

SUBJECT: Revising process for contesting environmental permit applications

COMMITTEE: Environmental Regulation — committee substitute recommended

VOTE: 7 ayes — Morrison, Isaac, Kacal, K. King, P. King, Lozano, E. Thompson

2 nays — E. Rodriguez, Reynolds

WITNESSES: For — Richard Mason, Shintech, Inc.; Christina Wisdom, Texas Association of Manufacturers; Stephen Minick, Texas Association of Business; Hector Rivero, Texas Chemical Council; Derek Seal, Texas Oil and Gas Association; Leigh Thompson, Texas Public Policy Foundation; (*Registered, but did not testify*: Tristan Castaneda, Jr, Allergan, Ford Motor Company; Gary Gibbs, American Electric Power Company; Carolyn Brittin, Associated General Contractors of Texas; Jacob Arechiga, Balanced Energy for Texas Coalition; Charlene Heydinger, BP; Jim Grace, Centerpoint Energy; Julie Williams, Chevron; Steve Perry, Chevron USA; Kinnan Golemon, Devon Energy, Shell Oil Company, Austin White Lime, Gulf Coast Waste Disposal Authority; Warren Mayberry, DuPont; Craig Beskid, East Harris County Manufacturers Association (EHCMA); Diane Davis, East Texas Against Lawsuit Abuse; Grant Ruckel, Energy Transfer; Samantha Omey, ExxonMobil; Kelly McBeth, Gas Processors Association; Mark Borskey, General Electric; Wendy Reilly, HID Global; Mike Meroney, Huntsman Corp., BASF Corp., and Sherwin Alumina, Co.; Dan Mays, Kinder Morgan; Bill Oswald, Koch Companies; Mindy Ellmer, LyondellBasell Industries; Ben Sebree, Marathon Petroleum Corporation; Kaylyn Seawell, MeadWestvaco; Parker McCollough, NRG Energy, Inc.; Randy Cubriel, Nucor; Julie Moore, Occidental Petroleum; Neftali Partida, Phillips 66; Chris Shields, Praxair, San Antonio Chamber of Commerce, Tenaska; Ed Longanecker, Texas Independent Producers and Royalty Owners Association;; Mike Hull, Texans for Lawsuit Reform; Rich Szecsy, Texas Aggregate and Concrete Association; Bill Stevens, Texas Alliance of Energy Producers; David Mintz, Texas Apartment Association; Richard A. (Tony) Bennett, Texas Association of Manufacturers; George Christian

and Lisa Kaufman, Texas Civil Justice League; Jeff Brooks, Texas Conservative Coalition; Thure Cannon, Texas Pipeline Association; Celina Romero, Texas Pipeline Association; John W Fainter Jr, The Association of Electric Companies of Texas, Inc.; Amy Beard, The Boeing Company; Daniel Womack, The Dow Chemical Company; Tanya Vazquez, Toyota Motor North America; Larry McGinnis, US Steel; Julie Klumphyan, Valero; Tara Snowden, Zachry Corporation; Scott Stewart, Zachry Group; Greg Macksood)

Against — Adrian Shelley, Air Alliance Houston; Maren Taylor, Alliance for a Clean Texas (ACT); Eric Allmon, Frederick, Perales, Allmon & Rockwell, P.C.; Cathy Sisk, Harris County; Madeleine Crozat-Williams, Houston Peace and Justice center; Cyrus Reed, Lone Star Chapter Sierra Club; Myron Hess, National Wildlife Federation; Carol Birch, Public Citizen; Tom “Smitty” Smith, Public Citizen; Elizabeth Riebschlaeger, Sisters of Charity of the Incarnate Word of San Antonio; Elise Wood, Stop Dripping Concrete; Andrew Dobbs, Texas Campaign for the Environment; David Weinberg, Texas League of Conservation Voters; and seven individuals; (*Registered, but did not testify*: Richard Lowerre, Caddo Lake Institute; David Foster, Clean Water Action; Dewayne Quertermous, Fort Worth Sierra Club; Christy Muse, Hill Country Alliance; Chris Frandsen, League of Women Voters of Texas; Kelly Davis, Save Our Springs Alliance; Arthur Browning, Sierra Club, Houston Regional Group; Jeffery Patterson, Texas Catholic Conference of Bishops; Byron Friedrich; Evelyn Merz)

On — Karen Darcy; (*Registered, but did not testify*: Robert Martinez, Texas Commission on Environmental Quality)

BACKGROUND: The Texas Commission on Environmental Quality (TCEQ) requires individuals or companies that wish to engage in certain types of projects or operations that could affect environmental quality to apply for and obtain approval of certain types of authorizations, including individual permits. A person or group who believes they will be adversely affected by such a project may contest the issuing of such an individual permit by requesting a hearing called a contested case hearing.

Government Code, sec. 2003.047 establishes the natural resource conservation division of the State Office of Administrative Hearings, which is charged with performing contested case hearings for the Texas Commission on Environmental Quality (TCEQ). Hearings are conducted by an administrative law judge within the division on behalf of the commission.

Chapter 5 of the Water Code contains provisions which govern some aspects of TCEQ's case contesting process, including a request for a contested case hearing, a description of a person affected in relation to a contested case hearing, and public meetings and public comment periods related to the contested case hearing process.

DIGEST:

CSHB 1865 would make various changes to the process for contesting environmental permits before they are issued as final by the Texas Commission on Environmental Quality (TCEQ).

