

Texas Municipal Utilities Association Utility Leadership and Management Conference—

April 19, 2023

Top Five Legislative/Regulatory Developments for Utility Decisionmakers

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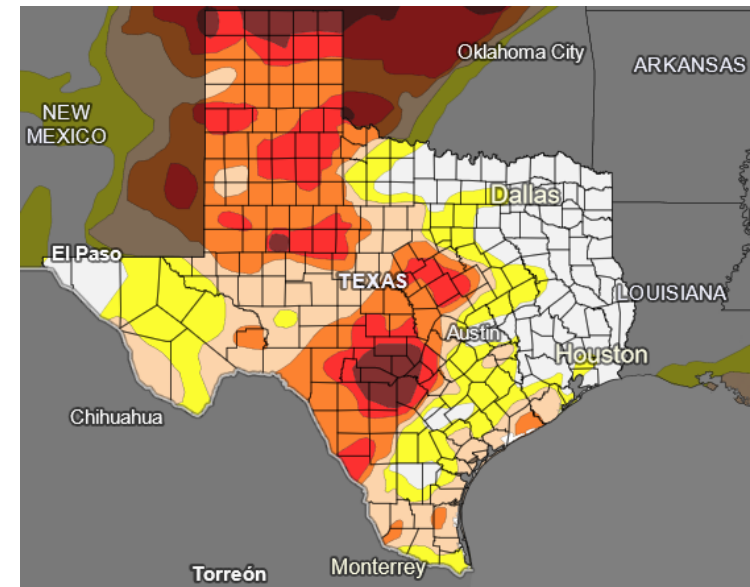
Principal,

Lloyd Gosselink Rochelle & Townsend, P.C.

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Legislative/Regulatory Backdrop

- >Texas Legislature in Session
- >Split Congressional Leadership
- >Groundswell for new water quality regulatory action (at both state and federal levels)
- >Ongoing Drought
- >Current personnel/hiring climate



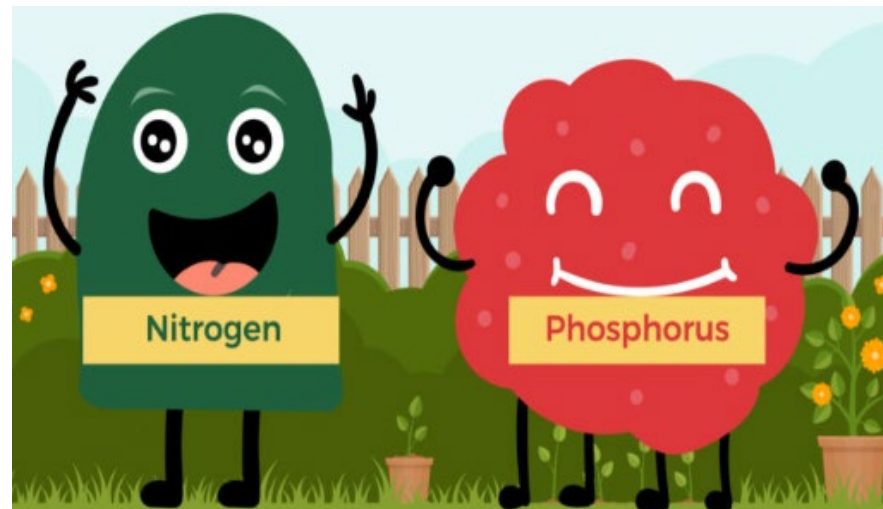
Headline Crafting on Key Legislative/Regulatory Issues

- >Tools to understand developments and proactively address issues developing now and in future.
- >On the ground solutions drive narratives to key stakeholders/involved parties:
 - Customers/Ratepayers
 - City Councils/Utility Boards
 - Regulators
 - Legislators

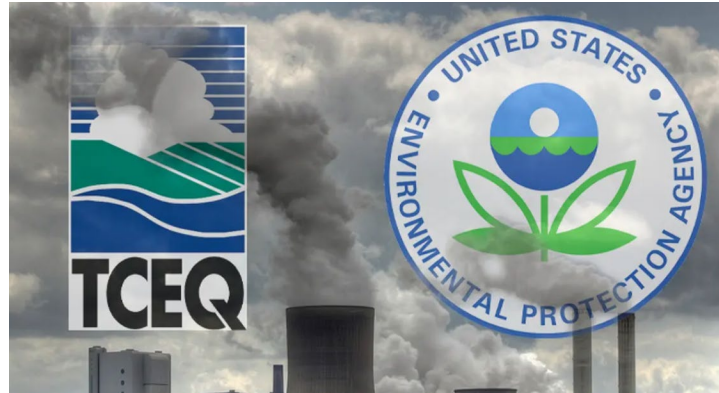
Top 5 Developments: #1

#1: Water Quality Permitting Changes/Updates at TCEQ

(Several changes/updates to track)



