

TEXAS DEPARTMENT OF WATER RESOURCES

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SUMMARY

The Texas Department of Water Resources has functioned as the state's principle water agency since 1977. Prior to 1977, the state's water resources were under the jurisdiction of three separate agencies: the Texas Water Rights Commission, the Texas Water Quality Board, and the Texas Water Development Board. The authorities and functions of these three agencies were consolidated during the 65th Legislative Session. The new agency was established with legislative, judicial, and executive functions, which is reflective of our general form of government. The Texas Water Development Board, a six-member part-time board, was retained as the legislative, or policy-making body. The Water Rights Commission, composed of three full-time members, was renamed the Texas Water Commission (TWC) and sits as a quasi-judicial body that rules on permits in accordance with established policy and statutes. The agency employs an executive director and his staff to carry out policy and provide administrative and technical support.

The TDWR carries out various water-related functions for the state. First, the agency is responsible for developing and protecting the state's water resources through financial assistance programs such as the Water Development Fund.

Second, the agency applies its major effort to regulating the use and quality of state water through a permitting and approval process. Before an entity can use state water, a water use permit must be obtained. Permits requiring that certain quality standards be met are also issued for many facilities discharging wastewater, disposing of industrial solid waste, or operating underground injection wells. Water district creation and bond issues must also be approved by the agency.

Third, TDWR is responsible for enforcing its permits. The agency operates 14 district offices around the state. In a related effort, the agency's enforcement division also oversees the state's portion of the federal "Superfund" program which was developed to clean up abandoned hazardous waste sites that are a serious threat to health or the environment.

Finally, the agency engages in various technical support activities, primarily water planning and data collection. In this regard, TDWR maintains a comprehensive, long-term plan for the orderly development and management of water resources.

Water in Texas is a scarce resource of basic importance to the state's citizens and economy. For this reason it is necessary that the resource be properly

used and protected. The management functions of the TDWR continue to be needed to provide this protection.

The department has generally carried out its functions in an efficient and effective manner. However, if the legislature decides to continue the agency, various improvements could be made in the operation of these functions. In addition, an analysis of alternatives to the current operations of the agency indicated that two alternatives exist where potential benefits outweighed disadvantages. Three issues were identified which offered both a change in state policy as well as major advantages and disadvantages.

Approaches for Sunset Commission Consideration

I. MAINTAIN THE AGENCY WITH MODIFICATIONS

A. Policy-making Structure

- 1. The Sunset Commission's basic conflict-of-interest provisions defining public members should be applied to the Texas Water Commission.**

Commissioners of the TWC can be considered "public" members since the statute requires only that they be selected from different regions of the state. Standard language of the Sunset Commission places conflict-of-interest provisions on public members to ensure that they have no ties with the regulated group. Such provisions are lacking in the TWC statute and should be added to conform to the basic sunset approach.

- 2. The Texas Water Development Board should be restructured to specify appropriate categories of representation.**

Currently, the only statutory requirement for members of the Water Development Board is that the members be drawn from different parts of the state. This board was given broad policy-making authority in the 1977 merger of the three water agencies. To help ensure that the diverse interests affected by the board's policies are represented, the board should be increased from six to nine members drawn from specific geographical regions and with the following backgrounds: law, engineering, farming or ranching, banking, industry, environmental concerns, and the general public.

- 3. Board members to the Lower Neches Valley Authority and the San Jacinto River Authority should be appointed by the governor instead of the Water Development Board.**

The board members of these two river authorities are appointed by the Water Development Board, while appointments to the great majority of river authorities, as well as most state agencies, are handled by the governor's office. No compelling reason could be found for maintaining this atypical appointment situation. Since the governor is well equipped to do the job, the appointment responsibility for these two river authorities should be transferred to his office.

B. Overall Administration

1. **Administrative roles and other responsibilities of the Texas Water Commission and the executive director need to be clarified.**

The organizational structure of the department is unique in that it contains two boards, with the Texas Water Commission being set up essentially as an agency within an agency. This structure results at times in unclear responsibilities and tensions between the TWC and the executive director's staff. The problem could be lessened within the existing framework by requiring the TWC and the executive director to develop joint policies and procedures for areas of conflict or unclear responsibility.

C. Evaluation of Programs

1. **Management of the Water Development Fund could be improved through greater use of expert financial advisory services.**

Currently, the agency contracts with its financial advisor just prior to each bond sale on the basis of lowest competitive bid. Most state agencies that are authorized to manage funds execute long-term contracts with their financial advisors. These contracts are awarded on the basis of services provided, and they make available a higher degree of financial expertise than that received by TDWR. It was determined that the Water Development Fund's management could benefit from this higher level of expertise.

2. **The statute should be amended to eliminate mandatory hearings for uncontested water use cases.**

The statute requires the Texas Water Commission to hold hearings for water use permits whether they are opposed or not. Mandatory hearings are not required for other types of permits that are uncon-

tested. This same approach could be used for water use permits and would result in a savings of hearing examiner time.

3. **The Texas Department of Water Resources should be required to collect fees to offset the cost of regulating industrial solid waste and underground injection wells.**

Of the three water quality permitting programs administered by the agency, only one, the wastewater discharge program, is supported in any meaningful way by fees. Generally speaking, some portion of the cost of regulating an industry or business should be borne by the regulated group. To address this inconsistency, the agency's statute should be amended to require the establishment of a fee system in these other two areas.

4. **The Texas Department of Water Resources should be authorized to assess administrative penalties.**

Currently, the department does not have the statutory authority to assess administrative penalties or fines. This authority would provide a mechanism to address compliance problems quickly, and could aid the agency in its efforts to secure continuing delegation of the federal hazardous waste program. For these reasons, the agency's statute should be amended to authorize the use of administrative penalties.

5. **A mandatory enforcement hearing before the Texas Water Commission should be required for chronically non-compliant permittees.**

It appears that a substantial number of permittees under the agency's jurisdiction -- particularly municipal wastewater facilities -- tend to remain out of compliance with their permits over extended periods of time. By requiring the agency to hold mandatory enforcement hearings, triggered automatically after the passage of a predetermined period of time such as four years, these violators would be sure of facing specific enforcement action and potential litigation through the attorney general's office. The agency's statute should therefore be amended to require mandatory enforcement hearings before the TWC in situations where chronic problems exist.

D. Public Participation

1. **Memoranda of understanding between TDWR and other state agencies should be processed through the APA rulemaking procedure.**

Several state agencies are responsible for administering the state's environmental protection laws. "Memoranda of understanding" are developed between agencies to address certain situations where jurisdiction needs to be clarified. These memoranda of understanding possess many of the characteristics of rules as defined by the Administrative Procedures Act. The agency's statute should therefore be amended to require that these memoranda of understanding be processed through the APA's formal rulemaking procedure, thereby allowing the opportunity for public input through the APA hearings requirement.

II. ALTERNATIVES

- 1. Amend the statute so that the executive director serves at the will of both the Water Development Board and the Texas Water Commission.**

The agency's executive director serves at the will of the Water Development Board. It has been suggested that this situation can cause the executive director and his staff to be unresponsive to the needs of the Water Commission. By making the executive director responsible to both boards, a greater degree of sensitivity to the commission by the executive director and his staff is ensured.

- 2. Transfer the public interest advocate operation of the agency to the new Office of Public Utility Counsel.**

Currently, the public interest advocate serves at the pleasure of a majority of the Water Development Board and the Texas Water Commission. This situation could make it very difficult for the advocate to take a position on behalf of the public interest, but contrary to the position of the agency. By transferring the water advocate to the Office of Public Utility Counsel (an independent agency), the independence of the advocate to intercede on behalf of the general public could be enhanced.

III. OTHER POLICY CONSIDERATIONS

- 1. Should the PUC's jurisdiction over water and sewer rates be transferred to the Texas Department of Water Resources.**

Jurisdiction over water and sewer rates and services is split between the PUC and the TDWR. During the 68th Legislature, S.B. 884 which was vetoed by the governor, proposed the transfer of the PUC's

jurisdiction over private water and sewer companies to the TDWR. It could be argued that this transfer would assist in developing a coordinated water policy, ensure a consistent ratemaking approach, and free up more of the PUC's time for dealing with the state's large electric and telephone utilities. On the other hand, the argument could be made that the PUC has a proven track record in dealing successfully with the private water and sewer utilities, and that its regulation over rates for these and other investor owned utilities ensures a consistent ratemaking approach for the private sector.

2. Should the portion of the state's hazardous waste program currently under the jurisdiction of the Department of Health be transferred to the Department of Water Resources.

The Health Department has jurisdiction over municipal hazardous waste, and TDWR has jurisdiction over the much larger category of industrial hazardous waste. If responsibility over all hazardous waste were consolidated in TDWR, confusion among the general public and the regulated industry over the specific division of authority would be eliminated, and administrative costs could possibly be reduced. An opposing view would be that the program split is now defined and understood adequately, and that consolidation would merely cause new confusion in other areas.

3. Should the Texas Water Commission be given the authority to review rates set by river authorities when it desires.

River authorities are agencies established by the legislature, but they receive no appropriations and are not subject to the state controls placed on most other agencies. River authorities control a large portion of the state's water rights and a large part of their income is derived from water sales to cities, industries and irrigators. By authorizing the Water Commission to review rates charged by river authorities for their water sales, the state could exercise a greater degree of control over these entities. However, it could be argued that such control is unnecessary since river authorities are subject to independent annual audits, and since most parties unsatisfied with rates charged by these agencies can already petition the TDWR for rate review under existing state law.

AGENCY EVALUATION

The review of the current operations of an agency is based on several criteria contained in the Sunset Act. The analysis made under these criteria is intended to give answers to the following basic questions:

1. Does the policy-making structure of the agency fairly reflect the interests served by the agency?
 2. Does the agency operate efficiently?
 3. Has the agency been effective in meeting its statutory requirements?
 4. Do the agency's programs overlap or duplicate programs of other agencies to a degree that presents serious problems?
 5. Is the agency carrying out only those programs authorized by the legislature?
 6. If the agency is abolished, could the state reasonably expect federal intervention or a substantial loss of federal funds?
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BACKGROUND

Responsibilities and Structure of the Agency

Prior to 1977 three agencies handled the state's water responsibilities: the Water Development Board, the Water Quality Board, and the Water Rights Commission. In 1977, the responsibilities of these agencies were combined in the Texas Department of Water Resources. Since that time the TDWR has exercised broad authority over many aspects of water development and management in the state. To outline major responsibilities, TDWR assists local governments develop water and sewer projects through the provision of grants and loans. The agency also controls the use of state water as well as the quality of that water. A person or entity wishing to use state water or to discharge waste into water must generally get a permit for that purpose from the agency. Related to the control of water quality, the department regulates the disposal of industrial solid waste through permits and registration. Before many water districts such as municipal utility districts can be formed, the agency must approve their creation as well as their bond issues in many cases. In addition to issuing permits and giving approvals related to water use and water quality, the TDWR enforces these actions for the state and can oversee corrective action in case that becomes necessary.

The agency is structured in a unique fashion to carry out its permitting, enforcement, and other responsibilities. By act of the legislature, the TDWR was structured into three parts. The Texas Water Development Board was retained as the "legislative" part of the agency with the responsibility of establishing policy for the entire organization. The Water Rights Commission was retained with the new name of the Texas Water Commission to act as the "judicial" branch of the agency. In this capacity the TWC holds quasi-judicial hearings for the purpose of issuing permits and making other judicial actions for the agency. The executive director of the agency and his staff constitute the "executive" part of the agency. The executive staff carries out the policies of the Water Development Board and drafts recommended permits and other recommended actions for the TWC. The executive director serves at the pleasure of the Water Development Board. This structure is supported by a total of 933 authorized staff and an operating budget of approximately \$30 million in fiscal year 1983. Funding in that year came from the following sources: 59 percent from general revenue; 38 percent from federal funds; and three percent from special funds. An organization chart, a chart

showing agency expenditures by various categories, and a list of district offices are included on the following three pages.

