SUBJECT: Public participation in environmental permitting procedures

COMMITTEE: Environmental Regulation — committee substitute recommended

VOTE: 6 ayes — Chisum, Culberson, Howard, Kuempel, Palmer, Talton

1 nay — Zbranek

2 absent — Allen, Dukes

WITNESSES: (*On original version:*)
For — Joseph Dworsky, Eastman Chemical; Shawn Glacken, Association of Electric Companies of Texas; Mary Miksa, Texas Association of Business and Chambers of Commerce; Ken Rigsbee, Phillips Petroleum; Paul Seals, Texas Chemical Council; James Terrell, Texas Association of Dairymen

Against — Raul Alvarez, Sierra Club, Lone Star Chapter; LaNell Anderson, Grandparents of East Harris County, Concerned Citizens Against Pollution, and Citizens Environmental Council; Sparky Anderson, Clean Water Action; Herb Appel, Greater Fort Bend Economic Development Council; Jim Baldauf, Texans United Education Fund; Bob Barton, Citizens League for Environmental Action Now; Bob Geyer, Sierra Blanca Legal Defense Fund; Myron Hess, National Wildlife Federation; Richard Hill, Beach City and Chambers County; Carole Lenz, Harris County Commissioner's Office; Richard Lowerre, Cities of Del Rio and Brackettville; Julie Marsden, League of Women Voters of Texas; Jim Marston, Environmental Defense Fund; Malcolm McClinchie, Citizens League for Environmental Action Now, Bul Verde/Spring Branch; Chris Sagstetter, Lake Houston Friends Insist Stop Toxic; Tom "Smitty" Smith, Public Citizen; Jill Sondeen, Comal Area League of Women Voters; Robert Stokes, Harris County Attorney's Office; Jerry Thomas, Spring Cypress Landfill Coalition and Bridgestone Homeowner's Association; Jane du Toit, People United for the Environment; Kathy McKissack; Julie Garrison; Mary Carter; Alice Bissel

BACKGROUND: Many types of environmental permits are subject to contested case hearings. A contested case hearing is a formal evidentiary hearing before an administrative law judge (ALJ) that a member of the public may request. Under current law, the Texas Natural Resource Conservation Commission

(TNRCC) must provide an opportunity for a contested case hearing for various permit applications, amendments, or renewals.

Whether or not the application, amendment, or renewal is subject to a contested case hearing depends on various factors, including the type of permit or action proposed. For example, an application for an individual permit for a new facility that has great potential to pollute, either by volume or class of pollutants, would be subject to a contested case hearing, while an amendment or renewal of an air permit that would not result in an increase of allowable emissions or in emission of a new air contaminant would not be subject to a contested case hearing.

To participate in a hearing, a member of the public must be judged "an affected person" and granted legal standing by the three-member TNRCC. Anyone who wishes to be granted standing in a contested case hearing must prove a "personal justiciable interest" in the case, which does not include an interest common to members of the general public. According to TNRCC, a person has a personal justiciable interest only if the person would be affected personally by the permit decision. In addition, the request must be judged "reasonable" and "supported by competent evidence." TNRCC has adopted rules specifying the factors to be considered when determining whether someone is an affected person in a contested case hearing.

For a more detailed discussion of these issues, see HRO Focus Report 76-9, *Public Participation in Environmental Permitting*, March 19, 1999.

DIGEST:

CSHB 801 would narrow certain parameters of the contested case hearing process, amend statutes concerning hearing requests, provide that contested case hearings no longer were required for renewal of certain hazardous waste storage and processing permits, and provide earlier notice and expanded public comment periods for certain environmental permits. The bill neither would expand nor restrict the kinds of permits that are subject to public notice and contested case hearing requirements.

The bill would require additional notice and expanded public comment for contested air permits but would leave in place the current statutory provisions that allow the TNRCC executive director to approve air permits for which hearings are not requested.

