

SUBJECT: State delegation of the National Pollutant Discharge Elimination System

COMMITTEE: Natural Resources — favorable, without amendment

VOTE: 8 ayes — Counts, Yost, Combs, Corte, King, R. Lewis, Puente, Walker

0 nays

1 absent — Stiles

WITNESSES: For — Ronald Hudson, City of Houston; James C. Frank, Texas Chemical Council; R. Kinnan Goleman, Hoechst Celanese, Exxon Chemicals and Valero Refining; Mary Miksa, Texas Association of Business and Chambers of Commerce; Ken Rigsbee, Philips Petroleum Company; James Terrell, Texas Association of Dairymen

Against — None

BACKGROUND: Anyone seeking to discharge into state waters must obtain both state and federal permits. Federal permits are issued by the U.S. Environmental Protection Agency (EPA), and state permits by either the Texas Natural Resource Conservation Commission (TNRCC) or the Texas Railroad Commission (TRC). The TRC issues permits for the discharge of wastewater from certain oil, gas and geothermal operations. The EPA administers the National Pollutant Discharge Elimination System (NPDES) permit program, under the federal Clean Water Act.

The NPDES authorizes EPA to delegate discharge permitting authority to a state whose program meets certain criteria and is approved by the EPA. The Water Code contains sections that would take effect only if Texas receives NPDES delegation.

Rule 60 of the Texas Rules of Civil Procedure provides that any party may intervene in a proceeding by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party.

The EPA requires that state NPDES programs ensure that boards or bodies (which would include TNRCC) cannot include members who have

received, or have in the previous two years received, a significant portion of their income directly or indirectly from permit holders or applicants.

DIGEST: HB 2015 would amend the Water Code and the Natural Resources Code to make statutory changes necessary for the state to obtain federal delegation of the National Pollutant Discharge Elimination System (NPDES).

TNRCC could not adopt a rule designed to increase the fee imposed on both domestic and industrial wastewater treatment facilities owned by a local government before August 31, 1999. This would apply to annual waste treatment inspection fees (now capped at \$11,000) imposed under Water Code sec. 26.0291.

The public would be permitted to comment in writing before the attorney general or TNRCC could approve voluntary agreements that would finally dispose of certain civil or administrative enforcement actions against a party for NPDES permit violations. This public comment requirement would apply only to agreed judgments, consent orders or voluntary agreements that would finally dispose of all the remaining issues in a civil suit or administrative action brought against a party for violation of a NPDES permit, a failure to obtain a NPDES permit or a civil penalty assessed by the commission under Water Code sec. 26.136.

Notice of the opportunity to comment would have to be published at least 30 days before the end of the comment period, and the attorney general or TNRCC would publish a notice about the comment period in the Texas Register. Comments would have to be promptly considered by the attorney general or TNRCC. They could withdraw or withhold consent to a proposed settlement if written comments disclosed facts that indicated that the settlement would be inadequate or inconsistent with Water Code requirements. If a change to the settlement arose out of submitted comments, no further notice of changes to the proposed settlements would have to be published.

HB 2015 would amend the Water Code and the Natural Resources Code to provide that the attorney general could not oppose intervention by a person with standing to intervene, as provided by Rule 60 of the Texas Rules of Civil Procedure, in the following civil actions:

- a civil action instituted by TNRCC or the Parks and Wildlife Department for a violation of a NPDES permit or a failure to obtain a NPDES permit issued by TNRCC.
- an action instituted by the attorney general alleging a violation of a NPDES permit or the failure to obtain an NPDES permit issued by the Railroad Commission, for discharge of wastewater from oil and gas exploration and production activities issued under Natural Resources Code, Chapter 91, or the discharge of wastewater from geothermal exploration activities, under Natural Resources Code, Chapter 141.

HB 2015 would also amend Water Code sec. 5.053 to provide that TNRCC commissioners appointed for terms that would expire after August 31, 2001, would have to comply at the time of their appointment with conflict-of-interest requirements in the federal Clean Water Act, 33 USC, secs. 1251-1387.

The bill would take immediate effect if approved by two-thirds of the membership of each house.

**SUPPORTERS
SAY:**

HB 2015 would make changes that EPA has required as a condition of granting NPDES delegation and help the state exercise full control over the discharge permitting process.