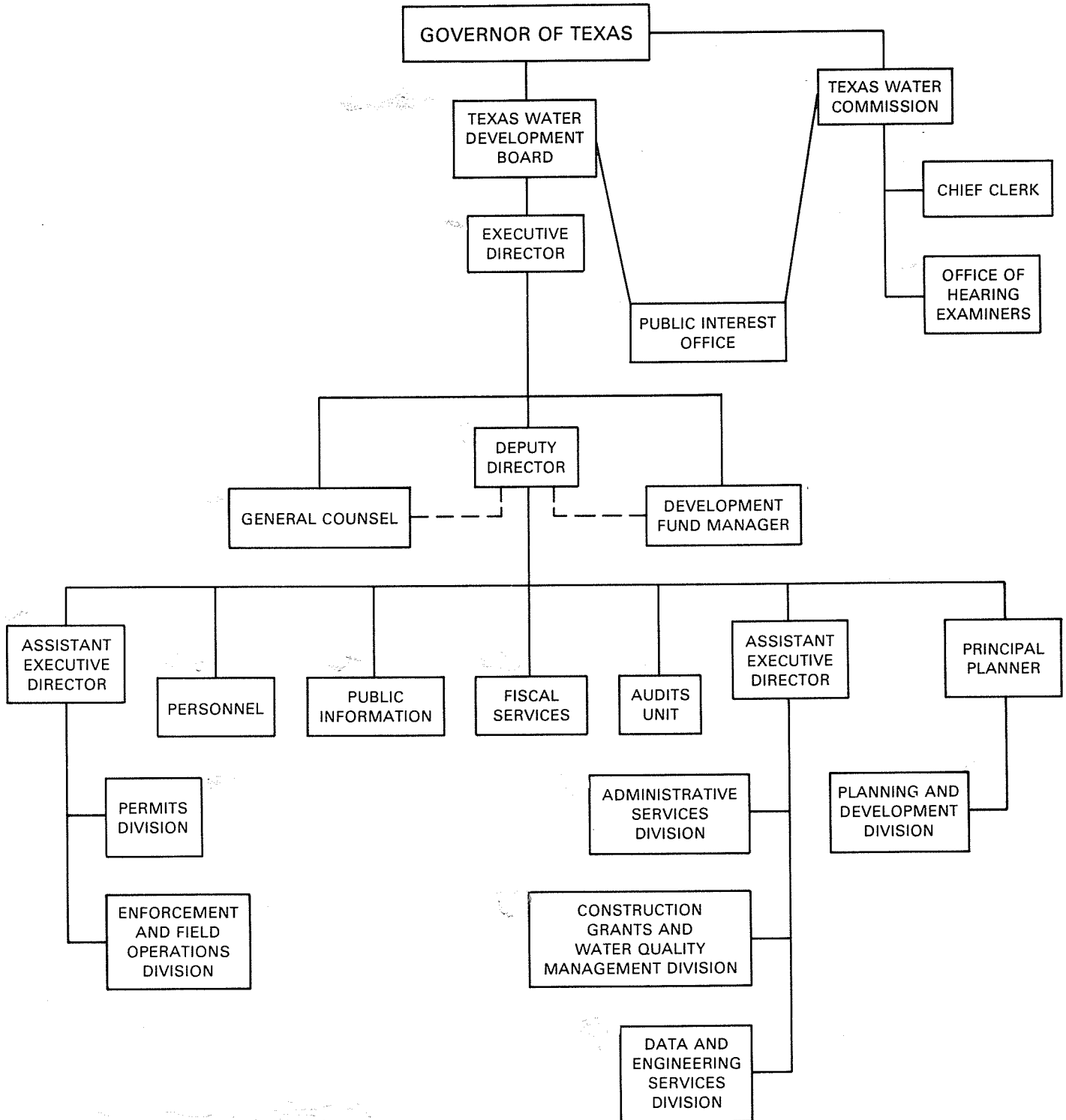
Guidelines for Reviewing the Agency

To evaluate an agency of TDWR's size in a meaningful way, it is necessary to focus carefully on the areas to be emphasized in the review. Several guidelines were developed for this purpose. First, the review was seen as an opportunity to make sure that the agency has the necessary authority and procedures in place to deal with the major problems that it may face in future years. Agency operations thought to relate to potential problem areas were thus stressed. Second, the TDWR has an unusual history and structure in that the agency is a combination of three separate agencies existing prior to 1977. Attention was given to ensuring that a proper balance of prior agency responsibilities was achieved when the merger occurred. Finally, various other state task forces or committees are actively studying aspects or issues relating to TDWR's operation. Two such study groups are the Governor's Task Force on Hazardous Waste and the Joint Committee on Water Resources of the house and senate. Less staff time was devoted to areas under study by such groups because of this attention.

With these guidelines in mind, areas of particular concentration were selected. Information for this selection was collected through interviews with agency personnel, and interviews with interest groups and knowledgeable members of the public. Concerns raised by interest groups having experience with the agency were particularly useful as indicators of where potential problems might exist. Interest groups, for example, pointed out concerns with the agency's policy-making structure and enforcement activities, and these areas were addressed in the report.

After issues were identified through interest groups and other means, relevant areas for analysis were further researched and necessary data collected. Recommendations, alternatives, and policy considerations were finally developed from this information. These suggestions are set out, along with other explanatory information about the agency, in the sections that follow.

TEXAS DEPARTMENT OF WATER RESOURCES

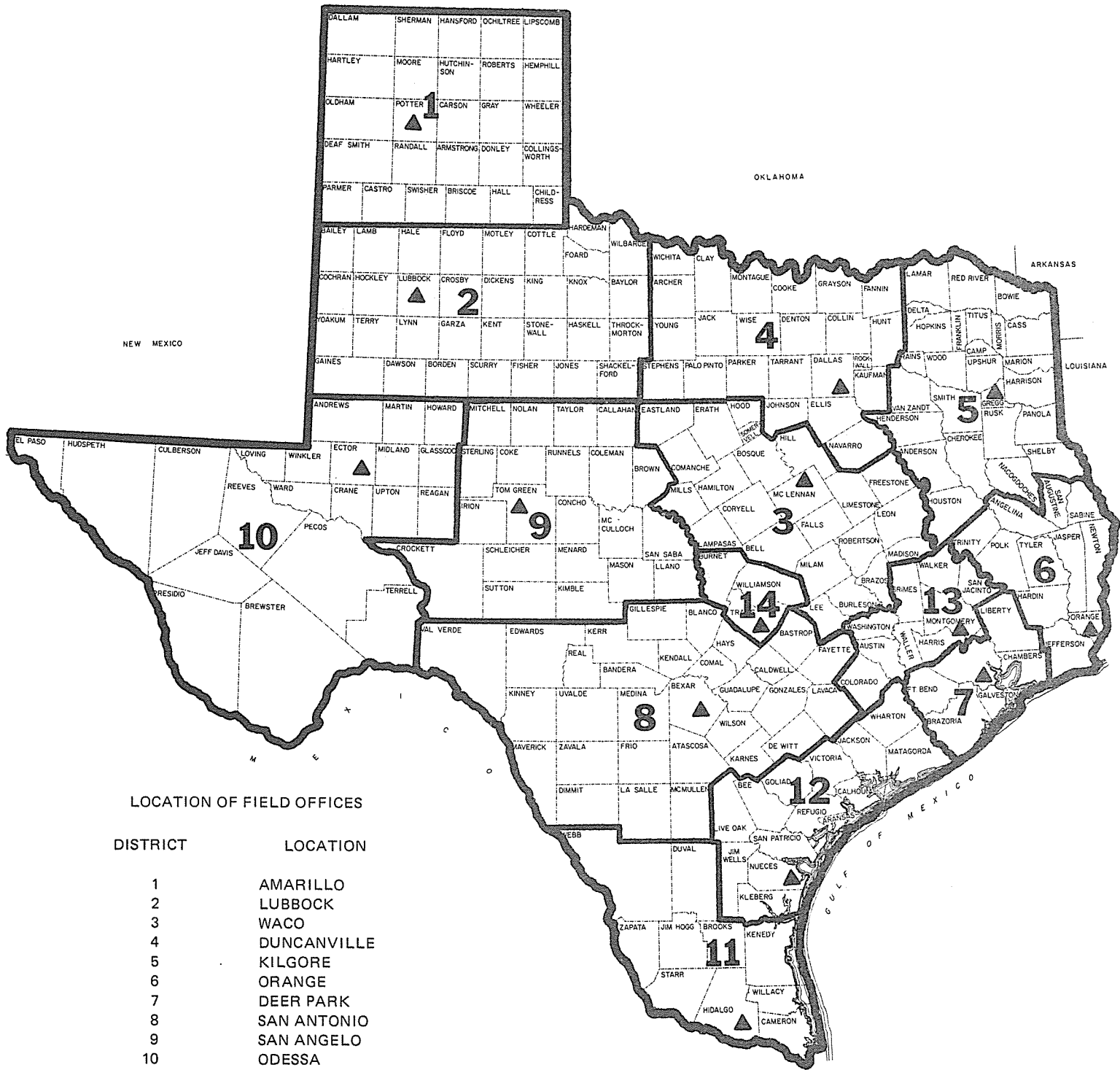


TEXAS DEPARTMENT OF WATER RESOURCES

Program Areas 1983 Expenditures

\$29,955,861

Abandoned Hazardous Waste Site Cleanup					\$1,520,642
Enforcement					\$5,534,606
Permits					\$5,893,946
Waste Water 19%	Water Use 39%	Solid Waste 21%	Water Districts 8%	Injection Wells 13%	
Water Project Financial Assistance					\$3,303,935
Planning and Technical Support					\$7,821,376
Administration					\$5,881,356



LOCATION OF FIELD OFFICES

DISTRICT	LOCATION
1	AMARILLO
2	LUBBOCK
3	WACO
4	DUNCANVILLE
5	KILGORE
6	ORANGE
7	DEER PARK
8	SAN ANTONIO
9	SAN ANGELO
10	ODESSA
11	WESLACO
12	CORPUS CHRISTI
13	SPRING
14	AUSTIN
WATERMASTER	WESLACO EAGLE PASS

REVIEW OF OPERATIONS

This section covers the evaluation of current agency operations undertaken to identify any major changes which should be made to improve the efficiency and effectiveness of those operations if the agency is to be continued. The evaluation is divided into three general areas dealing with: 1) a review and analysis of the policy-making body; 2) a review and analysis of the overall administration of the agency; and 3) a review and analysis of the operation of specific agency programs.

Policy-making Structure

The evaluation of the policy-making structure was designed to determine if the current statutory structure contains provisions that ensure adequate executive and legislative control over the organization of the body; competency of members to perform required duties; proper balance of interests within the composition; and effective means for selection and removal of members.

The Texas Department of Water Resources is unique in that its statute sets up two separate boards within its structure: the Texas Water Development Board and the Texas Water Commission. The Water Development Board is responsible for setting overall policy for the agency. This board is composed of six part-time members who must come from different geographical areas of the state. The Texas Water Commission is not statutorily involved in setting agency policy but instead holds hearings on permits and other agency matters requiring quasi-judicial attention. The TWC is a three-member full-time board whose members must also come from different geographical areas of the state. No qualifications other than those already mentioned are placed on members of either board. Members are appointed by the governor and confirmed by the senate for six-year terms. Findings and recommendations related to both boards are set out below.

Texas Water Commission

The analysis showed that, before the water agencies were merged in 1977, the Water Rights Commission was composed of three full-time members chosen by statute from different geographical areas of the state. The members were required to have "some knowledge of water law." The commissioners held quasi-judicial hearings to determine primarily who could use state water. After the merger, the name of the commission was changed from the Water Rights Commission to the Water Commission. The basic structure of the board was maintained, though the requirement concerning "some skill in water law" was

deleted. The quasi-judicial function of the board was also retained, and the range of cases that it could hear was expanded to pick up permits from the abolished Water Quality Board. These included waste water discharge, industrial solid waste, and underground injection permits.

