SUBJECT: Voluntary permitting of grandfathered facilities

COMMITTEE: Environmental Regulation — committee substitute recommended

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

2 nay — Dukes, Zbranek

1 absent — Talton

SENATE VOTE: On final passage, April 13 — 23-7 (Barrientos, Bernsen, Ellis, Gallegos, Truan, West, Whitmire)

WITNESSES: *(On House companion bill, HB 2504:)*
For — Mark Bryson, Alcoa Rockdale Operator; W.T. Eckert Jr., Alcoa; Jon Fisher, Texas Chemical Council; Gary Gibbs, Central and South West Corporation; Peter Guldberg, Foundation for Clean Air Progress; Mary Miksa, Texas Association of Business and Chambers of Commerce; Cindy Morphew, Texas Oil and Gas Association; Larry Nolen, United Steelworkers of America; Earl Schneebeli, Membership of International Brotherhood of Electrical Workers Local 2078; Wade Stansell, Association of Electric Companies of Texas; Michael Stewart, Texas Aggregates and Concrete Association; Ricky Stewart

Against — Sparky Anderson, Clean Water Action; George Smith, Sierra Club; David Griggs, Dallas Sierra Club Regional; April Johnson, Sierra Club; Tom “Smitty” Smith, Public Citizen; Todd Main, Texas Campaign for the Environment; Stephanie Benold, Texas Parents and Teachers Association; Lupe Cordova, Mothers for Clean Air; Susan Gergory, PATH 501 c3 Eco-Education; Jane du Toit, People United for the Environment; Rita Ruth, Peoples Action Coalition; Scott Johnson, Jim Koch, Esther McElfish, Josh Schonborn, Molly Rooke Seay

On — Ramon Alvarez, Environmental Defense Fund; Jimmy Herrington, Paper, Allied Industrial, Chemical, and Energy Workers International Union; Jeff Saitas and David Schanbacher, Texas Natural Resource Conservation Commission; Herbert McKee

BACKGROUND:

**Grandfathered facilities.** Grandfathered facilities are exempt from state pre-construction air permitting requirements because their construction predated the 1971 Texas Clean Air Act. Grandfathered facilities may remain exempt from the pre-construction permitting requirements so long as they do not undergo physical changes that would result in a significant increase in air contaminants or the emission of a new air contaminant not previously emitted. Once a grandfathered facility makes such a change, it is no longer exempt from obtaining a state pre-construction permit and the associated requirements of having to obtain the best available control technology (BACT), public notice and hearing requirements, and a review of the facility's impact on public health.

Texas Natural Resource Conservation Commission (TNRCC) pre-construction permits require facilities to use BACT to minimize air emissions as determined by the pollution control standards developed for that particular industry, the type of technology used in similar facilities, and the kinds of control technologies that are economically reasonable and technically practicable.

Facilities categorized as grandfathered are very diverse. They include power plants, feedlots, cotton gins, commercial bakeries, shipyards, and catalytic cracking units in refineries. The majority of these sources occur in older industries, such as electric utilities, refineries, oil and gas producers and pulp and paper manufacturers. The term "facility" can be used to describe both small units that stand alone or those that are part of a much larger plant. They can range from a single boiler or paint booth to an entire plant.

All grandfathered facilities must comply with TNRCC emission reporting requirements and pay fees for pollutants they emit, currently set at $26 per ton with an annual cap of 4,000 tons. In addition, reductions of air emissions that have occurred in the past either because of requirements imposed to meet state air emission rules or any other reason, do not affect a facility's grandfathered status.

The 75th Legislature in 1997 enacted HB 3019 by Allen, directing TNRCC to create a voluntary program by December 1998 to encourage grandfathered sources to voluntarily drop their grandfathered status. In September 1997, TNRCC created the 11-member Clean Air Responsibility Enterprise Advisory (CARE) Committee to help develop the voluntary plan.

Although various members of the CARE committee had widely divergent opinions on how a voluntary plan should be structured, they did reach a consensus on some issues and issued a report in December 1997 with a number of recommendations for a voluntary program to permit grandfathered facilities. A number of companies with grandfathered facilities subsequently announced that they would voluntarily relinquish their exempt status for certain of their facilities.

For more background information on grandfathered facilities see the House Research Organization Focus Report Number 75-22, *Texas Looks to Grandfathered Facilities For Air Quality Improvements,* April 2, 1998.