Texas' dual permitting program is burdensome and expensive for cities, industries, prisons, universities and other entities that operate wastewater treatment plants. Currently, all operators with state permits must also acquire EPA permits. Obtaining NPDES delegation would cut paperwork, bureaucracy and costs involved in getting dual permits. Most industries in Texas would prefer to deal with TNRCC than with a federal bureaucracy. State problems are better handled and understood by officials employed by and answerable to the citizens of Texas.

Current waste treatment inspection fees are capped at \$11,000 annually. The cap would rise to \$15,000 under NPDES delegation, under Water Code sec. 26.0291, but possible fee increases would still be less than the additional costs incurred in having to obtain two separate permits, which can cost as much \$50,000 extra.

The bill would allow Texas finally to obtain the delegation from the federal government under the NPDES that the state has sought for over 15 years. In order to assume the NPDES program, the state must provide for the possibility of public intervention and participation in enforcement proceedings related to wastewater discharges, and impose additional eligibility requirements on TNRCC members.

Allowing citizens with standing to intervene in enforcement actions concerning wastewater discharges is good public policy. Public health and safety may be affected by illegal discharges, and members of the public may have vital information pertaining to the violation.

Cities would be exempt from fee increases only until 1999. Since the program would probably take almost a year to put in place and be approved, cities would only be exempted from increased fees for a short time. In some states where the program was delegated, cities were hit with significant fee increases that they could not manage. By 1999 they would have had some breathing room to budget for possible increases.

The conflict-of-interest requirements that the EPA requires for the three TNRCC commissioners would be phased in slowly, and only apply to commissioners whose terms would expire after August 31, 2001, which would affect none of the current incumbents. TNRCC commissioners serve staggered six-year terms, and John Hall's term expires in 1997, Pam Reed's in 1995 and Peggy Garner's in 1999, although she has announced she will retire May 1, 1995.

Appointees to succeed incumbents who serve out their terms would be affected by the new conflict-of-interest provisions, but anyone appointed to finish out the term of a current commissioner would not, since the current terms end before 2001. By the time appointments are made for full terms, the federal government may have repealed the conflict-of-interest requirement, since many people have objected to it.

**OPPONENTS
SAY:**

The complications created by HB 2015 to eliminate dual permitting under the NPDES program may be more trouble than they are worth. State assumption of the NPDES program could bring large fee increases to pay for additional staff and other expenses. If the state assumes the NPDES

program, TNRCC would probably obtain delegation of federal programs for municipal and industrial wastewater discharges, pre-treatment of industrial water, stormwater discharges, sewage management and confined animal feeding operations, all of which would require additional staff to administer.

In an enforcement action by the state alleging violation of an NPDES permit, citizens are not usually allowed to intervene. HB 2015 would allow and encourage them to do so, causing headaches and increased litigation costs for permit holders. Cities, which sometimes cannot effectively control discharges (like city stormwater discharges after a heavy rainfall) would be particularly vulnerable to enforcement actions complicated by intervenors.

The \$15,000 cap on annual waste discharge permit fees would probably have to be increased for the state to be able to fulfill its obligations, and cities would be exempted from fee increases only until 1999. After that, cities and industries could face substantial fee increases. Oklahoma cities faced fee increases of more than 400 percent to fund the program. Cities would have to pass that cost on in higher sewer bills or decreased services. Dual-permitting might, in the end, be cheaper than NPDES delegation.

Under no circumstances should Texas allow the federal government to dictate conflict-of-interest requirements of TNRCC appointees. State statutes already provide ethical guidelines for appointments to the commission. The federal law would rule out too many good appointees. The EPA, in the Federal Register, 40 CFR, 123.26, provides that state NPDES programs are required to ensure that boards or bodies (which would include TNRCC) cannot include members who have received, or have in the previous two years received, a significant portion of their income directly or indirectly from permit holders or applicants. This would bar appointment of anyone who had served at the LCRA, most universities and other entities that hold permits. This could make it more difficult for the governor to find qualified appointees with the technical knowledge to serve competently.

OTHER
OPPONENTS
SAY:

It would be unfair for cities to be able to exempt themselves from the higher fees that may come with delegation of the NPDES program. Big industries may not feel the bite of increased fees, but most industrial discharge permit holders in the state are small and can ill afford cost increases. Cities, like all permit holders who would benefit from a single-permitting program, should help to shoulder the burden for its cost.

NOTES:

A similar bill, SB 1000 by Patterson, was referred to Senate Natural Resources. A related bill, HB 1623 by Jackson, which would provide that EPA NPDES permit holders would not be required to seek state permits, was referred to the House Natural Resources Committee.