The current structure of the TWC was judged to be generally adequate. However, it was determined that statutory qualifications for TWC membership could be improved as follows.

The Sunset Commission's basic conflict-of-interest provisions defining public members should be applied to the TWC.

The statute setting up the current Texas Water Commission makes no requirement on qualifications of commissioners other than directing that they be chosen from different geographical areas of the state. Since members can be chosen from the general population, they are in essence "public" members.

As a general principle, public members should be free of any ties with the regulated community that are likely to cause conflicts of interest. This principle is seen clearly in the statute setting up the Public Utility Commission, an agency very similar to the TWC in its board structure and regulatory nature. That statute contains strict prohibitions against potentially conflicting interests. Also, the standard language of the Sunset Commission which defines a public member sets out such prohibitions. Under sunset language, a public member cannot be, for example, an employee, manager, or owner of an organization regulated by the agency.

The statute setting up the public membership for the Texas Water Commission does not contain this type of conflict of interest language. The statute should be amended to define TWC members in a manner consistent with the Sunset Commission's definition of public membership. This modification would not affect current members.

Texas Water Development Board

The Water Development Board was established in the state constitution in 1957. Its specific composition was left up to the legislature. The board was given the responsibility of making loans to local entities for water development projects. To carry out this responsibility, the legislature required that there be six board members from different geographic regions of the state. Prior to the merger, the

statute setting up the board required that it be composed of two members from the public at large and one member from each of the following fields: law, engineering, farming or ranching, and public or private finance.

In 1977 the role and composition of the Water Development Board were changed with the merger of the water agency functions. In the merger, the Water Quality Board was eliminated. As previously pointed out, the Water Rights Commission was retained as the judicial arm of the agency. The Water Development Board was also retained to function as the broad policy board of the new agency.

The review indicated that the structure of the board developed in 1977 could be improved, and that one of its specific responsibilities could be eliminated. These recommendations are outlined below.

The Texas Water Development Board should be restructured to specify appropriate categories of representation.

When the Water Development Board was assigned the responsibility of being the chief policy-making body for the new water agency, its structure was maintained at six part-time members. However, qualifications other than members being from different geographical areas of the state were removed. In addition to its traditional role in the development of water resources, as head of the new agency the board also assumed policy-making responsibility for the areas of water quality and water use. The new agency's water quality responsibilities, overseen by the board, included among other things the issuance of permits to dispose of municipal or industrial wastewater and industrial solid waste — much of the latter being hazardous. The agency's water use responsibilities concerned the evaluation of permits to use or divert state water. In fiscal year 1983, the agency's operating budget was approximately \$30 million. Of this amount, roughly half of the expenditures related to the water quality area, with much smaller percentages allocated for water use and water development and planning.

A board appropriately structured for this broad policy-making role should include persons having backgrounds in business, industry, and the environment, as well as representatives of the general public. Since water is a statewide concern and agency activities occur across the state, it is appropriate that board members be drawn from different geographic regions.

Analysis of the board's structure indicates three problems. First, as stated above, the statute does not currently require membership from specific backgrounds. Without specific statutory guidelines, actual membership on the board since 1977 has included two persons with an agriculture background, a banker, an engineer, an attorney, and five persons in business-related areas (oil and gas, car sales, chamber of commerce, road construction, electric cooperatives). From this it can be seen that persons concerned with water policy in business and industry have been well represented on the board. Persons with a strong background in environmental protection have been lacking, however. A second problem with the board's composition is that it lacks clear guidelines for public membership. According to sunset guidelines, at least one-third of a board's membership should be public members. Further, to be eligible as a public member under the sunset approach, a person generally cannot be part of the regulated community. The Water Development Board oversees policy development in large areas of state regulation. As such, a provision to ensure that a portion of the board is composed of true public members can be reasonably applied.

A final problem concerns geographic representation on the board. As stated previously, the statute does require that members of the board come from different geographic regions. While this is appropriate, analysis indicates that two current board members come from Dallas. This fact would appear to violate the intent of the law.

The three problems mentioned above all result from the lack of specificity in the statute defining the Water Development Board's composition. Water agencies in other western states and available studies were reviewed to determine whether this lack of statutory specificity was common or considered desirable. The analysis indicated that there are two states besides Texas which have single boards dealing primarily with overall water policy. These states are California and Oklahoma. Both of these states specify membership categories. For example, Oklahoma's Water Resource Board is composed of nine members: three members from the public at large and one member from each of the six congressional districts of the state having backgrounds in recreation, industry, irrigation, municipal concerns, agriculture, and soil conservation interests. The one study that directly addressed the question of board membership in Texas was the report of the Joint Committee on Government Operations. This report originally recommended the combination of water agencies that occurred in 1977. However, the report suggested a

different membership from that which was finally adopted. The recommended membership included one person from each of the following six areas: law, engineering, farming or ranching, banking, environmental interests, and the public at large. This information indicates that it is not unusual for a more specific approach to be applied or considered for water board makeup.

It is recommended that the composition of the Water Development Board be laid out with more precision in the statute. An appropriate composition would include nine members. Four of these nine would have the pre-1977 backgrounds specified for the old Water Development Board: law, engineering, farming or ranching, and public or private finance. The fifth and sixth members would be experienced in industry and environmental concerns. The remaining three members would be from the public at large and would be defined according to the sunset guidelines for public members. To ensure proper geographic representation, the statute should also specify that five of the nine members come from the following five areas of the state: Gulf Coast, Trans-Pecos, Central Texas, Northeast Texas, and Panhandle-South Plains. The remaining four members should be drawn from areas judged to be most appropriate by the governor and the senate.

Board members to the Lower Neches Valley Authority and the San Jacinto River Authority should be appointed by the governor instead of the Water Development Board.

During the review, it was noted that one responsibility of the Water Development Board with respect to river authorities could be reasonably eliminated. River authorities are independent state agencies established by the legislature. Most river authorities came into being during the depression years and have as their primary activities the distribution and supply of water, flood control, and water quality control. Presently, there are approximately 20 river authorities serving the major river basins in Texas.

River authorities are governed by boards of directors ranging in size from three to 24 members. Directors for a few authorities are elected from their local area or appointed by governing bodies of cities or counties. However, the directors for a great majority of authorities are appointed by the governor. Only the appointments to the Lower Neches Valley Authority and the San Jacinto River Authority are handled by the Water Development Board.

The reason for treating the state appointments to these two authorities differently from the great majority of other state appointments could not be determined. There appears to be no present advantage in continuing to make the appointments to these two boards through the TWDB instead of the governor's office.

Given the governor's traditional role in making river authority and other appointments and the availability of an experienced appointments staff, it is reasonable to extend the governor's appointment powers to the Lower Neches Valley and the San Jacinto river authorities. The enabling legislation of these two authorities should be amended so that all future appointments to their boards are made by the governor with confirmation by the state senate.

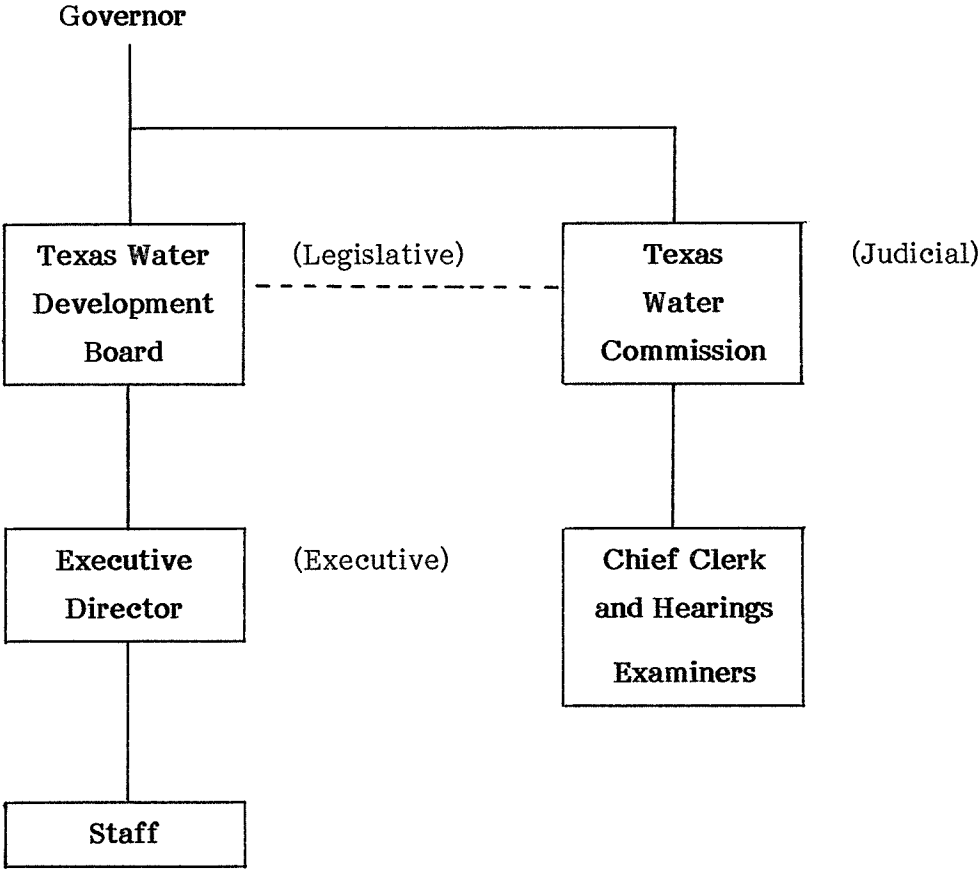
Overall Administration

The evaluation of the overall agency administration was designed to determine whether the management policies and procedures, the monitoring of management practices and the reporting requirements of the agency were consistent with the general practices used for internal management of time, personnel, and funds. The review indicated that elements of the agency's operation related to administration could be improved, as indicated below.

Administrative roles and other responsibilities of the Texas Water Commission and the executive director need to be clarified.

The merger in 1977 set up the Water Development Board as the agency's policy or "legislative" body, with the Texas Water Commission being retained as the agency's independent "judicial" arm. The executive director of the agency was assigned the agency's "executive" or basic administrative functions. To understand the administrative relationships involved in this merger, it is helpful to see the organizational framework set up for the agency. A simplified organization chart is presented on the next page.

**Simplified
Organization Chart
of the
TEXAS DEPARTMENT OF WATER RESOURCES**



In analyzing the administrative elements of the TDWR, there are two items of major importance which can be seen from the chart. First, the executive director is employed by the Water Development Board and as such is not under the control of the Texas Water Commission. The executive director is given the statutory responsibility of managing the administrative affairs of the entire department, however. The second element is the general independence of the TWC from the rest of the agency. The statute sets up this independence by creating the TWC "as an agency of the state" to carry out the department's quasi-judicial responsibilities. The statute also authorizes the TWC to employ a chief clerk, and establishes an office of hearings examiners "under the exclusive control of the commission." Final budget approval for the TWC and the rest of the agency, however, is vested in the Water Development Board.

In simplified terms, the 1977 merger resulted in the creation of an agency within an agency. Several problems could be anticipated as likely to occur from this type of structure. First, the executive director's authority over the department as a whole could potentially come into conflict with the TWC's apparent authority as a separate agency. Second, the executive director's independence from the TWC combined with the commission's dependence on the director's staff for services could potentially cause conflicts.