*In describing the requirements for Voluntary Emissions Reductions Permits, (VERPs) that would be established by CSSB 766, the bill refers to the following sections and definitions now in the Health and Safety Code:*

**Notice requirements for new source review and federal operating permits.** *Health and Safety Code, sec. 382.056* governs both new source review permits under the Texas pre-construction program for new construction and modification of facilities and notices of intent to obtain federal operating permits . Permit applicants are required to publish notice at least once in a newspaper of general circulation or in the city nearest to where the facility is located or proposed to be located. TNRCC rules under this section require two separate notices to be published. If the elementary or middle school nearest to the facility provides a bilingual education program, the applicant is required to publish notice at least once in the language taught in that program in a publication of general circulation in that language, if one exists.

TNRCC, by rule, must prescribe when notice must be published and can require additional notice. The notice must include a description of the location of the facility, a statement that a person affected by emissions from the facility can request a hearing, and a description of how TNRCC can be contacted. A sign must be placed at the site declaring the filing of the permit or permit review and explaining how TNRCC can be contacted. Pre-construction permits and renewals of such permits are subject to contested case hearings under this section.

**Public comment requirements for federal operating permits.** *Health and Safety Code, sec. 382.0561,* requires TNRCC to publish notice of and hold a public comment period. Any person may submit a written comment during that time. TNRCC must consider public comments when determining whether or not to issue a permit. Once a public comment period is announced by TNRCC, the commission is required to receive comments for at least 30 days. TNRCC may extend or re-open a public comment period. Concerns about the permit or TNRCC's preliminary permit decision must be raised during the public comment period.

**Hearing requirements for federal operating permits.** *Health and Safety Code sec. 382.0561* provides requirements for public hearings and public comment periods for federal operating permits (FOPS). These hearings are not contested case hearings. A hearing is required if, within the public comment period set by TNRCC, a person who is judged by TNRCC to be affected by the emissions or a legislator from the general area where the facility is located, requests a hearing. If the request by a person who may be affected is determined to be unreasonable, the TNRCC does not have to hold a hearing. Anyone may submit oral or written statements at a hearing. The person who holds the hearing may set a reasonable time limit on oral statements. A public comment period extends to the close of the hearing.

**Notice of decisions and response to comments for FOPs.** *Under Health and Safety Code, sec. 382.0562,* TNRCC is required to send notice of a proposed final action to the applicant and any persons who commented during the public comment period or during the hearing. The notice must include responses to comment, identify any changes in the conditions of the draft permit, and reasons for that change. The notice also must contain a description of how affected persons could petition the administrator for judicial review, explain the petition process, and give the date by which a petition must be filed.

**Judicial review.** *Under Health and Safety Code sec. 382.032,* a person affected by a TNRCC decision can appeal the action by filing a petition in district court in Travis County. The petition must be filed within 30 days after TNRCC's decision or action.

**Renewal/review of new source review permits.** *Health and Safety Code, sec. 382.055* requires construction permits for new source reviews to be renewed at various intervals. Those issued before 1991 must be reviewed at least every 15 years and those issued after 1991 are subject to review every ten years, except for those which, for cause, may be reviewed every five to 10 years. TNRCC determines whether, and under what conditions, a permit may be reviewed taking into consideration the facility's compliance records and the effectiveness of its emission control equipment and practices. A new source review permit renewal may be subject to a contested case hearing.

Conditions for permit renewals that are imposed by TNRCC must be economically reasonable and technically practicable considering the age of the facility and the effect of its emissions on the surrounding area. In general, requirements imposed cannot be more or less stringent than those required by the existing permit. New source review permit renewals are subject to contested case hearings if the applicant has a poor compliance record or the renewal involves a modification of the facility.

**Standard exemptions**. *Health and Safety Code, sec.382.057* allows TNRCC to exempt facilities or groups of facilities from having to obtain an air permit if those facilities can demonstrate that they do not emit pollution above a certain predetermined level or that they are making a change that will not significantly contribute air contaminants into the atmosphere. Over 120 standard exemptions are available for sources as diverse as fireplaces, concrete batch plants, landfills and restaurants.

TNRCC has developed general guidelines for these facilities, including specific requirements for emission limits and procedures for each category. Facilities that are installing emission control equipment that constitutes a modification or a new facility also can be granted an exemption.

Grandfathered facilities may be granted standard exemptions. A grandfathered facility that uses solvents that are allowed to evaporate into the air, for example, could propose to capture and burn those emissions in an incinerator. If emissions were decreased or stayed the same, the incinerator might be then granted a standard exemption. In this way, a facility can make a change and keep its grandfathered status if that change will not significantly increase air contaminants into the atmosphere. Only standard exemptions for concrete batch plants are subject to contested case hearings.