Petition to Revoke TCEQ's delegation of NPDES authority



Overview:

- On September 23, 2021, citizen petition submitted to revoke TCEQ's delegation of NPDES authority
- Petitioners requested that the EPA require that Texas correct the alleged “deficiencies” in the Texas Pollutant Discharge Elimination System program
- Petitioners requested that EPA withdraw Texas' delegated authority to administer the National Pollutant Discharge Elimination System permitting program under the CWA

- Petitioners argue TPDES program is purportedly deficient due to:
 - Tier II Antidegradation review limitations
 - Public participation limited opportunities (including air focus)
 - Alleged failure to ensure that effluent limits contained in permits are demonstrated to be compliant with applicable regulations and water quality standards
 - Alleged failure to recognize that an injury to recreational interests is an independent and sufficient basis for judicial standing

Tied to Antidegradation Review and Recent TCEQ Permit Actions

What Petitioners Want

- Pull back TCEQ Authorization under NPDES Program
- Only **two states in U.S. without delegation:**



Current Status of Petition

- EPA is conducting an “informal investigation” of Texas’ CWA permit program
- CWA allows EPA to take steps including limiting or withdrawing a state’s authority of its delegated program is deficient



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1201 ELM STREET, SUITE 500
DALLAS, TEXAS 75270

Office of the Regional Administrator

January 24, 2023

Mr. Eric Allmon
Perales, Allmon & Ice, P.C.
Attorneys at Law
1206 San Antonio Street
Austin, Texas 78701

Re: Citizens Petition for Corrective Action or Withdrawal of NPDES Program Delegation From the State of Texas

Dear Mr. Allmon:

This letter is to update you on the progress of the U.S. Environmental Protection Agency Region 6’s review of the Citizen Petition for Corrective Action or Withdrawal of NPDES Program Delegation from the State of Texas filed on September 23, 2021, on behalf of the Petitioners.

Current Status of Petition

- Excerpts from Letter:
 - “If proven to be true, the allegations in the Petition are concerning.”
 - Revocation can be warranted if a NPDES program fails to comply with public participation requirements.
 - Investigation will determine whether EPA will “commence proceedings” (separate process) under federal regs (40 CFR 123.64) – formal hearing with TCEQ providing written responses/answers to allegations.

Top 5 Developments: #1

#1: Water Quality Permitting Changes/Updates at TCEQ

Nutrient Loadings and Antidegradation Analysis
Court of Appeals Denial of Motion for Rehearing on
Dripping Springs Permit (March 7, 2023)



Top 5 Developments: #1

#1: Water Quality Permitting Changes/Updates at TCEQ

- Nutrient Permitting and planning for new limits
- Stakeholder Involvement with TCEQ Permitting
- Compliance Period (three years) vs. on-the-ground WWTP updates to meet requirements

Top 5 Developments: #1

#1: Summary of Water Quality Permitting Changes/Updates at TCEQ:



- a) EPA/TCEQ Delegation Review Ongoing (on Petition to Revoke)
- b) TCEQ Antidegradation Analysis approach surviving challenges (for now)
- c) Increased Nutrient limits in permits anticipated

Top 5 Developments: #1

#1: Summary of Water Quality Permitting Changes/Updates at TCEQ:



Desired Headline + Actions Utility Leaders to consider:

**“CITY PREPARED FOR MORE STRINGENT
PERMIT FOLLOWING COORDINATION OF CIP
PLANNING WITH RISK ASSESSMENT”**

Top 5 Developments: #2

#2: Environmental Justice/Public Access Updates:

Driven by Federal policy/EPA Emphasis

Background on Environmental Justice (“EJ”) Concerns and disproportionate impacts on certain communities



Top 5 Developments: #2

#2: Environmental Justice/Public Access Updates:

EPA Definition of EJ:



“The fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”

Top 5 Developments: #2

#2: Environmental Justice/Public Access Updates:

Federal Level:



-EPA announced \$177 million to create 17 technical assistance centers for community seeks competing for federal funds (April 2023)

*Tied to projects for compliance monitoring funds, pollution clean-ups/workforce development

-Enforcement Workplans with enforcement focus areas

Top 5 Developments: #2

#2: Environmental Justice/Public Access Updates:

State Level:

- Local impacts from TCEQ permitting activities at forefront of TCEQ Sunset Hearings
- Focused on public access and participation in certain permitting efforts

SUNSET

Top 5 Developments: #2

#2: Environmental Justice/Public Access Updates:

State Level:

- Plain Language Summaries for permits submitted (post May 1, 2022)

- Broad applicability across permitting (including air, water quality, water rights)

- No more than two pages, and include:

- a) function of the plant/facility;
- b) expected output of plant/facility;
- c) expected pollutants to be emitted/discharged;
- d) Applicant's planned control of pollutants

Top 5 Developments: #2

#2: TCEQ Template for Permit Renewals:

[*Company Name*] (CN[#####]) has submitted an application for renewal of permit number [#####]. The [*Facility/Area Name*] (RN[#####]) produces/manufactures [*Principal Company Product/Business*] at [*address/proposed location*], [*City*], [*County*] County.