Restricting contested case hearings. CSHB 801 no longer would require TNRCC to provide an opportunity for contested case hearings for two kinds of hazardous waste permits, as long as the waste was generated on site and would not include waste generated elsewhere and transported to the site. TNRCC could act on these kinds of permit applications without providing for a contested case hearing only if the agency had complied with the notice, public comment, and meeting provisions laid out in the bill. The permits would be for:

- storage of hazardous waste in containers, tanks, and other closed vessels, and
- processing of hazardous waste, as long as the processing did not include incineration or other types of thermal processing.

Despite this exemption, TNRCC would have to provide an opportunity to request a contested case hearing on these types of permit renewals if the commission determined that the applicant's compliance history in the past five years raised doubts about the applicant's ability to comply with a material term of the permit.

Affected-party status. CSHB 801 would amend Water Code, sec. 5.115(a) to delete a provision that allows the three-member TNRCC to deny a request for a contested case hearing if the commission deems the basis of a person's request "not reasonable" or "not supported by competent evidence."

New contested case hearing procedures. TNRCC could not refer an issue for hearing to the State Office of Administrative Hearings (SOAH) unless the issue involved a disputed question of fact, was raised during a public comment period, and was relevant and material to the application decision.

If TNRCC granted a contested case hearing, it would have to limit the number and scope of issues referred to SOAH and specify the maximum expected length of the hearing, consistent with the nature and number of the issues considered.

The bill would not preclude TNRCC, however, from calling a hearing if the commission determined that the public interest warranted doing so. When referring a matter to SOAH, TNRCC would have to provide the ALJ with a

list of disputed issues and to specify the date by which the ALJ was expected to complete the proceedings and propose a decision. The ALJ would have to establish a docket control order designed to complete the proceeding by the date specified. The ALJ, however, could extend the proceeding if failure to do so would deprive a party of due process or other constitutional right.

The scope of the hearing would be limited to issues referred by TNRCC. On a request by a party, the ALJ could consider an issue not referred by the commission if the ALJ determined that the issue was material and supported by evidence and that there were good reasons for the failure to supply available information about the issue during the public comment period.

The scope of permissible discovery would be limited to any matter reasonably calculated to lead to the discovery of permissible evidence on any issue referred by the commission and on any issue that the ALJ agreed to consider. This would include documents used in preparing application materials or in selecting the site of the proposed facility and documents relating to the ownership of the applicant or of the facility.

The commission would, by rule, provide for subpoenas and commissions for depositions and would require that discovery be conducted in accordance with the Texas Rules of Civil Procedure. TNRCC would determine the level of discovery appropriate for each type of case considered by the commission, taking into account the nature and complexity of the case.

Water quality, solid and hazardous waste, and injection well permits. The bill would add a new subchapter M to the Water Code, requiring public notice, meeting, and comment for certain environmental permits that now are subject to contested case hearings. Permits affected by the new requirements would include those issued under Water Code, chapters 26 and 27 and Health and Safety Code, chapter 361. These chapters provide the basis for TNRCC's regulation of water quality, underground injection wells, and solid and hazardous waste. These provisions would apply to permits, approvals, or registrations or other forms of authorization required by law for a person to engage in an action.

TNRCC, by rule, also would have to provide for additional notice as well as opportunities for public comment, notice, and hearings to satisfy federal Environmental Protection Agency requirements for authorization of a state

permit program.

Preliminary permit notice and public meetings. Within 30 days after TNRCC's executive director determined an application to be administratively complete, the applicant would have to publish notice of intent to obtain a permit in the newspaper of largest circulation in the county where the facility would be located. The chief clerk of TNRCC would mail the notice of intent to authorities who represented or resided in the area where the facility was to be located, including state senators, state representatives, mayors, county judges, and city and county health authorities. River authorities would be notified for water quality permits located in their areas.

TNRCC would establish the form and content of the notice, which would have to include the phone numbers of TNRCC and the applicant, a description of the procedural rights and obligations of the public, a procedure by which a person could be put on a mailing list to receive information about the application, and the time and location of public meetings. A permit applicant would have to make a copy of the application available for review and comment at a public place in the county where the facility was proposed.