**Permits-by-rule.** Permits-by-rule are issued to facilities TNRCC deems to present a minimal potential pollution risk and threat to public health and the environment. Operators must comply with standardized requirements, but are not required to notify TNRCC. Examples include small animal-feeding operations and some mining activities.

**Standard permits.** Standard permits, developed by TNRCC rule, set out specific design and operating requirements for various sources of air pollution depending on the type of facility or activity. They may be issued for certain voluntary emission reduction projects undertaken by a facility. Standard permits are not subject to contested case hearings.

DIGEST:

CSSB 766 would create a voluntary emission reduction permit (VERP), with a September 1, 2001, permit application deadline, for unpermitted grandfathered facilities. VERP permits would require air pollution control equipment at least as beneficial as 10-year old best available control technology (BACT). These permits would not be subject to contested case hearings. The holder of a VERP could defer the implementation of air contaminant emission reductions if the applicant made substantial reductions in other specific air contaminants. VERP holders also could be granted emission credits for conducting special environmental projects to offset emissions that exceeded VERP standards.

The bill also would create a multiple plant permit (MPP) for existing facilities at multiple locations and allow TNRCC, by rule, to develop criteria for facilities or groups of facilities, establishing a *de minimis* level of air contaminants below which new source review permits would not be required. The bill would allow TNRCC to issue standard permits outside the rulemaking process, authorize permits-by-rule for facilities that would not make a significant contribution to air contaminants, and provide that standard exemptions would be only for changes made to facilities, rather than types of facilities. The bill would grant an enforcement amnesty for certain actions taken before March 1, 1999, as long as the facilities subject to those actions applied for a VERP by August 31, 2001.

**Voluntary Emissions Reduction Permit (VERP).** CSSB 766 would create a VERP available to owners or operators of unpermitted grandfathered facilities with a September 1, 2001, permit application deadline. TNRCC would grant

VERPs to facilities within a reasonable time, if the agency found they were using air pollution control methods that were at least as beneficial as 10-year old BACT, considering the age and remaining useful life of the facility.

TNRCC would make decisions on VERPs using information that was available, including written comments or information presented at any public hearing. TNRCC could not grant a VERP to a facility if it did not meet Clean Air Act standards, including those protecting public health and physical property. Any modification to a facility with a VERP would have to comply with new source review permit requirements, including current BACT, before starting the modification.

**VERP emission reduction deferrals.** A VERP holder could defer the implementation of air contaminant emission reductions if the applicant made substantial reductions in other specific air contaminants. The deferral would have to be based on TNRCC's prioritization of air contaminants as necessary to meet local, regional, and statewide air quality needs.

**VERP notice**. VERP applicants would have to publish notice in the same manner as an applicant for a new source review or federal operating permit, under sec. 382.056 of the Health and Safety Code *(see background for details).*

TNRCC could authorize an alternative method of providing notice for a permit that was part of a small business stationary source, if the proposed method would result in better or equal communication with the public. In making this decision, TNRCC would take into consideration how effective the notice would be in reaching potentially affected persons, cost, and consistency with federal requirements.

**VERP hearing.** TNRCC would be required to provide an opportunity for a public hearings, public comments, and notice of permit application decisions in the same manner required of Federal Operating Permit applicants under secs. 382.0561 and 383.0562 *(see background for details).*

An individual affected by TNRCC's decision either to issue or to deny a VERP could move for re-hearing and would be entitled to judicial review under Health and Safety Code sec. 382.032 *(see background for details).*

**Emission reduction credits for VERPs.** TNRCC could issue a VERP to a facility that made good faith efforts to improve its equipment and reduce emissions to meet VERP requirements, could not reduce them to the degree necessary for issuance of a permit, but managed to acquire enough emission reduction credits to offset the facility's emissions that exceeded VERP standards.

TNRCC would be required, by rule, to establish a program to grant emission credits to an owner or operator of a facility who conducted special environmental projects to offset facilities emissions that exceeded VERP standards. The rules would establish two categories of projects eligible for credits under the program: emission reduction projects and environmental protection projects.

Emission reduction projects would have to reduce net emissions from one or more sources in an amount and type sufficient to prevent air pollution to a degree comparable to the amount the facility would have to reduce to meet VERP requirements.