The review indicated that difficulties stemming from both these conditions have occurred in the past. One specific administrative gray area cited by agency officials relates to budget execution. An agency's executive director is typically responsible for expenditures from the budget as a whole. Under provisions of the state's appropriations act, the director is also potentially liable for over-expenditures or improper purchases made by the agency. The TWC's ambiguous status as an agency within an agency can confuse the issue of liability and authority. Questions have been raised from time to time as to the appropriate manner to approve major TWC expenditures. Reflecting this situation, the TWC has expressed an interest in the past in having its own budget execution authority.

A second example of difficulty in administrative overlap concerns operating procedures. In general, the TWC operates under the department's operating procedures; however, the TWC has historically felt that it is under no obligation to do so. This independence has been exerted at least once when the TWC decided to operate on a different time schedule for merit increases than called for in the department's operating procedures. While the TWC's schedule was accommodated,

the commission's overlapping authority with that of the executive director raised questions concerning administrative responsibility and served as a source of friction.

In a final area, concerns have been expressed by interest groups and others that the executive director's independence from the TWC probably reduces that position's responsiveness to commission needs. Sometimes cited in this area is the commission's apparent difficulty in getting timely enforcement data on occasions in the past. Interviews with agency staff indicated that administrative conflicts have lessened considerably after the initial period following the merger. On the whole, the organizational structure has worked, though apparently in an uneasy fashion at times. Given this current organizational structure, changes could be made to improve its operation.

Most of the difficulties expressed result from the organizational independence of the executive director and the TWC, and the resulting independence of action. There has been no formal structure to help the two parts of the agency come to agreement in conflicting areas. The needed structure could be provided through a statutory amendment requiring the Water Development Board and the TWC to develop joint procedures and policies for areas of conflict or ambiguous authority. These written procedures should be jointly reviewed and updated on an annual basis.

As an additional change, it was noted previously that it is unclear whether the executive director is liable for TWC expenditures under provisions of the appropriations act. This situation should be clarified by adding a rider to the appropriation pattern of the TDWR. The rider should specify that the chairman of the TWC is held responsible for expenditures from the line item for the TWC for purposes of complying with the appropriation bill's liability provisions. The clarification should give the TWC some of the responsibility associated with being a state agency while clearing up an item of administrative uncertainty.

Evaluation of Programs

The water-related functions of the Texas Department of Water Resources can be grouped into four main areas. First, the agency provides grant and loan assistance to local governments for water and sewer projects. Second, the department issues various permits and approvals controlling, among other things, the use and quality of state water. Third, as a natural extension of its permitting process, the agency enforces these permits and the state's water laws. Finally, to

assist in decisions on permits, enforcement, and other water-related matters, the department engages in various support services such as large scale planning and data collection efforts. Of the agency's total 1983 expenditures of approximately \$30 million, 11 percent was spent in the category of water project assistance; 20 percent in the permits area; 23 percent for enforcement (including the superfund program); and 26 percent for planning and technical support (the remaining 20 percent was spent for administration). The primary activities and recommendations within these areas are described below.

Water Project Assistance

The TDWR provides water project grants and loans through two programs: the construction grants program and the Water Development Fund. The construction grants program is designed to help communities plan and construct facilities to meet their sewage treatment needs. The grants are funded by the federal government at a current level of 55 percent, with local governments providing the remaining percentage. Texas' share of this federal program is approximately \$100 million annually. There are some 500 active projects at this time, with another 78 projects scheduled as ready to proceed in fiscal year 1984.

The second assistance program of the agency involves loans to political subdivisions through the Water Development Fund and the Water Assistance Fund. Through these funds, low interest loans are made to local governments unable to obtain financing through commercial channels. Typically, loans are for reservoir construction, municipal water supply facilities, and sewage treatment plants.

Loans made from the Water Assistance Fund come from a \$40 million appropriation. However, most of the loans made by the agency are from the Water Development Fund. This fund is derived from the sale of the State of Texas Water Development Bonds. The agency is authorized to sell \$600 million of these general obligation bonds. Of this total amount, \$400 million is for water development purposes, with the remaining \$200 million being authorized for water quality projects. To date, the agency has issued slightly over \$430 million in bonds. The last bond sale was in February 1983 when a \$50 million issue was sold. Another \$50 million issue is currently pending. Since the beginning of the loan program in 1957 over 380 loans have been made from these funds.

The review of the agency's assistance programs focused on management aspects of the Water Development Fund and did not consider either construction

grant funding which is essentially a federal program, or whether the amount of bonding authority should be increased.

Management of the Water Development Fund could be improved through greater use of expert financial advisory services.

As pointed out above, money for loans from the Water Development Fund comes from the sale of bonds. After the bonds are issued, the agency's statute requires that the proceeds be placed in the treasury. Proceeds can then be invested in U.S. government securities until such time as they are needed for the purpose of making a loan. The loan repayments from the political subdivisions to the fund are used to make debt service payments on the Water Development Bonds. Monies held in the fund, but not immediately needed to make loans or make debt service payments (idle balances) varied in fiscal year 1983 from about \$87 million to \$140 million with an average of about \$125 million, according to agency records. Since the inception of the program, no one has ever failed to meet their principal and interest payments on a loan from the fund.

The review focused upon the management of both the bond sales and idle balances. Proper management should result in timely bond sales at reasonable interest rates and the investment of idle balances at optimum yields consistent with state law and prudent investment practices. To determine whether improvements could be made, the management practices of the Water Development Fund were compared to those used by other major constitutional or investment funds of the state.

The review indicated that other state agencies with such funds make greater use of expert financial advice than does the Texas Department of Water Resources. Looking first at bond sales, TDWR's bonding operations were contrasted with those of the General Land Office, the Permanent University Fund and the National Guard Armory Board. Historically, before each bond sale, TDWR has hired a financial advisor on the basis of the lowest competitive bid. The other agencies do not use this "sale by sale" approach. Instead, their financial advisors are kept under contract from one bond issue to the next, and are compensated on the basis of actual services provided.

The two approaches result in considerable differences in the kinds of analyses provided to TDWR as compared to the other agencies. The TDWR advisor is hired primarily to carry out the analyses necessary to market the upcoming bond sale.

The other agencies, in contrast, contract to receive this service as well as many other planning-related activities between bond issues. The Veterans Land Board, within the General Land Office, operates a program much like that of TDWR and serves as a good example of an agency that contracts for and receives a more extensive level of financial services. The land board's advisor performs all necessary long-term forecasting of revenues, expenditures and loan demand; provides complete investment portfolio analyses, represents the fund to bond rating agencies and the IRS; performs short-term and long-term market projections; evaluates current market conditions; works with the agency shortly after each bond sale to start planning for the next issue; and maintains daily or weekly contact with the agency, in addition to actually placing the bonds out on the market.

A particular advantage of the long term approach is that there is professional planning for the future benefit of the fund. This type of planning could assist the agency in anticipating future market conditions and financing needs. A greater emphasis on planning could have possibly been of assistance, for example, in the agency's currently pending bond sale. The financial advisor for the issue was hired in February 1984, and the issue was originally scheduled to be sold in March 1984. The sale was indefinitely postponed because interest rates had risen to an unacceptably high level. There is no assurance that this postponement could have been avoided under any circumstance. The greater level of financial planning services used by the other agencies, however, lessens the possibility of this kind of problem occurring.

With regard to idle balances, the current management of the Water Development Fund reflects an investment policy that gives less attention to funds management than that provided by other agencies surveyed, including the Employee's Retirement System and Veterans Land Board. As in the case of bond sales, the TDWR does not have a staff with extensive financial expertise, nor has it sought independent expertise outside the agency. Again, the other agencies employ or seek such expertise to help increase yields on their investments.

To see whether expert advice might provide a reasonable opportunity for increased earnings to the Water Development Fund, yields reported by funds receiving such advice were reviewed. The Veterans Land Board offered the best comparison to the Water Development Fund. These two funds are similar in major respects and might reasonably be expected to earn comparable yields. In fiscal year 1983 the Veterans Land Board earned 10.73 percent while the Water

Development Fund earned 9.84 percent. Had the Water Development Fund earned the higher rate, its annual interest revenues would have been about \$1 million greater. It is important to note that such comparisons do not provide a precise measure of possible earnings since there are always differences between funds that cannot be easily taken into account. The similarities in this case do suggest, however, a reasonable opportunity for greater returns to TDWR if more expertise were applied to funds management.

A review of management practices used in these other funds also suggested the opportunity for increased earnings for the Water Development Fund, given increased emphasis on funds management. Several techniques were noted which could be investigated for possible use. Historically, for example, it has been the practice of the TDWR to invest idle funds in U.S. Treasury Bills maturing in three to six months. These bills are held to maturity at which time they are reinvested in new T-Bills if funds are not needed for loans or debt service payments. Some other agencies are able to accomplish this reinvestment without an interruption of interest revenues. The mechanics used by TDWR are such, however, that the agency loses one day of interest during the exchange of T-Bills. A review of TDWR records indicated that this type of transaction occurred 13 times in fiscal year 1983 and involved transactions totalling approximately \$158 million. If one day of interest could have been gained in these transactions, an estimated \$50,000 could have been added to the fund.

Another technique used by other agencies relates to the range of maturities in the investment portfolio. As a general rule, the longer the period of time remaining before a government security matures, the higher will be the yield. In other words, long-term government securities provide a higher yield than short-term government securities. To demonstrate this rule, on Tuesday, May 1, 1984, the following U.S. Treasury rates were in effect:

<u>Term</u>	<u>Yield</u>
3 month	8.72
6 month	10.62
1 year	11.09
2 year	11.82
3 year	12.07

It is common for other agencies to attempt to invest proceeds of bond sales in maturities consistent with anticipated funds requirements. If a bond sale is expected to provide loans over a two-year period, some of the funds are invested in short-term instruments and funds not needed for one or two years are invested in longer term securities to take advantage of their higher yields. Other strategies can be used when rates are expected to rise or fall without subjecting the fund to financial risk. As stated above, the TDWR maintains a policy of investing in T-Bills with maturities of only three to six months. If additional analysis by the agency indicated that this limitation could be reasonably extended, then greater yields could be obtained.

During the course of the review, it was noted that the agency began to improve its general money management practices. To strengthen this effort, the agency should follow the example of other state agencies with similar responsibilities and make greater use of expert financial advice. The cost of these services should be far outweighed by the benefits. The TDWR pays its financial advisor 45 cents per \$1,000 in bonds, while the Veterans Land Board pays its advisor 55 cents more, or \$1.00 per \$1,000 in bonds. The total additional cost would probably range from \$20,000 to \$30,000 per year. However, a one percent increase in interest revenues from the improved investment of idle balances would probably generate total increased earnings of at least \$1 million per year. It is therefore recommended that the TDWR's statute be amended to require the agency to seek a greater degree of expertise for the management of the Water Development Fund. This expertise should ensure that the fund is managed in a manner consistent with generally accepted standards.

Permits

The Texas Department of Water Resources performs its regulatory function mainly through the issuance of three basic types of permits. A water use permit is required in order to take, store, or divert surface water in the state. During fiscal

year 1983, the agency issued approximately 240 permits for water use. As of the end of fiscal year 1983, there were about 9,100 water use permittees in the state.

A second general type of permit the agency issues relates to water quality. There are basically three different kinds of water quality permits issued by the agency. A wastewater discharge permit must be obtained by any entity wishing to discharge waste into the waters of the state. In fiscal year 1983, approximately 750 wastewater discharge permits were issued. The total number of waste discharge permittees at the end of 1983 was approximately 3,600. The agency also issues permits to industrial solid waste disposal facilities. Entities which generate or transport hazardous industrial solid waste are not permitted but are registered and monitored by the agency. Very few industrial solid waste permits have been issued to date. This is because the majority of industrial solid waste disposal facilities are located at the site where the wastes are generated. Prior to the passage of the federal Resource Conservation and Recovery Act in 1976, these facilities did not need to be permitted. There are approximately 900 facilities in the state which will eventually be permitted. At the end of fiscal year 1983, about 2,500 generators and 600 transporters were registered. The agency also issues water quality related permits for underground injection wells. These wells are used to dispose of most of the industrial waste generated in Texas. In addition, underground injection well permits are needed for solution mining of uranium or sulphur. In fiscal year 1983, 32 waste injection permits were issued. The total number of injection well permittees as of the end of fiscal year 1983 was approximately 270.

