

Testimony before the Sunset Advisory Commission

Regarding the Review of the Texas Commission on Environmental Quality

by Kathleen Hartnett White

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I am Kathleen Hartnett White, Distinguished Senior Fellow and Director of the Armstrong Center for Energy and the Environment of the Texas Public Policy Foundation. I am also former Commissioner of TCEQ from 2001-07 and former Chairman from 2003-07. I thank you for the opportunity to provide testimony to the Sunset Advisory Commission regarding the Texas Commission on Environmental Quality (TCEQ).

I respectfully offer four recommendations to enhance the effectiveness and efficiency of TCEQ's functions in the pursuit of its mission "to protect our state's human and natural resources consistent with sustainable economic development."

Structural Reorganization

Restructure the agency from its current organization by function to an organization by environmental media: air, water, and waste. Strengthen the role of rigorous science by expanding the role and scope of the Office of the Chief Engineer. To better serve the millions of Texans and businesses affected by TCEQ actions, increase decisions and services offered through regional offices by transferring select functions of TCEQ's headquarters in Austin to regional offices. (See TCEQ Reorganizational Proposal Attached.)

Regulatory Transparency— Cost-Effectiveness Analysis

Increase regulatory transparency by clearly requiring in state law that TCEQ conduct cost-effectiveness analysis for all TCEQ rules.

Measure Performance by Environmental Outcomes in Addition to Administrative Outputs
Require more environmentally meaningful performance measures that measure environmental "outcomes" (e.g., actual improvements or deterioration in air quality or water quality) in contrast to administrative "outputs" (e.g., number of permits or enforcement orders issued).

TCEQ-EPA Roles

The Legislature's support of TCEQ's resistance to EPA's current unprecedented and unlawful encroachment on state authority is critical. TCEQ should not be expected to function as a branch of the federal government.

Structural Reorganization of TCEQ

Reorganizing TCEQ by environmental media (air, water and waste) instead of the current structural organization by function or process (permitting, enforcement and legal) could increase environmental effectiveness, efficiency, and customer service as well as reduce expenditures. Distributing more agency functions such as permitting, enforcement, remediation and public assistance to the regional or HUB offices will similarly increase responsiveness to public interest and needs. (A more detailed proposal for TCEQ proposed reorganization is attached.)

TCEQ already has taken a first step in this direction by the creation of an Office of Water in which water programs previously dispersed across multiple functional divisions have been brought together. Strategically expanding the scope and role of the Office of the Chief Engineer to cover the technical aspects of all air,

water, and waste issues could amplify the role of the highest quality of science and engineering throughout the agency. Expanding the functions of regional offices to include select permitting, remediation, compliance assistance, and legal functions would bring important TCEQ decisions closer to the people and local governments most directly impacted by the state agency decisions. As Governor Perry has said, “Decisions affecting individual Texans, in most instances, are best made by those individuals, their families, and the local government closest to their communities.”

TCEQ is now the second largest environmental agency in the world after the U.S. Environmental Protection Agency. With a staff of 3,000 FTE’s, 2010-11 total appropriations of over a billion, and 16 regional offices, TCEQ is by far the largest of all state environmental agencies. Although EPA, the TCEQ regional offices, and almost every state environmental agency are divided by media, TCEQ since 1999 has been divided by function or process: permitting, enforcement, legal, and administration.

Over time, this functional organization has led to an emphasis on the management process at the expense of results, program quality, and program management. This organization by function has engendered a highly centrally controlled, top heavy agency in Austin. The 16 regional offices provide little service other than to initiate enforcement through field investigation. Then Austin headquarters (HQ) completes the lengthy process. Even the most elementary, non-contestable authorization or permit is not available through a regional office but exclusively through Austin HQ. Contending with TCEQ decision makers exclusively in Austin is a costly burden for small businesses across the state.

TCEQ’s current broad jurisdiction, and thus size, derived from the Texas Legislature’s decision to form one large regulatory agency out of the federal and state environmental programs originally within the Texas Department of Health, the Air Control Board and the Water Commission. The newly created agency (then called the Texas Natural Resource Conservation Commission–TNRCC) covered almost all regulatory programs on air quality, solid waste management and disposal, water quality, water rights, water utilities, and limited regulation of groundwater. The original TNRCC was structured according to the three major environmental media created by law (air, water, and waste) and two auxiliary divisions covering field offices/enforcement and administration.