The applicant, in cooperation with the TNRCC executive director, could hold a public meeting in the county in which the facility was located to inform the public about the application and to obtain public input.

Notice of preliminary decision. Once the executive director completed a technical review of the application and issued a preliminary decision, the applicant would have to publish notice of the decision in a newspaper. Notice would have to include the location where a copy of the preliminary decision would be available for review and a description of how to submit comments. TNRCC would, by rule, have to establish the form and content of the notice, the manner of publication, and the duration of a public comment period.

Public meeting and comment period. During the public comment period, an applicant and the TNRCC executive director could hold one or more public meetings in the county where the facility was proposed. The executive director would have to hold a public meeting if requested by a legislator who represented the area where the facility was proposed or in the event of substantial public interest in the proposed activity.

The executive director would have to file with TNRCC's chief clerk a response to each relevant and material public comment on the preliminary decision. The clerk would transmit the executive director's decision, response to public comments, and instructions for how to request a contested case hearing to the following people: the applicant, those who commented during the public comment period, and those who requested to be on the mailing list for the permit action.

Requests for reconsideration or contested case hearing. A person could ask TNRCC to reconsider the executive director's decision or to grant a contested case hearing on the permit. A request would have to be filed and acted upon by TNRCC during a period provided by commission rule. The commission could not grant a request for a contested case hearing unless it was filed by an "affected person" as defined in Water Code, sec. 5.115.

Air permits and federal operating permits. CSHB 801 also would amend and expand current requirements for notice, public meetings, and public comment for federal operating permits, which are not subject to contested case hearings, and for various air permit applications that are subject to notice, comment, and contested case hearings. These permits would include applications for "new source" permits and some modifications of facilities.

The bill would require an applicant for these air permits to publish a notice of intent concerning the application within 30 days after TNRCC determined a permit application or review to be administratively complete. The notice would have to describe a location where a copy of the application would be available for review and to state that a person who could be affected by air contaminants from a facility, proposed facility, or federal source would be entitled to request a hearing from TNRCC.

The executive director would have to conduct a technical review and issue a preliminary decision. The bill would continue to allow, as under current law, an air permit that was uncontested after notice was published the first time to go directly to the executive director for a decision. However, if a public hearing were requested and not withdrawn before the decision was issued, the applicant would have to publish notice of the decision in a newspaper, and TNRCC would have to seek public comment on it.

The applicant would have to make a copy of the preliminary decision available for review and copying at a public place in the county where the facility or federal source was located. The notice required of the applicant would include the location of where the preliminary decision could be reviewed and a description of the way in which people could submit comments concerning the decision.

The bill would require TNRCC, by rule, to establish the form and content of the notice, the manner of publication, and the duration of the public comment period. The bill would impose almost identical requirements for notice and public meetings to those found in the proposed subchapter M. Requirements concerning the form and content of the notice, the public comment period, and the executive director's response to public comment also would be very similar to those in the proposed subchapter M.

CSHB 801 would delete current statutory language regarding who may request a public hearing and would allow the commission to deny a request considered unreasonable.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Its provisions would apply only to applications declared administratively complete on or after the effective date.

SUPPORTERS SAY:

CSHB 801 is the result of arduous negotiations carried out in good faith by industry, local government, public interest, and environmental groups. Many witnesses who testified against the original bill now support the committee substitute. It would balance the needs of everyone with an interest in environmental permits by shortening the contested case hearing process and by making it more efficient and predictable for permit applicants, while at the same time preserving opportunities for citizens affected by permit proposals to request contested case hearings.

CSHB 801 would encourage permit applicants and those affected by permits to meet and discuss permits early in the process. Providing an early forum for problems to be identified and resolved and for misapprehensions to be assuaged would result in fewer requests for contested case hearings. The bill also would enhance meaningful public participation in environmental permitting. Many citizens, if notified early enough, would want to offer comments on a permit but not to participate in the formal and intimidating

atmosphere of a contested case hearing, which essentially is a civil trial complete with lawyers and expert witnesses.