This renewal will authorize the continued operation of [*description of the facilities being renewed (each emission source does not need to be listed, but instead a summary of what the facilities are)*]. [*Company Name*] has certified there will be no changes to the permit. The following permitted emission rates will remain the same.

Name of Pollutant	Total Amount Allowed (tons per year)

The facilities being renewed continue to be controlled by [*summary of the type of controls for the facilities being renewed; not a BACT discussion*].

Top 5 Developments: #2

#2: Environmental Justice/Public Access:

Desired Headline + Actions Utility Leaders to consider:

**“UTILITY FENDS OFF CHALLENGE TO
PUBLIC NOTICE PROCESS IN CRITICAL
WATER SUPPLY PERMIT DECISION
BEFORE TCEQ”**

Top 5 Developments: #3

#3: CERCLA AND PFAS DESIGNATION.

-PFAS/PFOA will be deemed “Hazardous Substances” under CERCLA following notice/comment rulemaking.

-Risks of Third Party Enforcement

CERCLA made simple

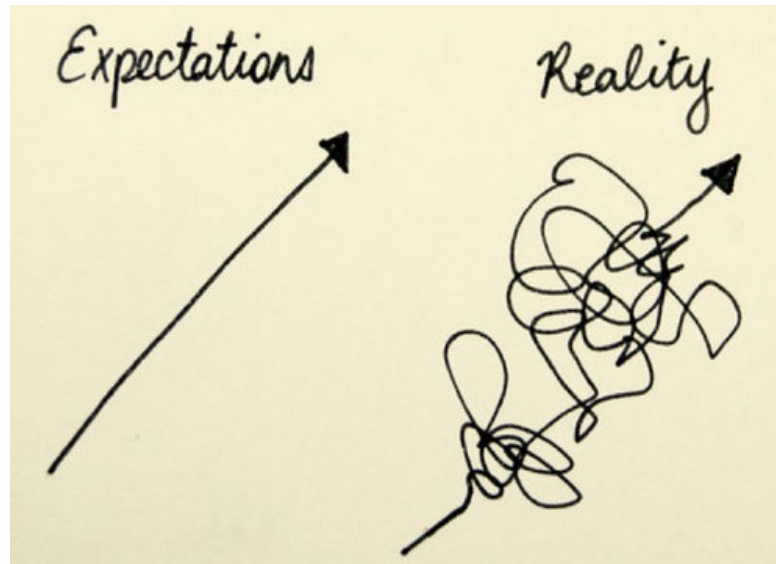
-**Current**: Comprehensive Environmental Response, Compensation, and Liability Act (enacted Dec. 11, 1980) (also known as SUPERFUND)



CERCLA unpacked

-IDEA vs. Reality:

>**Idea:** Federally-established process to find and clean-up hazardous waste releases in the environment at the cost of the entity responsible for the release.



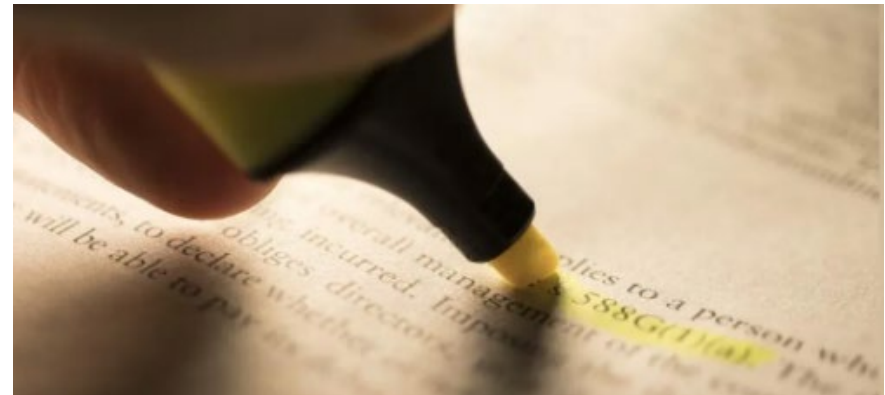
>**Reality:** Broad definitions, joint/severable liability, and third party litigation options *create a wide universe of CERCLA defendants beyond those creating/releasing hazardous substances.*

CERCLA unpacked

-Impacts on Utilities:

- >No Passive Receiver Exemption

- >Federal focus on Pretreatment for PFAS/PFOA removal



Top 5 Developments: #3

#3: CERCLA Hazardous Substances Designation for PFAS/PFOA:

Desired Headline + Actions Utility Leaders to consider:

**“PASSIVE RECEIVER EXEMPTION EXTENDED
TO WATER/WASTEWATER/SOLID WASTE
FACILITIES, PROTECTING AGAINST CLAIMS
BY CERCLA POTENTIALLY RESPONSIBLE
PARTIES”**

Top 5 Developments: #4

#4: Legislative Enactments from Texas Legislature:

Selected Bills of Interest from current legislative session:



- HB 4819 (Martinez)**: Relating to municipal requirements/ordinances and obligations to follow such local laws/ordinances as conditions of Chapter 26 permits
- HB 2595 (Rosenthal)**: Relating to advertisement of disposable wipes as “flushable” in light of problems caused to municipal wastewater systems, with penalties for wholesalers/suppliers/retailers
- SB223 (Campbell)**: Would require at least one public meeting for initial permits for WWTPs in county where WWTP to be located

Top 5 Developments: #4

#4: Legislative Enactments from Texas Legislature:

Selected Bills of Interest from current legislative session:



-**HB 441 (Lopez (Bexar Co))**: Relating to penalties assessed by TCEQ and requiring notice issued to state representative and state senator of such penalty assessed

-**HB 934 (Dutton)**: Relating to affected persons status, and would make state senators and state representatives considered “affected persons” in administrative hearings

-**HB57 (Zwiener)**: Relating to TCEQ reporting and four-year requirement to prepare public report regarding impacts of climate change on human health, economy, infrastructure, surface water/groundwater, and emergency preparedness (among others)

Top 5 Developments: #4

#4: Legislative Enactments from Texas Legislature:

Selected Bills of Interest from current legislative session:



-**SB 40 (Zaffirini)**: Relating to the establishment of uniform boil water notice alert system by TCEQ (with recission/expiration requirements and text messaging capabilities)

-**HB 1889 (Tinderholt)**: Relating to study of Israeli seawater desalination processes and feasibility for use of technology in Texas

-**HJR 169 (Clardy)**: Relating to potential Constitutional amendment to dedicate revenues from particular sales/use tax to set-aside fund for water infrastructure investment in Texas

Top 5 Developments: #4

#4: Legislative Enactments from Texas Legislature:

Other Key legislative outcomes to track:

- Ultimate package on TCEQ and PUC Sunset (including requirements for public notice and public participation)
- Funding for water/utility infrastructure out of state surplus



Top 5 Developments: #4

#4: Legislative Enactments from Texas Legislature:

Desired Headline + Actions Utility Leaders to consider:

**“LEGISLATIVE SESSION ENDS WITH
MINIMAL UNFUNDED MANDATES AND
SUPPORT FOR UTILITIES CRITICAL TO
DELIVERING KEY SERVICES FOR TEXANS ”**

Top 5 Developments: #5

#5: TCEQ/EPA Enforcement Trends:

- Across environmental media
- State and federal developments



- Ways to plan ahead
(or respond upon receipt of NOV/Agreed Order)

Top 5 Developments: #5

#5: TCEQ/EPA Enforcement Trends:

-State Enforcement Updates

- Expiration of “shield” agreements for wastewater infrastructure (SSOI)

- Enforcement process and timing updates (time from initiation to TCEQ Agenda to compliance deadlines)

Top 5 Developments: #5

#5: TCEQ/EPA Enforcement Trends:

-State Enforcement Considerations/Best Practices

Before facing Enforcement

- >Compliance History Review (August-October each year)
- >Env't'l Audit under Audit Privilege Act (protection from violations discovered)

**Texas Environmental,
Health, and Safety
Audit Privilege Act**

After receipt of Proposed Agreed Order

- >Don't pay fee; apply for SEP (can get credit for compliance costs incurred)
- >Negotiation of terms/requirements

SEP

Top 5 Developments: #5

#5: TCEQ/EPA Enforcement Trends:

-Federal Enforcement updates

>Continued use of Administrative Orders

>Lesser focus on municipal Consent Decree initiation
(trends are extensions/modifications)

>Reporting via DMRs/Monthly Spill Options (vs. 24-hour/5-day)



Top 5 Developments: #5

#5: TCEQ/EPA Enforcement Trends:

Desired Headline + Actions Utility Leaders to consider:

**“MUNICIPAL PERMIT COMPLIANCE RECOGNIZED BY
INDUSTRY GROUPS FOR EXEMPLARY
PERFORMANCE TO MEET MORE STRINGENT
STANDARDS”**

Top 5 Developments: #5

Top 5 Summary:

- 1. Water Quality Permitting Changes**
- 2. Environmental Justice Trends**
- 3. CERCLA Exposure due to PFAS designation as “Hazardous Substances”**
- 4. Texas Legislative Developments**
- 5. Enforcement Trends at State/Federal Levels**

Questions?

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