In the late 1990s, the then TNRCC completely restructured the agency’s organization, changing to a division by function. Organization by process, function or type of activity rather

than subject matter was a popular organizational scheme at the time for both private corporate entities and governmental entities. In 1999, TNRCC reorganized into four functional divisions: permitting, enforcement, legal, and administration. The Office of Legal Services had grown to a division of almost 100 lawyers by 2007. The Office of Compliance and Enforcement (OCE), intended to oversee field activities and enforcement in the regional offices, has grown to a huge bureaucracy in the Austin headquarters.

After more than 10 years, this organizational structure based on function instead of program subject matter (e.g., air quality), has led to an inadvertent emphasis on process for the sake of process to the detriment of results, program quality, efficiency and effectiveness. Authority and responsibility for implementation of the programs is fractured.

TCEQ could strategically amplify the prominence of high quality science grounding the thousands of regulatory decisions made each year by the agency. The Current Office of Chief Engineer (OCE) covers all federally mandated State Implementation Plans (SIPs) for ozone and the other National Ambient Air Quality Standards (NAAQS) and toxicology. In a newly restructured TCEQ, the scope of the OCE could be enlarged to cover the technical aspects of all air, water and waste issues and include toxicology, monitoring and modeling, information technology and homeland security.

TCEQ has long recognized the fundamental role of science and engineering in its mission. With rare exceptions, federal and state environmental laws mandate science as the foundation of regulatory environmental protection. Most federal and state statutes establish general, narrative environmental standards to protect human health and require EPA or TCEQ to establish the exact and typically numeric environmental standards or emission limits by scientific process and engineering principles.

Regulatory Transparency— Cost-Effectiveness Analysis of TCEQ Rules

Existing Texas law should be clarified, broadened, and simplified to require a cost-effectiveness analysis of all TCEQ rules. As a basic step in rulemaking, cost-effectiveness analysis in no way precludes the most stringent or high cost regulation. The process merely encourages efficiency and full disclosure. (See “Time for Regulatory Transparency,” TPPF Policy Perspective, May 2009.)

Assessments of the financial cost and environmental benefits—through cost-effectiveness analysis—should be a more clearly required component of TCEQ rulemaking. Analysis

of the cost of compliance with a rule and the palpable environmental benefit intended by the rule (how much improvement in air quality or reduction in specific emissions) will help the rule maker (TCEQ) design more targeted rules to maximize genuine environmental benefit at the least cost.

Provisions enacted in 1997 (Texas General Government Code 2001.025) require a Regulatory Analysis of Major Environmental Rules. TCEQ, however, has never utilized and consistently resisted this analysis when challenged to do so. This is an issue in TCEQ's current rulemaking for Oil and Gas Production Sites (OGS), which would transform the regulatory system for all OGS, imposing multiple new complex requirements on over 9,000 sites across the state.

The federal government and many states already require assessments of the cost and benefit of regulation, but Texas has not similarly required it for private sector impacts. The Texas Administrative Procedures Act requires assessment of fiscal implications for state and local government but not for the public or regulated entities.

Full disclosure of cost-effectiveness is particularly needed in environmental regulations, the most rapidly expanding area of state and federal regulation. Environmental regulations now affect every moment of daily life and all goods and services. TCEQ implements and enforces roughly 6,000 regulations. Although multiple benefits may flow from these rules, there is no accessible mechanism for tracking cost and effectiveness. The cost and results of the growing edifice of environmental regulation remain nebulous.

Cost-effectiveness analysis is usefully distinguished from cost-benefit analysis. The latter typically quantifies and assigns a dollar value to both the costs and the social benefits of regulation. For example, the analysis would compare the cost of using a specific pollution control technology compared to an estimated dollar value assigned to the health benefits supposed to result from an amount of pollution reduction. Cost-effectiveness analysis, in contrast, compares the dollar cost of regulatory compliance with the intended result (e.g., amount of an emission reduced).

Appropriately conducted, cost-effectiveness analysis of proposed TCEQ rules can reduce cost and strengthen environmental protection. More prudent, targeted rulemaking will save state expenditures as well as enhance legislative oversight of agency implementation of state and federal law. Texans already benefit from strong measures for fiscal transparency providing full disclosure of state revenues and expenditures. Texans equally deserve regulatory transparency—full disclosure of the cost-effectiveness of environmental rules.

Measure Performance by Environmental Outcomes

Regulators and legislators struggle to devise meaningful measures to gauge whether an agency is meeting its statutory responsibilities. Typically, performance measures calculate administrative outputs such as number of investigations, enforcement orders, sum of fines, volume of permits, etc. Although a useful accounting of activities, quantified outputs reveal little to nothing about whether agency rule, permit, and enforcements are, in fact, genuinely and/or optimally effective.