Limiting contested case hearings. The bill would allow TNRCC to renew two kinds of permits without providing an opportunity for contested case hearings, under very narrow circumstances. The agency could do this for permit renewals — not original applications — for storage and for processing of hazardous waste that was generated on site by the permit applicant. As the materials already would be generated on site, no additional on-site impacts would be created when the permit was renewed. Processing would not include incineration, and waste generated from another site would not qualify. A contested case hearing could be allowed for these kinds of permit renewals if the facility had a bad compliance history.

A facility like a chemical manufacturing facility, for example, sometimes must store waste generated on site until it can be picked up for disposal. There is no need to provide for a contested case hearing to renew a permit to do this, because the waste is already on site and there are no additional on-site impacts. A commercial hazardous-waste disposal facility proposing to renew a permit to store or process hazardous waste still would be subject to a contested case hearing.

In the past, contested case hearings have been misused by people who bear a grudge against the permit applicant but who have no valid technical reason to object to the permit. CSHB 801 would prevent these two kinds of permit renewals from being impeded by unnecessary contested case hearings that consume time and resources with no benefit to the public.

Affected-party status in contested case hearings. CSHB 801 would eliminate problematic statutory provisions stipulating that TNRCC must judge a request for a contested case hearing to be “reasonable” and “supported by competent evidence.” These provisions are opposed both by those who feel that the provisions have allowed TNRCC to refuse hearings to people who deserve them and by original supporters of the provisions who now feel that, because of recent court decisions, the provisions hinder the agency from being able to refuse frivolous requests. CSHB 801 would solve both problems by repealing the troublesome provisions, while at the same time strengthening TNRCC’s ability to deny frivolous requests.

CSHB 801 would accomplish this by stipulating that TNRCC could not refer an issue to SOAH unless TNRCC determined that the request involved a disputed question of fact, was raised during the public comment period, and was relevant and material to the decision and application.

The provisions that CSHB 801 would delete were enacted in 1995. At that time, their supporters hoped they would guide TNRCC in dealing with frivolous requests for hearings. However, some feel that the provisions have had a chilling effect on public participation, curtailing the public's right to participate in administrative hearings — a right they claim is supported by case law and should be interpreted liberally. These observers believe that TNRCC's rules implementing these provisions have set too high a threshold for public participation in contested case hearings. This opinion has been bolstered by recent court opinions that have reversed TNRCC decisions to deny standing in contested case hearings. Some judges, for example, troubled by the requirement that a request be supported by "reasonable evidence," have opined that TNRCC would have to conduct a mini-trial before it could grant standing for a hearing. This is impractical for TNRCC and unacceptable for someone requesting a hearing.

Many observers now believe that because of these court reversals, TNRCC has become more hesitant to deny standing even when such a decision is warranted. Thus, many who supported the provisions originally now find them to be having the opposite effect of what was intended.

New contested case hearing procedures. New procedures would expedite the contested case hearing process and ensure that the issues discussed would be germane. The current system encourages interminable, open-ended, expensive, and acrimonious trials. Under CSHB 801, issues would be identified earlier through a less formal notice and comment period, so the contested case hearing would not be seen as the only vehicle for identifying and resolving issues associated with a project.

CSHB 801 would require hearings to be conducted in a more efficient and timely manner by requiring TNRCC to set a time period by which an ALJ would be expected to complete a hearing. ALJs would have to limit hearings to key issues actually in dispute and to limit the scope of permissible discovery to issues relevant to the case, including documents relevant to the underlying application, site selection, and ownership. The bill would prevent

SOAH examiners from arbitrarily expanding contested case hearings to include issues without some basis in previous hearing or discovery.

The bill would reduce the length, complexity, and expense of hearings for all parties, since no time would be spent investigating issues that had no bearing on the permit. Currently, the process is so open-ended that both sides incur unnecessary expenses in protracted periods of discovery during which little is uncovered that is relevant to the issues supposedly being investigated.

