
- compliance assistance training; and
- on-site technical assistance and training performed by commission staff.

Prior to the commission initiating enforcement action for a violation committed by a small business or local government, the commission could enroll the small business or local government into the enforcement diversion program. The commission could not enroll a small business or local government into the diversion program if an enforcement action would be required under federal law. The commission could not take enforcement action against a small business or local government entity the violation that prompted enrollment in the program if the business or government had successfully completed the program.

A small business or local government entity would not be eligible to enroll in the diversion program if it had committed a violation that resulted in an imminent threat to public health, committed a major violation as defined by the commission, or had been enrolled in the program in the two years preceding the date of the violation.

The bill would apply only to violations that occurred on or after the effective date.

Environmental flow standards review. The environmental flow standards advisory group would be required to periodically review the environmental flow standards for each river basin and bay system adopted by the commission. The bill would set forth requirements for each review and would require the advisory group to transmit completed reviews and corresponding recommendations to the commission for use adopting rules.

The advisory group also would be required to develop a biennial statewide work plan to prioritize and schedule the review of flow standards as required in the bill. The work plan would establish the methodology and timeline for required reviews and would have to be provided to the commission. The first statewide work plan from the advisory group would be due on or before January 1, 2025.

The commission would be required to consider the advisory group review and work plan when altering an environmental flow standard or set-aside and when it established the schedule for rules review related to each standard or set-aside. The commission would be prohibited from reviewing rules related to an environmental flow standard or environmental flow set-aside more frequently than once every ten years unless the work plan from the advisory committee provided for a more frequent periodic review.

The commission also would be required to submit a report biennially to the advisory group on the implementation and effectiveness of environmental flow standards. The bill would establish requirements for the report. The first biennial report would be due by January 1, 2024.

The bill would repeal provisions that required abolishment of the environmental flow standards advisory group and the environmental flows science advisory committee once the commission had adopted environmental flow standards, as well as provisions requiring the abolishment of the basin and bay expert science team upon the

abolishment of the advisory group.

Temporary concrete plant permits. SB 1397 would require the commission to issue a standard permit for a temporary concrete plant that would perform wet batching, dry batching, or central mixing in support of a public works project. Plants that received the temporary permit could not support a project unrelated to the public works project and would have to be located in or next to the right-of-way of the public works project. Plants that received a temporary concrete plant permit could occupy a designated site for no more than 180 consecutive days or to supply material for a single project, but not other unrelated projects.

Air permits. The bill would allow the commission to develop by rule the criteria for determining a de minimis level of air contaminants for which certain permits identified in the bill would not be required.

If the commission held a public meeting on a permit application for which consolidated notice was issued, it would be required to hold open the open public comment period on the application and the period for which a contested case hearing could be requested for at least 36 hours after the end of the public meeting.

Temporary and indefinite permits. A person with a temporary or indefinite term permit that did not have a regular reporting requirement would be required to annually report to the commission whether the activity subject to the report was ongoing. The first reports required under this provision would be due on or before December 31, 2024.

Water districts. The commission would be required to send notice of receipt of an application for a permit that would require public notice and hearing to each state representative and state senator who represented an area inside the proposed water district's boundaries.

Effective date. The bill would take effect September 1, 2023.

**SUPPORTERS
SAY:**

CSSB 1397 would improve the transparency and efficiency of the Texas Commission on Environmental Quality (TCEQ) by strengthening its enforcement and providing for better communication with the public on its activities.

The changes proposed in the bill to require community outreach and education on the permit process, ensure online posting of all permit applications, and other management recommendations in the Sunset report would provide opportunities for stakeholders and communities to engage more meaningfully in the permit process. These steps would help to restore trust in TCEQ's work and update certain outdated processes.

The enforcement diversion program would be a positive step for those who are interested in making improvements or have committed a clerical error. Technical assistance offered through the program would help ensure that organizations better understand state regulations and reporting requirements, which could improve compliance and reduce pollutants.

Given the connection between surface waters and groundwaters, the review of environmental flow standards and adherence to a review schedule required under the bill would help ensure standards remain relevant and appropriate as growth occurs and conditions change.

Increasing fines for repeat offenders would be a helpful deterrent for those who may be slow to change practices that violate pollution regulations. The bill would recognize differences between the types of violation that could lead to a fine by allowing a lower fine for those making an administrative error and a greater fine for repeat violators releasing unallowable levels of pollutants into the environment.

Allowing TCEQ to revise the criteria for classifying an organization as a repeat violator and providing the corresponding ability to change an organization's compliance history to reflect the new classification would provide more transparency for organizations with the most serious repeat violations and would help hold bad actors accountable.

CRITICS
SAY:

CSSB 1397 should do more to improve TCEQ's performance as a regulator and its ability to hold those polluting the environment accountable, which would help to improve public trust. Penalties should be revised to better reflect the type of violation that occurred and ensure that administrative errors do not receive the same penalty as the release of a toxic substance into the air or water. Additionally, the commission should be required to take the concerns of all stakeholders into consideration when processing a permit to ensure that important voices are not left out of the process. Those that use Texas waterways for commercial fishing and recreation also should have an opportunity to provide testimony at a permit hearing that will impact the waters they use.

The federal Environmental Protection Agency (EPA) is informally reviewing TCEQ regulations, processes, and practices to ensure they align with federal requirements, including who has standing to request a judicial review of a permit decision. The Legislature could take this opportunity to address the issue in the bill to ensure federal program funding would not be jeopardized if the EPA were to make a formal decision about the policy.

TCEQ also should be required to consider the cumulative effects of polluters in close proximity to each other by reviewing criteria that evaluates the number and type of polluters in a proposed permit area to determine the concentration of polluters, the current impact to community health, and how additional pollutants in an area would contribute to the overall health of a community.

The protection of environmental flows through applicable standards is an essential TCEQ function and final decisions on these standards should be left to the commission rather than to advisory boards, who may not be scientists or subject matter experts. TCEQ's mission statement also should be revised to eliminate "economic growth" to emphasize its focus on environmental impact rather than business needs.