The third basic area regulated by the agency is in the approval of water district creations and water district bond issues. Most of the activity in this area relates to municipal utility districts. In fiscal year 1983, 18 water district creations and 109 bond issues were approved. The total number of water districts approved by the agency since the program began was 1,139 with 623 of these being municipal utility districts.

The regulation of the state's water resources through permitting and approvals is a complicated and technical task. This task is becoming increasingly complex and time consuming as industrial expansion and population growth occurs. In this context, it is important to have a permitting process which is efficient, yet gives the necessary opportunity for careful consideration of all viewpoints. Additionally, the regulation should be supported financially in a reasonable fashion.

One area of concern that was identified and that currently is being addressed by the state relates to wastewater discharge permits. These permits are required under both state and federal law. Texas has not received delegation from the EPA to operate the federal program; thus, a wastewater discharge permit must be obtained from both the TDWR and the EPA. These two permits are equivalent in most respects. In fact, the department actually does most of the paperwork for the EPA. This system is wasteful in that regulated entities must go through additional paperwork and red tape to obtain a federal permit that is similar to the state's own permit in most respects.

This problem would be eliminated if the state were to receive delegation of the EPA program. Efforts to achieve state delegation have been in progress for some time. However, delegation cannot occur until the Texas Railroad Commission and the TDWR, both of which have jurisdiction over a portion of the state's wastewater program, satisfy all of the federal requirements. Both agencies indicated during the review that the major obstacles have been cleared and that delegation could occur early in 1985. The two agencies should continue to pursue this goal to eliminate unnecessary duplication.

The review of the permits area also resulted in several recommendations that could improve the general efficiency and design of the permitting process. These recommendations are outlined below.

Mandatory hearings for uncontested water use cases should be eliminated.

The permitting process of the agency is set up in two stages. Agency staff first evaluates a permit application and makes a permit recommendation. The application with recommendations is then forwarded to the Texas Water Commission for final action.

By statute, the TWC processes these applications through two different procedures, depending on whether the permit relates to water quality or water use. Water quality applications that are validly protested go through a complete quasi-judicial hearing procedure before a hearings examiner. Unopposed water quality applications are processed by clerical staff of the TWC and forwarded to the commissioners for their approval or disapproval. In contrast, all applications for water use permits must go to a hearing before a hearings examiner, whether

opposed or unopposed. An analysis was made to determine whether there were significant advantages of one method over the other.

The review indicated that the required hearings for unopposed water use permits resulted in a substantial use of hearing examiner time. In fiscal year 1983, there were approximately 240 water use permit hearings, with an estimated 60 percent of these being unopposed. These unopposed water use hearings took about two days of examiner time each for a total of roughly 300 days. Unopposed water quality cases, in contrast, do not require hearings and therefore do not involve hearing examiners. Instead, the clerical staff processes these cases. In fiscal year 1983, some 700 unopposed water quality applications were completed without the use of hearing examiners.

No reason could be found to justify the different statutory methods for handling unopposed water use and water quality cases. As in the case of unopposed water quality hearings, no apparent harm to the public would result if hearings for unopposed water use cases were eliminated. In addition, agency staff indicate that elimination of mandatory water use hearings for unopposed permits would shorten processing time per case to roughly that required for unopposed water quality applications.

Since mandatory hearings for unopposed water use cases are an inefficient use of staff time, it is recommended that the statute be amended to eliminate this requirement. A substantial amount of examiner time would be saved (about 300 days based on fiscal year 1983 workload). This time could then be shifted to other areas requiring assistance. For instance, the commission experiences an average backlog at any given time of 125 opposed water quality permit applications. In addition, hearings for hazardous waste permits are expected to increase dramatically in the next few years pursuant to recent federal initiatives. By eliminating mandatory hearings for unopposed water use cases, it should be possible to reduce the backlog and provide increased ability to deal with a growing permit workload while also reducing the need to hire new hearings examiners.

The Texas Department of Water Resources should be required to collect fees to offset the cost of regulating industrial solid waste and underground injection wells.

The Texas Department of Water Resources is authorized by statute to charge certain fees in their various permit areas. These fees were reviewed to determine

their reasonableness. As a result of this review, it was determined that statutory fees authorized for certain water quality permits should be revised.

As explained earlier, the agency is involved in water quality regulation in three areas: industrial solid waste, underground injection control, and wastewater disposal. The focus of this regulation is generally on business or industry and certain public entities in the case of wastewater disposal.

As a general principle, some portion of the cost associated with regulating an industry or business should be borne by the regulated group. This principle is demonstrated most frequently in "licensing" agencies for professions, where 100 percent of the cost of licensing a profession is frequently paid for by fees. Another example involves the regulation of hazardous waste. Twenty-nine states require fees for the support of their programs. The state Bureau of Radiation Control regulates activities associated with the use or processing of radioactive materials and the operation of radiation machines and has recently been authorized to support the total cost of the program from fees.

The review of water quality permitting programs indicated that a substantial fee is already being charged in the wastewater area. This fee was authorized during the 68th legislative session and was collected for the first time in the current fiscal year. The fee is charged for the annual inspection of wastewater treatment facilities and can range from \$100 to \$2,000 depending on the volume of discharge. In fiscal year 1984, the costs to the state incurred in the permitting and enforcement of wastewater treatment facilities is estimated at about \$6 million. The inspection fee is expected to generate approximately \$2 million annually or 33 percent of the state's cost.

While a significant fee exists for the wastewater area, only minimal fees are collected in the industrial solid waste and underground injection control programs.

The total cost of administering the state's industrial solid waste program is estimated to be approximately \$4 million in fiscal year 1984. Three-fourths of this comes from the federal government and the remainder from the state. The only charge authorized by statute, however, is a \$25 one-time application fee plus mailing costs. Collections for fiscal year 1984 are expected to be approximately \$1,292 -- a negligible portion of the state's cost.

A minimal fee is also charged in the underground injection control program. The total cost of administering this program is estimated to be approximately \$460,000 in fiscal year 1984. About three-fourths of this comes from the federal

government and the remainder from the state. Again, the only charge authorized by statute is the \$25 one-time application fee plus mailing costs. Collections for fiscal year 1984 are expected to be only \$865.

To conform to the general principle set out previously, the agency should be directed in statute to implement an increased fee schedule for both of these areas. An examination of the process used to set fees by the Bureau of Radiation Control of the State Department of Health reveals at least three important factors which should be required in setting the fees.

First, the Bureau of Radiation Control has set fees at a level anticipated to cover 50 percent of the program's cost. Using this amount as a rough guideline, it seems reasonable to require that fees for the industrial solid waste and injection well programs be set to recover between 25 and 50 percent of the state's cost. The use of a percentage range gives the agency the flexibility to determine an amount most appropriate to these programs. This range also ensures a significant increase in funds to offset the cost of regulation without creating a strong disincentive to compliance.

The second factor which should be considered in the development of the fee structure is that the fees charged should be reasonably related to the costs incurred by the agency in performing the various aspects of regulation. For example, in the area of industrial solid waste, the size of the facility and the nature of treated or disposed waste bears a relationship to the cost of permitting and inspecting the facility. It appears reasonable that the fees should vary in relation to the regulatory effort the fee is designed to support. This concept is found in fees applied by the State Banking Department. Regulated banks are charged fees which vary directly with their size, as measured by total assets.

The third factor which should be required in the development of the fee structure is its adoption through the rulemaking process of the Administrative Procedures Act. The use of this process will ensure that all affected parties have ample opportunity for input into the process, and will also assist in the development of complete information concerning the impact of proposed fees on the entities involved.

Enforcement

Permits and other actions of the agency must be enforced. The major enforcement effort is directed towards water use and water quality permits.

To enforce its permits, the agency has 184 employees in its enforcement division. These employees are split between the central office and 14 district offices around the state. In fiscal year 1983, the division had an operating budget of about \$7.6 million.

As Texas has experienced a rapid rate of growth in population and industrial activity, enforcement of water-related laws has become more difficult. This is especially true in the area of water quality. Cities continue to have problems in properly planning for the increasing sewage treatment capacity they need. Industrial hazardous waste is also a concern because of its toxic nature and the volume generated in the state. Texas is the second largest generator of hazardous waste in the country. For these reasons the review centered primarily on the enforcement of water quality permits.

As indicated in the last section, the agency administers three water quality programs authorized under state and federal law. Facilities that must be permitted include the following: 1) industrial solid waste treatment facilities, which are regulated under the federal Resource Conservation and Recovery Act (RCRA) and the Texas Solid Waste Disposal Act; 2) underground injection wells, regulated under the federal Safe Drinking Water Act and chapter 27 of the Texas Water Code; and 3) municipal and industrial waste treatment facilities, regulated under the federal Clean Water Act and chapter 26 of the Texas Water Code.

Initiation of enforcement action is the responsibility of the executive director and his staff. There are five official enforcement actions used by the agency in its enforcement program.

- 1) Citation - a citation is simply a notice of violation and is used only in the wastewater area;
- 2) Enforcement letter - an enforcement letter can originate from the district office or the headquarters. The letter describes the problem in more detail than a citation and usually recommends some type of corrective action;
- 3) Compliance agreement - a compliance agreement is usually used after one or more letters have failed to bring results. This agreement is reached during an enforcement conference at which time the violator and TDWR mutually determine what course of action to take;

- 4) Texas Water Commission enforcement order - the executive director may refer a case to the TWC, which will then initiate a hearing. This hearing can result in the issuance of a legally binding enforcement order; and
- 5) Referral to the attorney general - this action is the agency's enforcement option of last resort. A civil suit is initiated when administrative enforcement action is no longer considered by the executive director to be appropriate. Summarized enforcement data is presented on the following page.

In the review of the water quality enforcement effort, particular attention was given to determining whether the agency had the necessary enforcement tools to achieve compliance. It was determined that several improvements could be made which would assist in this area. These recommendations are outlined below.

The Texas Department of Water Resources should be authorized to assess administrative penalties.

The enforcement authority of the Texas Department of Water Resources was compared to that of other agencies to determine whether the range of enforcement tools was reasonably complete. Through this analysis, it was determined that both the federal Environmental Protection Agency and the Texas Railroad Commission have the authority to use administrative penalties in water quality enforcement cases, but the Texas Department of Water Resources does not.

An administrative penalty is different from other enforcement actions in that a fine is levied by the agency for a violation. The advantage of this type of penalty is that it can be applied quickly, without having to first go through a lengthy court proceeding. This advantage makes the administrative penalty particularly suited for cases where a time delay in legal proceedings might be anticipated and where a violation generally has serious and immediate consequences for human health or the environment. Staff of both the Railroad Commission and the EPA indicate that administrative penalties are effective in producing quick results and acting as a strong deterrent.

As with the Railroad Commission and the EPA, authority to levy administrative penalties could be appropriately applied to TDWR's water quality enforcement effort. Improper disposal of hazardous waste or inadequate treatment of sewage

ENFORCEMENT DATA

FY 1983

	<u>Domestic Wastewater</u>		<u>Industrial Wastewater</u>	<u>Industrial Solid Waste</u>	<u>Underground Injection Control</u>
	<u>Municipal</u>	<u>Private</u>			
Number of permittees	1,819	575	1,248	984 ³	136 ⁴
Number of inspections made in FY '83	1,652	511	676	940	175
Number of citations issued in FY '83		49 ¹	5	N/A	N/A
Number of enforcement letters written in FY '83 ⁵		21 ¹	3	55 ²	13
Number of cases referred to A.G. in FY '83		22 ¹	12	31	1
Number of enforcement cases initiated in FY '83	47	19	8	96	9

¹Data not broken down between municipal and private facilities in agency records.