List of disputed issues. With regard to a request to reconsider the executive director's decision on a permit or to hold a contested case hearing, CSHB 1865 would require that each of the disputed issues referred by the commission and provided to the administrative law judge for consideration have been raised by an affected person and submitted in a comment by that person in a timely manner. The list of issues would also have to be detailed and complete and include either factual questions only or mixed questions of fact and law.

Timeframe. CSHB 1865 would establish a time limit following the preliminary hearing by which the administrative law judge would have to complete the contested case proceeding and provide a proposal for decision to the commission regarding the case. This limit would be the earlier of 180 days or the date specified by TCEQ at the preliminary hearing, unless the judge specified a later date after determining that failure to grant the extension would deprive a party of a constitutional right.

Applicant's draft permit and rebuttal. CHSB 1865 would establish that the draft permit as prepared and preliminarily approved by the TCEQ, along with other supporting documentation submitted in the application process, would serve as a prima facie demonstration that the permit application met necessary legal and technical requirements and that it would protect human health and safety, the environment, and property. A party could rebut this demonstration by presenting evidence under certain circumstances. The bill would allow the applicant and the executive director of the commission to respond by presenting additional evidence supporting the draft permit.

Persons affected. CSHB 1865 would establish factors the commission could consider in determining whether a person or association was a person affected by the draft permit for purposes of the contested case hearing process. These would include:

- the merits of the underlying application, including whether it met the requirements for permit issuance;
- the likely impact of the permitted activity on the hearing requestor's health, safety, and use of property;
- the administrative record, including the permit application and other documentation;
- the analysis and the opinions of the TCEQ executive director; and
- other relevant information.

TCEQ could not find that:

- a group or association was an affected person unless the group or association timely identified by name and address a member who would be a person affected in the person's own right; or
- a hearing requestor was an affected person unless the requestor timely submitted comments on the permit application.

CSHB 1865 would require TCEQ to adopt rules to implement the provisions in the bill by January 1, 2016.

This bill would take effect September 1, 2015, and would apply only to a permit application filed on or after that date.

SUPPORTERS
SAY:

By shortening the time during which a contested case hearing could occur, CSHB 1865 would provide more certainty for companies seeking environmental permits as part of building or expanding their facilities or operations. The current process is not predictable and can last much longer than six months. This can have an adverse impact on economic growth and can deter companies from locating in Texas because other states have different processes that may allow them to issue permits within a more predictable timeframe.

The bill would create other limitations on the contested case process that would make it fairer and more balanced. For example, the bill would clarify that if TCEQ had already issued a preliminary decision on an applicant's permit application and met other related requirements, this would serve as adequate evidence that the permit met necessary requirements and would be adequate to protect health, safety, property and the environment for purposes of the contested case hearing. Previously, applicants whose permits were being contested typically presented information to show that they had met these requirements to the administrative law judge, even if their applications already had received a level of approval by TCEQ.

The bill also would ensure that those contesting the permit application were personally affected and had been participating in the process prior to contesting a specific case. In the past, associations or groups could be considered affected even if no individual person could be identified that was affected in his or her own right early in the process. The bill therefore would discourage groups from inappropriately contesting cases to further a broad agenda or for frivolous reasons.

TCEQ already does a thorough review of applications for environmental permits, and applicants must spend time and resources to satisfy and participate in that process. This bill would shorten the contested case

process when it occurred and would create greater efficiency for everyone involved by ensuring that concerns surfaced early in the process for legitimate and specific reasons and that all parties knew who was raising concerns.

OPPONENTS
SAY:

CSHB 1865 would further limit public participation in a process in which concerned people have few tools to oppose the building or expansion of a facility that they believe could harm the environment, their health, or their property. Tightening the time period during which a case could last and placing additional restrictions on who could be considered an affected party — as well as which types of issues could be raised during the process — would increase the risk that problems with a permit would not be identified, possibly resulting in harm to the environment and public health.

The bill would shift the burden of proof onto those protesting a permit and away from those applying for the permit in a contested case, even though companies trying to obtain permits have the advantage of time and resources to make their case as compared to average citizens. This is of special concern to individuals who live in rural, unincorporated areas because counties have limited power to prohibit incompatible land uses. As a result, citizens who might not be schooled in law or have the resources to hire an attorney must rely on the contested case process to protect their rights and property. Placing the burden on the party contesting the permit to disprove the applicant's evidence — rather than requiring the applicant to prove that the proposed project was not harmful — would change the nature of the process.

The bill would reduce the number of people who could contest a case as persons affected, even if they would indeed be affected, either because the person did not know about or participate in the process early enough or because the person did not articulate the issues in the right way at the right time. The changes to the public participation process could affect the federal delegation of authority of the permitting process from the Environmental Protection Agency to TCEQ.

The imposition of a 180-day time limit represents a “one-size-fits-all” approach that would not be appropriate in all cases and might not allow enough time for meaningful discovery, presentation of evidence, and adequate analysis of all the information presented in a complex case. By some estimate, contested cases in Texas last about 245 days on average. Shortening the length of that process greatly would reduce its effectiveness in terms allowing environmental concerns to surface.

The contested case process often results in improvements to the permit instead of resulting in its denial. By introducing a more restrictive process and a limit of 180 days for contested cases, the bill would increase the chance that permits were approved or issued based on bad information or faulty analysis, which would erode the protections offered through the process.

NOTES: The Senate companion bill, SB 709 by Fraser, was approved by the Senate and reported favorably from the House Environmental Regulation Committee on April 28.