

SUBJECT: Prohibiting air dispersion modeling at hearings for concrete batch plants

COMMITTEE: Environmental Regulation — favorable, without amendment

VOTE: 6 ayes — Chisum, Allen, Culberson, Dukes, Howard, Palmer

1 nay — Zbranek

2 absent — Kuempel, Talton

SENATE VOTE: On final passage, April 21 — 25-4 (Barrientos, Gallegos, Wentworth, West)

WITNESSES: *(On House companion bill, HB 2312:)*
For — Gary Johnson, Ingram Ready-Mix, Inc.; Michael Stewart, Texas
Aggregates and Concrete Association

Against — Raul Alvarez, Sierra Club, Lone Star Chapter; Warren Alston,
Bob Barton, Kate Mathis, and Malcolm McClinchie, Citizens League for
Environmental Action Now

On — Victoria Hsu

BACKGROUND: **Standard exemptions.** Under Health and Safety Code, sec. 382.057, the Texas Natural Resource Conservation Commission (TNRCC) may, by rule, exempt changes made to a facility, as well as certain types of facilities, from having to obtain new-source review permits, which are subject to notice and hearing requirements. These facilities or changes in facilities can be exempted only if TNRCC finds that such changes or types of facilities will not contribute a significant amount of air contaminants to the atmosphere.

More than 100 standard exemptions exist for sources as diverse as fireplaces, landfills, concrete batch plants, and restaurants. Facilities that are granted standard exemptions may operate without a permit, but they must comply with regulations and, in some cases, use certain kinds of emission-control equipment. These kinds of exemptions are subject to such conditions restricting their applicability as TNRCC deems necessary. If a facility or modification is

defined “major” under the federal Clean Air Act, it cannot be granted a standard exemption.

Concrete batch plants. Concrete batch plants are facilities that mix bulk cement with water and other materials like sand and gravel to make concrete. There are three standard exemptions concerning concrete batch plants. Health and Safety Code, sec. 382,058, however, requires that construction cannot begin on most concrete batch plants under an exemption unless the person building the plant has complied with notice and hearing requirements. Concrete batch plants are the only facilities granted standard exemptions that are subject to contested case hearings. Current law provides that only persons residing within 440 yards of the proposed plant and legislators from the area may request a hearing as a person who may be affected.

Contested case hearings in environmental permitting. 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 that may be requested by a member of the public. Under current law, TNRCC must provide the opportunity of a contested case hearing for various different permit applications, amendments, or renewals. Whether or not an application, amendment, or renewal is subject to a contested case hearing depends on various factors, including the type of permit or action proposed.

DIGEST: SB 1298 would provide that if TNRCC considered air dispersion modeling (ADM) information in the course of adopting a standard exemption for a concrete batch plant, the agency could not require a person qualifying for that exemption to conduct ADM before beginning construction of a concrete plant. Also, evidence regarding ADM could not be submitted at a contested case hearing concerning a proposed concrete batch plant.

This bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house.

SUPPORTERS SAY: SB 1298 would ensure that air dispersion modeling would neither be required of those proposing concrete batch plants nor introduced as evidence in contested case hearings. TNRCC performed extensive ADM when the agency created the standard exemption for concrete batch plants. It would be unfair and

redundant to ask persons proposing to build a concrete batch plant to recreate the ADM at great expense.

ADM is a computerized model of a facility that predicts concentrations of pollutants from a facility, considering various factors like wind direction, wind speed, and plant production capability. ADM is extremely costly for anyone person proposing to build a concrete batch plant. It also is very expensive for TNRCC to substantiate air modeling, either by running its own modeling or by reviewing the modeling introduced at a contested case hearing.

It would be inefficient for TNRCC to require a cement batch plant to carry out ADM when the agency already has done so for a similar type of facility and has found the facility safe enough to be granted a standard exemption. In fact, it constitutes an improper collateral attack on the rule itself for the agency to open up a question that already has been decided. If the standard exemption was proper, there is no reason to prove that these kinds of plants are safe over and over at the applicant's expense.

Concrete batch plants were granted a standard exemption in recognition of the fact that they produce almost no air pollution. These plants do not even have smokestacks. They are small facilities that mix bulk cement with water, sand, and gravel to make concrete that is transported to local sites for use. There is no burning or chemical processing of any kind at a concrete batch plant. Only small concrete batch plants can be granted standard exemptions. Large plants that are considered major sources of pollution must apply for new-source review permits.

The problem with allowing ADM to be introduced at a contested case hearing is that, invariably, both sides can find experts to prove their case, depending on what algorithm is used and what consultants they hire. As a result, air modeling studies are highly suspect unless performed by a completely neutral party. That is why the only modeling to be trusted is that done by TNRCC when it created and reviewed the exemption.

The contested case hearing process sometimes is abused by people who want to prevent a plant from being built but have no valid reason for doing so. These hearings can prove expensive and time-consuming for all concerned.

In 1998, TNRCC performed a “protectiveness review” of all standard exemptions, including those associated with concrete batch plants. Extensive research included air monitoring at different plants with varying production capabilities and exhaustive computer modeling.

TNRCC staff is still finishing the modeling, but it is expected that the staff will conclude that the current rules and regulations pertaining to the standard exemption for concrete batch plants protect the public’s health and safety. If they found this not to be so, the standard exemption would be repealed.

**OPPONENTS
SAY:**

SB 1298 would prevent TNRCC from requiring concrete batch plants to perform air dispersion modeling, leaving citizens, who often cannot afford to do modeling, with no chance to examine how the proposed plant would affect their community. The bill also would prevent evidence on ADM from being used in contested case hearings on concrete batch plants.

The bill would severely limit the ability of citizens to use the contested case hearing process to challenge TNRCC authorizations for proposed concrete batch plants. This effectively would prevent citizens from being able to fight these proposed plants, as the citizens in Bulverde recently were able to do when they challenged a plant by using ADM. SB 1298 would prohibit citizens from offering their own air-quality modeling evidence to challenge the claims of a concrete batch plant about the dispersion of particulate matter.

ADM demonstrates whether or not a plant exceeds federal ambient air quality standards for particulate matter and is one of the few tools available to assess potential particulate pollution before a plant is built. The financial burden involved in a contested case hearing where ADM is introduced is as great on the citizens as it is on the applicant. If citizens are willing to bear that burden for the sake of protecting their families, they should not be stripped of their rights because of the financial worries of the applicants.

Cement batch plants can pose severe local air-pollution problems, creating toxic concrete dust potent enough to eat paint off a car and harmful if inhaled. The plants are significant sources of particulate matter. The air impacts usually are fairly localized but are significant in areas where the particles are emitted and dispersed. Many scientific studies have associated exposure to particulate matter with increased premature mortality and respiratory

problems. The plants are particularly harmful for children and the elderly and often are located near schools and neighborhoods.

The state should not prohibit TNRCC from requiring ADM, since it is an accepted scientific method for predicting pollution and is used for reviewing other air permits in Texas. In fact, ADM has been used since the 1970s to demonstrate whether or not facilities will emit unacceptable amounts of pollution into nearby communities.