²Includes some repeat letters.

³This is the number of potential permittees. Most entities which must eventually be permitted have not yet received their permits.

⁴This is the number of permittees allowed to dispose of Class 1 waste, which contains hazardous waste, and does not include solution mining permits.

⁵Includes only those enforcement letters which were signed by the executive director.

can pose a serious and immediate threat to both the environment and human health. In addition, an analysis of enforcement cases indicates that enforcement litigation can result in long time delays. In the area of municipal wastewater, compliance cases can often take several years of agency time before being referred to the attorney general for court enforcement action (a situation that is discussed further in the next recommendation). A lengthy court proceeding before a penalty can be assessed after such a delay is particularly undesirable.

While administrative penalties appear reasonable for the area of water quality enforcement, another advantage to giving the agency this authority relates to "delegation" to the state of the federal hazardous waste program operated under the Resource Conservation and Recovery Act (RCRA). Delegation of this program would mean that the state is authorized to administer the federal program. In order to receive delegation, a state effort must be substantially equivalent to the federal program. The agency already has delegation of several other federal programs, and is currently operating the RCRA program under interim delegation.

If the state were not to receive permanent delegation of this program, the regulated community would continue to be under the dual jurisdiction of the Texas Department of Water Resources and the EPA. This means that each regulated entity could have to secure a permit from each agency and make periodic reports to both of them. This duplication of regulatory effort would be costly, time consuming and confusing for permittees. The EPA has published guidelines in draft form which outline in general what is expected in a state program to qualify for delegation. These guidelines state that there should be authority for the assessment of an administrative penalty of up to \$25,000 per day within 150 days of detection of certain types of violations. These guidelines also indicate that when a state's authority is no longer equivalent, delegation withdrawal proceedings may be initiated. Interviews with the EPA confirm that administrative penalties could be an element required for continuing delegation.

It is therefore recommended that administrative penalties be made available to the Texas Department of Water Resources to assist in efforts to receive RCRA delegation and to help ensure timely and effective compliance in the water quality area. The procedure should be similar to that used by the Railroad Commission, but modified to fit the unique organizational structure of the Texas Department of Water Resources. This process would include an initial assessment of the penalty by the executive director, who could also negotiate a settlement with the

permittee. A penalty agreed upon by both parties would be approved by the Texas Water Commission in a commission order. Where no agreement is reached between the executive director and the permittee, a hearing would be held before the Texas Water Commission to determine the action to be taken. If a permittee wished to appeal an order of the commission, the appeal should be heard under the substantial evidence rule. Additionally, as implemented by the Railroad Commission, the penalty should be paid into an escrow account before an appeal could be made. In order to be consistent with EPA policy, the maximum penalty authorized should be \$25,000 per day of violation.

A mandatory enforcement hearing before the Texas Water Commission should be required for chronically non-complaint permittees.

As part of the review of the agency's enforcement activity, an analysis was made to determine general lengths of time that a water quality permit holder could be in non-compliance. A review of enforcement cases initiated in the six-month period between January and June of 1983 indicates that substantial delays in achieving compliance have occurred. Data from these cases is summarized on the following page. This data indicates that municipal wastewater facilities have taken much longer to be brought into compliance than other permittees.

The reasons for higher rates of non-compliance by cities are generally due to the special nature of a municipality. A private company can ultimately be forced out of business for continued non-compliance. A city, on the other hand, is not so easy to put out of operation. Demand for sewage service would continue regardless of whether a valid permit existed. In addition, costs for needed improvements are high, sometimes running up into the millions of dollars. In general, it is politically unpopular to raise this money through bond sales, tax hikes, or rate increases; and citizens cannot be consistently counted on to vote for new bond issues. When non-compliance occurs, these special problems of cities often make it difficult for TDWR officials to find an effective means of correcting the problem.

Ironically, the federal wastewater works grant program can compound the problem. Many of the non-compliant municipalities are on a waiting list for a grant to make needed improvements. These entities tend to delay the construction of new facilities as long as possible in hopes that they will receive a grant. It is likely that many of them will never receive a grant, however. In Texas, \$1.8 billion in projects are currently on this waiting list. Annual grants awarded are

WATER QUALITY ENFORCEMENT CASES

(January 1983-June 1983)

	<u>Domestic Wastewater</u>		<u>Industrial Wastewater</u>	<u>Industrial Solid Waste</u>	<u>Underground Injection Wells</u>
	<u>Municipal</u>	<u>Private</u>			
Sample Size	23	15	2	38	9
Average age of sample cases	4.8 years	2.2 years	4 years ¹	1.3 years	1.3 years
Number of cases over 10 yrs old	1	0	0	0	0
Number of cases 8-10 yrs old in sample	4	0	0	0	0
Number of cases 6-8 yrs old in sample	5	0	1	0	0
Number of cases 4-6 yrs old in sample	1	1	0	0	0
Number of cases 0-4 yrs old in sample	12	14	1	35 ²	9
Number of sample cases in compliance to date	3	4	0	2	8

¹A sample size of two is not considered large enough to provide a meaningful average, but does indicate a relative infrequency in industrial wastewater enforcement cases.

²In three cases, the date that the problem was originally identified was not recorded. Total sample size was 38.

approximately \$100 million. The agency estimates that only about one quarter of the projects on the waiting list will receive a grant.

In cases such as the municipal wastewater area where unique problems exist, a special enforcement mechanism is needed to address the difficulty. The procedure should have as an essential feature an automatic trigger to eliminate any doubt as to whether action will really be taken. An effective means of addressing the problem must then come into play.

One procedure which satisfies these guidelines would involve the use of an automatic enforcement (or show cause) hearing before the Texas Water Commission. This type of hearing is an official quasi-judicial proceeding where witnesses and evidence can be subpoenaed. In a show cause hearing, the non-compliant entity is asked to "show cause" why some type of enforcement penalty or action should not be pursued. Based on evidence presented at the hearing, an order is entered specifying what kind of action must be taken.

The TWC currently has the clear authority to hold such enforcement hearings on referral from the executive director. However, this type of action has only been initiated three times since the 1977 merger. Under this suggested procedure, however, referral would be automatic at the end of an established period of time. A reasonable time period could be four years after the identification of a substantial problem not satisfactorily addressed. Four years is roughly the average age of municipal cases taken in the sample. This length of time gives the executive director substantial flexibility to deal with chronically non-compliant permittees, yet is short enough to put pressure on those cases that tend to linger beyond the four-year period.

A procedure based on an automatic enforcement hearing should prove effective for a number of reasons. One primary benefit is the publicity it affords. An enforcement hearing is considered to be an open meeting under the Administrative Procedure Act. Public notice must therefore be given in advance of the hearing. The public nature of the hearing draws public attention to the problem and also informs voters that a bond issue might be required for needed improvements. It was noted that, before the 1977 merger, the Water Quality Board used a proceeding similar to a show cause hearing. Interviews with staff involved in these early proceedings indicated that the publicity provided through the hearing did appear to promote compliance.

A second benefit of this type of show cause proceeding is its judicial nature. The TWC has the authority to subpoena records and witnesses and to question witnesses under oath. A record is developed upon which a judgment is rendered in the form of an enforcement order. This order is legally binding, and failure to comply is a violation of state law. In some cases it is easier to prove in court that an enforcement order was violated than to prove a permit violation. Specific and verifiable actions are often required in enforcement orders. In comparison, sufficient compliance data on permits is sometimes hard to collect.

Given the above, it is recommended that TDWR's statute be amended to require that permittees who are in substantial non-compliance and are not addressing their problem satisfactorily after four years be automatically referred to the TWC for a mandatory enforcement hearing. Enforcement of a TWC order would be the responsibility of the executive director. To simplify initiation of this suggested process and to allow time for substantially non-compliant entities to correct current problems, the four-year period could begin for all permittees at the same time after enactment of the provision. This mandatory procedure should help reduce chronic non-compliance, particularly in the municipal wastewater category, and should require no additional expenditure of state funds.

Planning and Other Technical Support

The agency engages in various substantive activities in support of its regulatory and water development functions. Support activities of major importance include water resource planning, and data collection efforts.

As part of its planning activities, the agency is directed in statute to develop and maintain in current condition a comprehensive statewide water plan to ensure an adequate long-term water supply. To prepare this plan, long-term forecasts of the supply and demand for water are developed in order to estimate the need for new sources of supply. Schedules for water resource development are also prepared and research into new sources of supply, such as weather modification and water importation, is conducted.

The department is also engaged in planning efforts to manage the quality of the state's waters. In accordance with the federal Clean Water Act, the agency develops the State Water Quality Management Plan, and annually updates the plan. Water quality management plans include identification of water quality problem areas, pollution projections, needed wastewater treatment and collection systems, waste load allocations, and stream standards. This information is used by the

agency to determine the level of treatment and volume of waste which can be discharged without forcing the receiving stream segment to fall below its quality standard.

These and other planning efforts of the department, as well as other agency activities, require the development and use of large amounts of data. The department gauges stream flows and measures sediment loads. It also monitors groundwater levels and the quality of surface water and groundwater regularly to establish the data base for water resource management.

During the review of the department, very little comment was received from the public or interest groups regarding the agency's planning and technical support activities. In addition, other study groups have focused on the department's planning activities. As a result, this area was not emphasized in the review. Attention was given to determining whether the public was given an opportunity to provide input to the planning process and whether the state's effort in planning seemed appropriate.

No major problems were noted in these areas. The agency has a proper role in evaluating the state's water needs in order to carry out its regulatory functions. In addition, it appears that the public is allowed input in the planning process. The agency began a major effort to revise and update the state water plan in 1981. In the process of revising this plan, the agency held hearings in 13 cities and interviewed representatives at various levels of government. The water quality management plan is reviewed by local advisory committees and discussed at public hearings or public meetings prior to submission to the governor for approval.

EVALUATION OF OTHER SUNSET CRITERIA

The review of the agency's efforts to comply with overall state policies concerning the manner in which the public is able to participate in the decisions of the agency and whether the agency is fair and impartial in dealing with its employees and the general public is based on criteria contained in the Sunset Act.

The analysis made under these criteria is intended to give answers to the following questions:

1. Does the agency have and use reasonable procedures to inform the public of its activities?
 2. Has the agency complied with applicable requirements of both state and federal law concerning equal employment and the rights and privacy of individuals?
 3. Has the agency and its officers complied with the regulations regarding conflict of interest?
 4. Has the agency complied with the provisions of the Open Meetings and Open Records Act?
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EVALUATION OF OTHER SUNSET CRITERIA

This section covers the evaluation of the agency's efforts in applying those general practices that have been developed to comply with the general state policies which ensure: 1) that the necessary awareness and understanding exists to have effective participation by all persons affected by the activities of the agency; and 2) that agency personnel are fair and impartial in their dealings with persons affected by the agency and that the agency deals with its employees in a fair and impartial manner.

Open Meetings/Open Records

Meetings and activities of the agency have generally complied with the requirements of the Open Meetings Act and the Open Records Act. The review indicated that meeting notices are filed with the Office of the Secretary of State in a timely manner. Notification of Water Development Board meetings are handled by the office of General Counsel. The Texas Water Commission's chief clerk is responsible for giving notice of commission meetings.

No improper use of executive sessions was identified. The Water Development Board follows a procedure of holding executive sessions only to discuss employment, appointments, or litigation. The Texas Water Commission has no formal policy regarding executive sessions, but does post them in accordance with the Open Meetings Act. Minutes of Water Development Board meetings can be obtained from the General Counsel's office, and minutes of Texas Water Commission meetings are available at the chief clerk's office.