Are TCEQ's rules and permits leading to steadily improving environmental conditions across all media (air, water, and waste) in all regions of Texas? Although TCEQ gathers hordes of data relevant to answering this question, there is no system for analyzing or consolidating this data in a way that provides Texans with a report on the historical trends and current conditions of the "state of the Texas environment."

Developing a practically viable, reasonably accurate, meaningful system of environmental indicators over time is an extremely complex task but a worthy goal. Texans need to see that their efforts, expenditures and needs are being served by the thousands of federal and state environmental rules under which they live. Regulators and regulated entities need a clearer sense of whether the current regulatory methods are working. If current approaches are not working or no longer needed, change, based on current data and new technology, is in order.

Federal and state regulators have grappled with this need to develop meaningful measures of environmental conditions over time. Several years ago, the EPA published an extensive report on the topic. This EPA project, apparently, was dropped under new leadership.

Texas, through TCEQ, could develop meaningful measures of environmental outcomes. The legislature could ask TCEQ to develop such a system in conjunction with an advisory group drawn from the private sector, academia, and other interest groups.

TCEQ-EPA Roles

Although not within the express purview of the Sunset Commission review of TCEQ, the high stakes of the current unprecedented disputes between TCEQ and EPA warrant some comments.

In the over 25 years during which I have observed EPA actions, I have never seen such quantity, scope, stringency in

EPA actions, implemented at such speed, and with so little accommodation to long-acknowledged state authority under the federal and Texas Clean Air Acts. At an annual meeting of the Environmental Council of the States (ECOS) in 1997, state environmental commissioners handed out T-shirts with the slogan, “the states are not branches of the federal government.” Under the current administration of EPA, that slogan is starting to feel like wishful thinking.

As a former chairman and commissioner of TCEQ, I am most troubled at EPA’s dismissal of basic restraints of the federal Administrative Procedures Act (APA) in many of its recent actions. The APA imposes basic restraints on the method and timeframes under which EPA can exercise authority to bind states or regulated entities. A glaring example is EPA’s regulatory declaration that states have 6-8 months before mandatory regulation of greenhouse gases (in Prevention of Significant Deterioration permits) to begin January 2, 2011. The federal Clean Air Act allows states two to three years to absorb a new federal requirement. The current EPA aggressively interprets its authority to coerce states into a timeframe that would force TCEQ to violate state law or EPA will freeze TCEQ authority to issue permits.

Texas asked the D.C. Circuit of Appeals for an emergency stay of the EPA greenhouse gas rules effective January 2, 2011. EPA roguely declares that after January 2, 2011, TCEQ

must regulate CO2 in all PSD permits or EPA will withdraw the state’s authority to issue the permits through A Federal Implementation Plan (FIP). Affidavits appended to the state’s legal motions estimate that 167 construction projects in Texas to expand or create a business would be frozen. Our Attorney General concludes that Texas’ compliance with EPA’s rushed dictates would violate the U.S. and Texas Constitutions as well as the federal and Texas Clean Air Acts. On December 9, the federal court denied our state’s motion for an emergency stay of EPA’s January 2 effective date for greenhouse gas regulation. The state’s original legal challenge to the four EPA greenhouse gas rules promulgated over the last will now proceed on the merits.

The state’s many legal challenges to EPA’s actions of the last two years, of course, are regrettable and a major burden on the private economy of Texas. TCEQ and the state of Texas, however, face a pivotal choice: to legitimize EPA’s unlawful demands by acquiescence or to fight to preserve the constitutional and statutory restraints on agency actions. The Supreme Court has previously ruled that federal agencies cannot “commandeer” states—force states to do their bidding. Indeed, states are not branches or field offices of the federal government. The Texas legal battle must be fought or the U.S. and Texas will begin to resemble the likes of Venezuela. ★

About the Author

Kathleen Hartnett White joined the Texas Public Policy Foundation in January 2008. She is a Distinguished Senior Fellow-in-Residence and Director of the Armstrong Center for Energy and the Environment.

Prior to joining the Foundation, White served a six-year term as Chairman and Commissioner of the Texas Commission on Environmental Quality (TCEQ). With regulatory jurisdiction over air quality, water quality, water rights and utilities, and storage and disposal of waste. TCEQ’s staff of 3,000, annual budget of over \$600 million, and 16 regional offices make it the second largest environmental regulatory agency in the world after the U.S. Environmental Protection Agency.

Prior to Governor Rick Perry’s appointment of White to the TCEQ in 2001, she served as then-Governor George Bush’s appointee to the Texas Water Development Board, where she sat until appointed to TCEQ. She also served on the Texas Economic Development Commission and the Environmental Flows Study Commission.

