

SUBJECT: Amending TCEQ permitting procedures

COMMITTEE: Environmental Regulation — committee substitute recommended

VOTE: 5 ayes — Bonnen, Chisum, Crownover, W. Smith, West
0 nays
2 absent — Kuempel, Flores

WITNESSES: For — Jon Fisher, Texas Chemical Council; Mary Miksa, Texas Association of Business and Chambers of Commerce; (*On committee substitute:*) James Morris

Against — Richard Lowerre, City of Del Rio, Kleberg County Commissioner Precinct No. 1, Martinez Environmental Group, et al.; Cathy J. Sisk, Harris County Commissioners Court

BACKGROUND: The 76th Legislature enacted HB 801 by Uher et al., revising the environmental permitting process at the Texas Commission on Environmental Quality (TCEQ). Changes made by HB 801 included:

- amending the requirements for evaluating a request for a contested case hearing;
- providing earlier notice and expanded public comment periods for certain environmental permits;
- providing that contested case hearings no longer were required for renewal of certain hazardous waste storage and processing permits; and
- narrowing certain parameters of the contested case hearing process.

DIGEST: CSHB 2877 would amend TCEQ procedures for issuing a permit for wastewater, an injection well, or a solid waste facility, as well as for a preconstruction permit for a facility that could produce air emissions, or a federal operating permit.

Wastewater, injection wells, or solid waste facility permits. TCEQ

automatically would have to extend the public comment period that began after the executive director's preliminary decision on the permit application until the close of any public meetings that were held on the application. However, TCEQ could not extend the period for filing a request to initiate the public participation process or request reconsideration. CSHB 2877 would specify that the executive director had to file a response to each relevant and material public comment only if it was filed in writing.

A request for reconsideration of the executive director's decision could be filed only after publication of the preliminary decision. A request for a contested case hearing could be filed only after transmittal of the executive director's response to public comments. TCEQ could not grant a request for a contested case hearing unless the hearing was requested by an affected person who submitted written comments during the public comment period. The commission would not be required to provide public notice of a contested case hearing. TCEQ could not refer an issue to the State Office of Administrative Hearings (SOAH) for a contested case hearing unless:

- the hearing request established a reasonable basis for the factual dispute and described how the executive director's response to comments failed to resolve the dispute;
- the issue was discrete, not a broad or generalized objection; and
- the issue was raised by the person requesting the hearing.

Air permits. The bill would amend the requirements for publishing notice of intent to obtain a preconstruction permit, review, or renewal or a federal operating permit. A notice would have to include a statement that a person who might be affected by emissions from the facility or proposed facility was entitled to request initiation of the public participation process. Notice of a preliminary decision on a preconstruction permit would have to include a statement that a person who might be affected by emissions from the facility or proposed facility was entitled to request a hearing. CSHB 2877 would specify that the executive director had to file a response to each relevant and material public comment only if it was filed in writing.

If a request to initiate the public participation process for a preconstruction permit or renewal was not filed during the period prescribed by rule, TCEQ would have to conduct a public hearing held in response to a later public

notice only in compliance with hearing requirements for the federal operating permit program. TCEQ would have to extend the public comment period automatically until the close of public meetings. The commission could not extend the period for filing a request to initiate the public participation process or request reconsideration.

SOAH hearings. In designating parties to a hearing on a permit application, an administrative law judge could name only the executive director of TCEQ, the office of public interest council, the permit applicant, or a person whose hearing request had been granted by the commission and referred for a contested case hearing. The executive director could participate in a contested case hearing only to provide information to complete the administrative record. An administrative law judge could make a summary disposition of the issues referred by TCEQ according to commission rules.

The bill would take effect September 1, 2003. The bill would apply only to a permit or permit amendment or renewal filed with TCEQ on or after that date.

**SUPPORTERS
SAY:**

CSHB 2877 would clarify the law to reflect the intentions of HB 801, which was the compromise product of lengthy negotiations between industry, local government, public interest, and environmental groups. It was intended to improve public notice, clarify the role of notice and comment in the permit process, and restrict contested cases to issues instead of an entire permit. With four years of experience, however, some issues have arisen that were unforeseen or interpreted differently than intended by the agreeing parties. Instead of a more radical approach as some have advocated, CSHB 2877 would be a good-faith attempt to fix problems in the permitting process that have been uncovered since enactment of HB 801.

The bill would not prevent the executive director of TCEQ from responding to oral comments on a preliminary decision. Public meetings can be lengthy affairs with large amounts of repetitive testimony. The bill would save time and money by not requiring agency staff to pore over hearing testimony, searching for any new comment. All comments, written or oral, would remain part of the record that could be used to make a decision and refer an issue for a contested case hearing.

The bill would not require published notice of a contested case hearing in a

newspaper because a permit application already would have had to meet extensive public notice requirements. First, an applicant must provide public notice when a permit application is determined to be administratively complete. Next, an applicant must publish public notice of the executive director's preliminary decision. Moreover, notice of a public meeting must be published. Because the executive director's decision and response to public comments, as well as instructions for requesting a contested hearing, are sent to the applicant and every person who submitted comments, there is no need for additional public notice.

The bill would not prevent affected parties from requesting a contested case hearing. However, it would prohibit those who did not participate in the public comment period from requesting a contested case hearing. Often during a permit application, opponents form a coalition to request a contested case hearing in the hope of slowing down the permit process. The bill would prevent such delay tactics, which waste the resources of the state and other involved parties.

**OPPONENTS
SAY:**

CSHB 2877 would reduce the public's role in permit proceedings at TCEQ. In fact, it would backtrack on agreements forged during the negotiations over HB 801. The bill would be one more step in industry's biennial efforts to expedite the permitting process by cutting back public involvement.

The bill would limit public involvement in agency decisions. It would prevent the agency from extending the deadline for initiating the public participation process. However, the bill would not prevent the agency from extending filing or other deadlines for permit applicants, a common occurrence. The bill would require that the executive director had to respond only to comments submitted in writing. However, many people attend public meetings to present their comments in oral testimony. Moreover, the bill would specify that public notice was not required for a contested case hearing on a wastewater, injection well, or landfill permit.

The bill also would make it more difficult for cities, counties, or the federal government to participate in permit decisions. In the case of a landfill permit, for example, the bill would limit requests for a contested case hearing only to those people who submitted comments during the public comment period. The U.S. Air Force often becomes involved in landfill permit proceedings

because of the danger to pilots posed by birds attracted to landfills. Unfortunately, this bill could preclude the Air Force's involvement in many cases because the Air Force usually is not able to respond during the public comment period. Affected air bases might not receive notification and the Air Force's size and bureaucracy might prevent a quick response. By restricting who could request a contested case hearing, the bill effectively could prevent some affected parties from participating.

NOTES:

The companion bill, SB 1263 by Armbrister, was reported favorably, as substituted, by Senate Natural Resources on April 22.

The committee substitute differs from the bill as introduced in by:

- extending the public comment period until the close of public meetings and prohibiting extension of the deadline for filing a request to initiate the public participation process;
- amending the requirements for referring an issue to the State Office of Administrative Hearings; and
- specifying that public notice would not be required for certain contested case hearings.