With regard to agency records, within the department there is a records management program which provides public access to its records in accordance with the Open Records Act. Those records not classified as open include: personnel files, files pertaining to litigation, information that could be economically advantageous to business competitors or bidders, and any information deemed confidential by law. All records of the Texas Water Commission are considered open because they pertain to active hearings or pending decisions on completed hearings.

EEOC/Privacy

The agency was reviewed to determine whether it complied with applicable federal and state laws concerning affirmative action and the rights and privacy of employees. The Department of Water Resources is currently operating under an

affirmative action plan, which includes a formal grievance procedure. This plan is reviewed and updated annually.

The unique organizational structure of the agency has resulted in a point of confusion regarding personnel policies. Staff of the Texas Water Commission indicated that the commission generally follows the personnel procedures of the agency as laid out in the department's operating procedures. However, the Texas Water Commission does not feel obligated to follow these procedures. For instance, the TWC sometimes has followed a different time schedule than the rest of the agency in giving merit increases. As decided by the executive director and the TWC, the TWC also has its own separate grievance procedure. Currently, there is no clear written statement available as to which personnel policy will definitely apply to the TWC. To help avoid possible confusion for TWC staff and agency administration in the future, such a statement should be developed. This clarification could be accomplished in the development of the joint policy statement between the TWC and the Water Development Board recommended in the "overall administration" section of this report.

In reviewing the agency's EEO record, it was noted that since 1981 three suits have been filed against the Water Development Board and one suit has been filed against the TWC. All four suits are still in litigation.

Public Participation

The agency's policies and practices were reviewed to determine whether the general public and those affected by the agency have been kept adequately informed of these activities, and have been provided an opportunity to participate in the policy formulation process. The results of the review indicated that, in general, the public and the regulated community have had adequate access to information and opportunities to provide input to agency processes.

Information is disseminated through the agency's Public Information Section. This section publishes Texas Water, a monthly newsletter which contains rule changes, board actions, technical information, and general developments affecting the agency. The Public Information Section also answers telephone inquiries and has prepared a number of brochures which describe the agency in general.

Various other methods also exist for assisting or informing the public. The agency's public interest advocate is available to counsel the general public on how to participate in hearings, board meetings, and commission meetings. The agency holds public meetings and hearings throughout the state to give the public an

opportunity to comment on topics such as water rights, water use, wastewater discharges, hazardous waste facility permitting, and the state water plan. In addition, agency personnel participate regularly in seminars, conventions, and meetings held by local groups and civic organizations throughout the state. The review did indicate, however, that one improvement could be made in the agency's attempts to inform the public.

Memoranda of understanding between TDWR and other state agencies should be processed through the APA rulemaking procedure.

Several state agencies in Texas are mandated to protect both the public and the environment from the adverse effects of pollution. Besides TDWR at least three other state agencies play a major role in regulating activities which, if not conducted properly, would prove dangerous to the public and environment alike. These other agencies are the Texas Department of Health, the Railroad Commission and the Texas Air Control Board.

The responsibilities of agencies are broadly established by statute. For example, under the Solid Waste Disposal Act (Art. 4477-7, V.A.C.S.), the TDWR is responsible for regulating the management of "industrial" solid waste while the Department of Health is in charge of regulating the management of "municipal" solid waste. Such statutes provide guidance as to the general jurisdiction of each agency by defining essential terms and by setting out the duties of each agency using broad language.

Such broad treatment typical of statutes does occasionally cause confusion among state agencies in regards to jurisdictional responsibilities. For instance, a statute will not provide specific instruction as to how each agency should cooperate and interact in situations when jurisdiction over a particular kind of waste is unclear.

Through either rulemaking or a joint written agreement called a "Memorandum of Understanding" (MOU), involved agencies typically have defined each other's responsibilities in order to avoid duplication of effort and to enhance cooperation between the agencies. TDWR has entered into four MOUs with state agencies: 1) with the Railroad Commission to regulate surface coal mining and reclamation activities (MOU signed October, 1970); 2) with the Texas Air Control Board to cooperatively regulate wastewater treatment facilities, industrial solid waste facilities affecting non-point sources of air contaminants, and incinerators used to process hazardous industrial solid waste (MOU signed November, 1981); 3)

with the Railroad Commission and the Texas Department of Health concerning pollution from oil and gas activities (MOU signed January, 1982); and 4) with the Texas Department of Health concerning in situ uranium mining (MOU signed January 1983 and adopted as a rule February 1983). The review indicated that this last MOU was generally adopted as an agency rule under the Administrative Procedure Act. Other MOUs have not gone through this procedure.

The APA defines a rule as "...any agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency" (Art. 6252-13a, V.A.C.S.). It could be reasonably argued that agency MOUs typically fit this definition. For example, the agency MOU with the Texas Department of Health and the Railroad Commission clarifies agency responsibilities regarding waste from oil and gas exploration in the following manner:

The disposal of tank bottoms and stormwater runoff from storage tanks and tank-farms during the production phase, and the storage at any central crude storage area prior to entering the refinery, are under the jurisdiction of the Railroad Commission. Wastes generated from storage tanks which are part of the refinery, however, are subject to the jurisdiction of the Texas Department of Water Resources, while solid wastes resulting from the marketing of refined products are subject to the jurisdiction of the Texas Department of Health.

This language appears to "implement and interpret" the general governing statute as contemplated under the APA.

A major purpose of the APA rulemaking procedure is to provide for public comment in the agency's interpretation of general law. Under the APA the public must be given at least 30 days notice before a rulemaking action to allow all interested persons the opportunity to submit data and express their views in a public hearing.

The general character of MOUs as rules and the importance of public comment in rulemaking suggest a need to remove any question as to how these agreements should be handled in the future. The agency's statute should be amended to require that all future MOUs, or revisions to existing agreements, be processed through the APA rulemaking procedure.

Conflict of Interest

The review focused on agency efforts to inform board and commission members, as well as agency employees, of their responsibilities regarding conflict-of-interest statutes. The agency is in general compliance with applicable laws.

Members of the board and commission are informed of conflict-of-interest provisions through the issuance of the Governor's Handbook for Members of State Boards and Commissions, and have submitted the necessary financial disclosure documents to the Office of the Secretary of State. New employees are provided with copies of the statutory provisions concerning conflicts of interest and are required to sign a statement that they have read these provisions.

ALTERNATIVES

The analysis of whether there are practical alternatives to either the functions or the organizational structure are based on criteria contained in the Sunset Act.

The analysis of alternatives is directed toward the answers to the following questions:

1. Are there other suitable ways to perform the functions which are less restrictive or which can deliver the same type of service?
 2. Are there other practical organizational approaches available through consolidation or reorganization?
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ALTERNATIVES

As part of the review of this agency, the functions performed by the agency were evaluated to determine if alternatives to current practices were available. State agencies with functions similar to those performed by this agency were reviewed to determine if they had developed alternative practices which offered substantial benefits and which could be implemented in a practical fashion. In addition, the practices of other states were reviewed in a like fashion and it was determined that their practices were similar to those of Texas. It was concluded that practical alternatives to the current structure do exist, and they are discussed below.

Amend the statute so that the executive director serves at the will of both the Water Development Board and the Texas Water Commission.

The Texas Department of Water Resources consists of two decision-making boards and the staff of the executive director. Both the Water Development Board and the Texas Water Commission depends on the staff for various functions and services. The Water Development Board counts on staff support for all aspects of its policy-making function such as rule-making, and grant and loan decisions. The Texas Water Commission depends on the executive director's staff for providing draft permits, compliance information on permittees, and basic administrative support.

While the executive director's staff provides services to both bodies, the executive director is hired and fired only by the Water Development Board. Since the merger in 1977, various members of the Texas Water Commission have complained that this arrangement makes the executive director and staff unresponsive to the commission's needs.

The review of the agency indicated that an alternative to this current single line of authority does exist. The executive director could be hired and fired in the same way as the agency's public interest advocate. The advocate serves at the will of a majority of each board meeting jointly.

By making the executive director responsible to both boards, a greater degree of sensitivity to the commission by the executive director and the staff is ensured. The commission should also have increased confidence that the executive director's

staff will meet its needs. Since the executive director could not be fired without a majority vote of both boards, the executive's position should continue to be stable and resistant to arbitrary action from either board.

Transfer the public interest advocate operation within the agency to the new Office of Public Utility Counsel.

When the water agencies were merged in 1977, the legislature established within the department the Office of the Public Interest Advocate. The advocate is hired and fired by a majority of the Water Development Board and the Water Commission meeting jointly. The statute makes the advocate a party to all proceedings before the Water Commission. The statute defines his responsibilities as participating on behalf of the public interest, which includes but is not limited to environmental quality and consumer protection.

During the last session, the legislature created the Office of Public Utility Counsel as part of the re-authorization bill for the Public Utility Commission. The office, like that of the TDWR advocate, performs an advocacy function. The counsel intervenes on behalf of residential and small commercial ratepayers in any proceeding before the PUC and certain proceedings before the Railroad Commission. A major structural difference, however, is that the public utility council is not a part of the PUC or any other agency, but exists as a separate state agency with its own budget and staff (for fiscal 1984, the agency operated with a budget of approximately \$650,000 and a staff of 11).

The existence of the new independent advocate's office suggests the possibility of transferring the TDWR advocate's function into that agency. A major benefit resulting from this combination is that the water advocate would not be hired and fired by the TDWR. This independence could be important to the effectiveness of the advocate, given the nature of the position. An advocate's job is to support a particular point of view before an agency. That point of view may be contrary to the position of the agency. An independent advocate has more freedom to take unpopular positions since the advocate is not placed in a situation of "biting the hand that feeds him."

A second benefit that could result from the transfer is increased availability of expertise and administrative support for the water advocate function. Currently, the water advocate is assisted by a secretary and works alone in the advocate function. In the public utility council's office, the water advocate would

have increased staff support. In addition, the water advocate could be transferred to the independent office at minimal cost to the state. Given these benefits, transfer of the water advocate function to the independent agency appears desirable.

OTHER POLICY CONSIDERATIONS

During the review of an agency under sunset, various issues were identified that involve significant changes in state policy relating to current methods of regulation or service delivery. Most of these issues have been the subject of continuing debate with no clear resolution on either side.

Arguments for and against these issues, as presented by various parties contacted during the review, are briefly summarized. For the purposes of the sunset report, these issues are identified so they can be addressed as a part of the sunset review if the Sunset Commission chooses to do so.

OTHER POLICY CONSIDERATIONS

This section covers that part of the evaluation which identifies major policy issues surrounding the agency under review. For the purpose of this report, major policy issues are given the working definition of being issues, the resolution of which, could involve substantial change in current state policy. Further, a major policy issue is one which has had strong arguments developed, both pro and con, concerning the proposed change. The material in this section structures the major question of state policy raised by the issue and identifies the major elements of the arguments for and against the proposal.

Should the PUC's jurisdiction over water and sewer utilities be transferred to the Texas Department of Water Resources.

In Texas, jurisdiction over water and sewer rates and services is divided between the PUC and the TDWR. The PUC generally has rate-making and certification authority over private, for-profit water and sewer utilities of which some 650 were certified for operation as of September 1983. The TDWR's authority is not spelled out as clearly in the law. Generally speaking, however, the TDWR has broad ratesetting authority over disputes where one political subdivision, such as a city or water district, is selling water to another political subdivision on a wholesale basis. In fiscal year 1983, the agency was involved in five rate-setting cases. A major difference between the authority of the two agencies is that, when any water or sewer utility regulated by the PUC wants to change its rates, it must go to the PUC to get approval. In contrast, the TDWR becomes involved in setting rates only on the petition of a buyer or seller - a situation which seldom occurs.