New notice, hearing, and public comment requirements. CSHB 801 would provide for earlier and more effective notice for the public and would provide for an expanded public comment period so that issues could be identified and discussed thoroughly by all parties earlier in the process. Bringing the parties together at the beginning would encourage them to negotiate their differences before filing requests for hearings. This also would expand opportunities for applicants to alleviate public fears and misapprehensions about the proposed permit, renewal, or amendment. The bills also would ensure that TNRCC would evaluate public comments and take them seriously by requiring the executive director to respond in writing to each relevant and material comment.

CSHB 801 also would provide for earlier and more effective public notice. Applications and preliminary decisions on permits, for example, would be readily available for review and copying in the county where the facility was proposed.

The bill would allow the state's air permitting program to continue to work efficiently by continuing to allow applications that remain uncontested after notice is published to go directly to TNRCC's executive director for a decision. More than half of the permits issued by TNRCC are air permits, and these rarely are contested. If an air permit were contested, however, the bill would provide the same expanded notice and comment procedures as for water quality, solid and hazardous waste, and injection well permits.

OPPONENTS SAY:

Although CSHB 801 would allow renewal of only two kinds of permits without requiring TNRCC to provide for a contested case hearing, that still is two too many. This bill could be the beginning of an onslaught of proposals to eliminate contested case hearings one by one.

Contested case hearings are the most effective way for the public to participate meaningfully in permitting decisions. Citizens do not request these hearings frivolously, as they are very expensive for all parties.

OTHER OPPONENTS SAY:

Many small businesses who must obtain air permits from TNRCC, such as printers and furniture makers, cannot afford to publish public notice in a newspaper of general circulation, as CSHB 801 would require. In Dallas, for example, it might cost about $5,000 to publish a notice to comply with permit requirements. CSHB 801 should be amended to allow TNRCC to develop criteria for public notice requirements imposed on small businesses.

The bill should clarify that federal operating permits, required in Texas by the federal Clean Air Act, would not be subject to additional notice requirements. A federal source permit requires a permit holder to compile a list of all federal requirements applicable to the permit. Since this type of permit is simply a list of requirements, there is no need for applicants to comply with CSHB 801's new notice requirements.

The bill also should clarify that registrations, which are included in the bill's definition of permits, would not be subject to contested case hearings and that the bill would not require TNRCC to provide an opportunity for a contested case hearing in any situation where a hearing is not required already.

NOTES:

The original version differed significantly from the committee substitute. HB 801 as filed would have replaced contested case hearings on almost all environmental permits with a notice, comment, and public hearing process and would have created a supplemental information process by which people could obtain additional information relating to permit applications from TNRCC.

The filed version of HB 801 also would have allowed an applicant or an affected person who commented during the public comment period to appeal a decision on a permit application by TNRCC's executive director to district court. It would have given direction to the court on such decisions and would have provided that the denial of a request for a public hearing of the executive director's decision would not be appealable.

The companion bill, SB 402 by Armbrister has been referred to the Senate Natural Resources Committee.

A related bill, SB 1788 by Bivins, would change statutory provisions concerning TNRCC's determination of who is an "affected person" in the same manner as CSHB 801, but also would require TNRCC to make a determination concerning a contested case hearing request on the basis of the person's request and the executive director's review of the application. SB 1788 also would provide that TNRCC would not have to hold an evidentiary hearing to make its determination concerning a request. SB 1788 also has been referred to the Senate Natural Resources Committee.

A related bill, HB 1479 by Clark, which would allow wastewater discharge permit renewals to be issued without contested case hearings, passed the House on April 22.

Another related bill, HB 1283 by Counts, would eliminate a statutory cap on the number of wastewater dischargers who could obtain general rather than individual permits. General permits, unlike individual permits, are not subject to contested case hearings. HB 1283 passed the House on March 23 and was reported favorably by the Senate Natural Resources Committee on April 16.