During the 68th Legislature, S.B. No. 884 by Senator Traeger proposed the transfer of the PUC's water and sewer jurisdiction to the TDWR. This bill was passed by both the senate and the house, but was vetoed by the governor. Strong arguments both for and against this transfer have been put forth. In favor of the transfer, it has been argued that authority over water and sewer rates should logically rest in a single agency. Unified regulation makes sense because it helps ensure a consistent ratemaking approach and equal treatment for those being regulated. The argument continues that, if water and sewer rates are to be handled by one agency, the logical place is the state's water agency. Placement of

all water and sewer jurisdiction at TDWR would assist in developing a coordinated water regulation. The agency's general knowledge and information about statewide water resources might also assist the regulatory program. Finally, the PUC has a heavy workload with regulation of private electric and telephone utilities. The PUC's time could be best spent concentrating on these multi-million dollar operations, leaving the regulation of the generally small yet often difficult to regulate private water and sewer companies to the TDWR.

On the other hand, it can be argued that the PUC has a successful and proven track record in dealing with these utilities. Private water and sewer utilities are often "mom and pop" operations, and the PUC has spent an increasing amount of time and effort in recent years ensuring that these utilities provide proper service to the public. Also, it is not unreasonable to have water and sewer rates regulated by the PUC. The agency regulates other for-profit utilities, and its general authority over state regulated, investor owned utilities ensures that such utilities are treated in a consistent manner. An additional concern is that transfer of the function to the TDWR would involve a period of time for the water agency to familiarize itself with the function. It would also increase the workload of the Texas Water Commission which already faces a heavy schedule. In fiscal year 1983 the PUC issued 216 final orders on water and sewer related dockets.

Should the Texas Water Commission be given the authority to review the water rates set by river authorities when it judges this to be desirable.

River authorities are agencies established by the legislature for developing and managing water-related projects in the state. There are approximately 20 river authorities serving the state today. Projects commonly undertaken by river authorities would include the development and operation of reservoirs and sewage treatment plants. These authorities generally have the power to issue revenue bonds, and money from the sale of bonds is a major source of funds for many authority projects. Bonds are paid off through fees that the river authority charges users of its services. River authorities receive no direct appropriations from the state legislature and are not subject to the typical controls placed on most other state agencies, such as keeping funds in the State Treasury.

The river authorities in Texas control large amounts of the state's water rights. Like any other entity using state water, the authorities must obtain permits

for these rights from the TDWR. A major source of income to many authorities comes from the sale of this water to other entities such as cities, industry, or irrigators. The contract negotiated for the sale of water between a river authority and another party must be submitted to the TDWR. The contract is checked to make sure it contains the information required by the agency. However, the rate set in the contract for the water is not reviewed to determine whether it is appropriate. Practically speaking, a rate would be evaluated from this standpoint only if one of the parties to the contract complains to the TDWR that the rate is unfair. The agency's control over river authority water rates could be strengthened by giving the Texas Water Commission the specific statutory authority to review water rates set by river authorities when it determines that this might be desirable.

In support of this change in authority, it could be argued that there is very little state oversight of the day-to-day operations of river authorities. Water sales provide a large portion of revenue for many of the authorities. By giving the TWC the ability to review these rates for fairness, a greater degree of state control over the river authorities would be provided. Also, by making this rate review optional with the TWC, the agency would be able to concentrate its efforts where real problems might lie, rather than spending its resources in a mandatory review of all contracts.

On the other side of this question, it could be argued that increased state oversight of river authorities through optional rate review is unnecessary. Operations of authorities are thoroughly audited annually by an independent public accountant. The audit is submitted to TDWR and reviewed by the agency which can take various actions if problems are noted. The river authorities are run, and rates set, by experienced directors and staff personnel. If problems with the authorities are encountered, the party receiving the water generally can petition the TDWR for rate review under existing state law. Finally, if the TDWR were to become active in reviewing river authority rates, more staff for the agency, and thus more appropriations, would probably be required.

Should the portion of the state's hazardous waste program currently under the jurisdiction of the Department of Health be transferred to the Department of Water Resources.

Currently, the Texas Solid Waste Disposal Act (Art. 4477-7, V.A.C.S.) establishes joint jurisdiction in the regulation of solid waste between the Department of Water Resources and the Department of Health. The Department of Water Resources is charged with the responsibility of regulating "industrial solid waste", while the Department of Health regulates "municipal solid waste". These two types of waste are defined in statute as follows:

"Municipal solid waste" means solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste.

"Industrial solid waste" means solid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operations.

"Hazardous waste" is seen as a subset of solid waste and is regulated under both state law and the federal Resource Conservation and Recovery Act (RCRA). In general, for waste to be considered hazardous, it must be toxic, corrosive, ignitable, chemically reactive, or a combination of the above.

Under RCRA, states operating a hazardous waste program substantially equivalent to the federal design are eligible to receive grant funding from EPA. In Texas, jurisdiction over hazardous waste is divided between the Health Department and TDWR according to the municipal and industrial definitions given above. In fiscal year 1984, the total RCRA grant divided between these agencies for the regulation of hazardous waste amounted to approximately \$4.5 million. To be eligible to receive the federal funds, 25 percent of the cost of the hazardous waste regulatory program must be borne by the state. Information showing how the state's hazardous waste program is divided between the Health Department and the Texas Department of Water Resources is given below:

	<u>TDWR</u>	<u>TDH</u>
Number of entities under the jurisdiction of the agency	2,600	475
Staff dedicated to permitting, registration, and enforcement	81	29
Percent of federal grant received by each agency	70%	30%
Percent of state's hazardous waste regulated by each agency	90%	10%

It has been suggested that the split of the hazardous waste program between the Health Department and the Texas Department of Water Resources is not the most appropriate way to regulate this important area. Opponents of the current split generally argue that regulation of hazardous waste should be consolidated in the TDWR. This agency already has the responsibility for most of the hazardous waste generated in the state. It could be argued that consolidation of the program in TDWR would help to eliminate current confusion among the public and industry as to the specific areas of jurisdiction of each agency. Consolidation would also help to promote uniformity of regulation by giving one agency clear authority over the design and administration of the program. It is also possible that transfer of the entire program to the TDWR would help to reduce duplication of administrative personnel, thereby reducing the cost of the program.

On the other side of this issue, it could be argued that the current system of split regulation has now been worked out satisfactorily. It makes little sense to tear down a structure that has been recently developed to replace it with a new system of questionable superiority. In addition, the Health Department currently permits municipal disposal facilities and has control over both the non-hazardous and hazardous waste deposited at those sites. If the consolidation were to occur, two agencies instead of one would be involved in the regulation of waste at municipal facilities -- the Health Department for non-hazardous waste, and TDWR for hazardous waste. This dual involvement could confuse and complicate the permitting and enforcement systems for these municipal facilities.

ACROSS-THE-BOARD RECOMMENDATIONS

From its inception, the Sunset Commission identified common agency problems. These problems have been addressed through standard statutory provisions incorporated into the legislation developed for agencies undergoing sunset review. Since these provisions are routinely applied to all agencies under review, the specific language is not repeated throughout the reports. The application to particular agencies are denoted in abbreviated chart form.

TEXAS DEPARTMENT OF WATER RESOURCES

Applied	Modified	Not Applied	Across-the-Board Recommendations
A. GENERAL			
X			1. Require public membership on boards and commissions.
X			2. Require specific provisions relating to conflicts of interest.
X			3. Provide that a person registered as a lobbyist under Article 6252-9c, V.A.C.S., may not act as general counsel to the board or serve as a member of the board.
X			4. Require that appointment to the board shall be made without regard to race, color, handicap, sex, religion, age, or national origin of the appointee.
X			5. Specify grounds for removal of a board member.
X			6. Require the board to make annual written reports to the governor, the auditor, and the legislature accounting for all receipts and disbursements made under its statute.
X			7. Require the board to establish skill-oriented career ladders.
X			8. Require a system of merit pay based on documented employee performance.
X			9. Provide that the state auditor shall audit the financial transactions of the board at least once during each biennium.
X			10. Provide for notification and information to the public concerning board activities.
*			11. Place agency funds in the Treasury to ensure legislative review of agency expenditures through the appropriation process.
X			12. Require files to be maintained on complaints.
X			13. Require that all parties to formal complaints be periodically informed in writing as to the status of the complaint.
	X		14. (a) Authorize agencies to set fees. (b) Authorize agencies to set fees up to a certain limit.
X			15. Require development of an E.E.O. policy.
X			16. Require the agency to provide information on standards of conduct to board members and employees.
X			17. Provide for public testimony at agency meetings.
X			18. Require that the policy body of an agency develop and implement policies which clearly separate board and staff functions.

Texas Department of Water Resources
(Continued)

Applied	Modified	Not Applied	Across-the-Board Recommendations
			B. LICENSING
		X	1. Require standard time frames for licensees who are delinquent in renewal of licenses.
		X	2. Provide for notice to a person taking an examination of the results of the exam within a reasonable time of the testing date.
		X	3. Provide an analysis, on request, to individuals failing the examination.
		X	4. Require licensing disqualifications to be: 1) easily determined, and 2) currently existing conditions.
		X	5. (a) Provide for licensing by endorsement rather than reciprocity. (b) Provide for licensing by reciprocity rather than endorsement.
		X	6. Authorize the staggered renewal of licenses.
		X	7. Authorize agencies to use a full range of penalties.
		X	8. Specify board hearing requirements.
		X	9. Revise restrictive rules or statutes to allow advertising and competitive bidding practices which are not deceptive or misleading.
		X	10. Authorize the board to adopt a system of voluntary continuing education.

TEXAS WATER COMMISSION

Applied	Modified	Not Applied	Across-the-Board Recommendations
A. GENERAL			
X			1. Require public membership on boards and commissions.
X			2. Require specific provisions relating to conflicts of interest.
X			3. Provide that a person registered as a lobbyist under Article 6252-9c, V.A.C.S., may not act as general counsel to the board or serve as a member of the board.
X			4. Require that appointment to the board shall be made without regard to race, color, handicap, sex, religion, age, or national origin of the appointee.
X			5. Specify grounds for removal of a board member.
		X	6. Require the board to make annual written reports to the governor, the auditor, and the legislature accounting for all receipts and disbursements made under its statute.
X			7. Require the board to establish skill-oriented career ladders.
X			8. Require a system of merit pay based on documented employee performance.
		X	9. Provide that the state auditor shall audit the financial transactions of the board at least once during each biennium.
		X	10. Provide for notification and information to the public concerning board activities.
		X	11. Place agency funds in the Treasury to ensure legislative review of agency expenditures through the appropriation process.
		X	12. Require files to be maintained on complaints.
		X	13. Require that all parties to formal complaints be periodically informed in writing as to the status of the complaint.
		X	14. (a) Authorize agencies to set fees. (b) Authorize agencies to set fees up to a certain limit.
X			15. Require development of an E.E.O. policy.
		X	16. Require the agency to provide information on standards of conduct to board members and employees.
		X	17. Provide for public testimony at agency meetings.
X			18. Require that the policy body of an agency develop and implement policies which clearly separate board and staff functions.

*Already in statute or required.
**Not approved for application.

Texas Water Commission
(Continued)

Applied	Modified	Not Applied	Across-the-Board Recommendations
			B. LICENSING
		X	1. Require standard time frames for licensees who are delinquent in renewal of licenses.
		X	2. Provide for notice to a person taking an examination of the results of the exam within a reasonable time of the testing date.
		X	3. Provide an analysis, on request, to individuals failing the examination.
		X	4. Require licensing disqualifications to be: 1) easily determined, and 2) currently existing conditions.
		X	5. (a) Provide for licensing by endorsement rather than reciprocity. (b) Provide for licensing by reciprocity rather than endorsement.
		X	6. Authorize the staggered renewal of licenses.
		X	7. Authorize agencies to use a full range of penalties.
		X	8. Specify board hearing requirements.
		X	9. Revise restrictive rules or statutes to allow advertising and competitive bidding practices which are not deceptive or misleading.
		X	10. Authorize the board to adopt a system of voluntary continuing education.

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**Not approved for application.