*Emission reduction projects* would include:

- generation of electric energy by a low-emission method, including wind power, biomass gasification power, and solar power. An example of biomass gasification is the collection of landfill gases for electric generation;
- purchase and destruction of high-emission automobiles or other mobile sources;

- emission reductions from a permitted facility that emitted air contaminants at a level significantly below levels necessary to comply with the facility's permit;

- carpooling, alternative transportation programs, or a telecommuting program for the owner/operator's employees; or

- conversion of a motor vehicle fleet operated by the owner/operator to low-sulphur fuel or an TNRCC- approved alternative fuel.

Environmental projects would have to benefit, preserve, or protect

environmental quality to a degree that the value of the project to the status of the state's environment would be comparable to reducing the facility's emissions to the extent necessary to meet permit requirements.

*Environmental protection projects* would include:

- the creation of a wildlife or plant preserve;
- the creation of an environmental easement;
- surface water, ground water, or soil pollution prevention or remediation; or
- wetlands enhancement, remediation, or preservation.

A VERP issued for facilities participating in these environmental projects would be required to be conditioned on the successful and timely completion of the project for which the credits would be acquired. To renew a VERP for a facility participating in these projects, the TNRCC would have to require the facility either to have been able to meet VERP requirements without emission credits or to acquire yet more credits as necessary to meet permit requirements for a new permit. Emissions reduction credits established for VERPs would not be transferrable.

**Multiple plant permits (MPP).** TNRCC could issue MPPs for multiple plant sites that are owned and operated by the same individuals or group under common control if TNRCC found that the aggregate rate of air contaminant emissions authorized under the permit would not exceed the total of:

- the rates authorized in existing permits (for previously permitted facilities) and
- VERP rates (10-year old BACT) for unpermitted and those holding VERPs.

For a MPP permit to be issued, there also could be no indication that the permit would conflict with Clean Air Act requirements, including those protecting the public's health and physical property.

A MPP could not authorize emissions from any facility that exceeded the facility's highest historic annual rate or the levels authorized in the facility's most recent permit. If original records did not exist, best engineering judgment would be used to demonstrate the facility's highest historic rate. Emission control equipment previously installed at an MPP could not be

removed or disabled except to maintain or upgrade the equipment or reduce the impact of authorized emissions.

TNRCC would be required to publish notice of a proposed MPP for existing facilities in the *Texas Register* and in one or more statewide or regional newspapers, designated by TNRCC rule, that would provide reasonable notice throughout the state. If the MPP permit were effective for only part of the state, the notice would be published in a newspaper of general circulation in that area. TNRCC, by rule, could require additional notice. The notice would include an invitation for written comments by the public to be published at least 30 days before TNRCC issued the MPP.

For existing facilities, TNRCC would have to hold a public meeting to provide an additional opportunity for public comment. Notice of the meeting would be included in the original permit notice. If TNRCC received public comment on an MPP, the agency would issue a written response to the comments at the time it issued or denied the permit. The responses would have to be made available to the public and TNRCC would mail the response to each person who made a comment. TNRCC would, by rule, establish procedures for application and approval for MPPs.

The issuance, amendment, or revocation of an MPP that applied only to existing facilities for which an application was filed before September 1, 2001 would not be subject to contested case hearings. The TNRCC could adopt rules to implement and administer MPPs and could delegate to the executive director the authority to issue, amend, or revoke a multiple plant permit. There would be no application deadline for MPP permits, as there would be for VERPs.

**Enforcement amnesty.** The bill would grant facilities amnesty from enforcement actions for certain illegal actions and modifications done before March 1, 1990, as long as the person who took those actions applied for a VERP by August 31, 2001. The actions for which TNRCC could not initiate an enforcement action would include failing to obtain a new source review permit or modifying a facility in a way that could emit air contaminants.

**Standard permits.** The bill would allow TNRCC to issue standard permits outside the rulemaking process for the first time. TNRCC could issue a standard permit for new and existing similar facilities if TNRCC found that

the permit was enforceable and TNRCC could adequately monitor compliance with the terms of the permit. BACT would be required of new source review permit applications and modifications of existing facilities filed before September 1, 2001. After August 31, 2001, all standard permit applications would be required to use BACT. This would allow unpermitted facilities to obtain a standard permit without using BACT until August 31, 2001.

CSSB 766 would provide that notice, written comment, public meeting, and response to public comment requirements for standard permits would be the same as those required for MPPs. Issuance, amendment, or revocation of a standard permit would not be subject to a contested case hearing. TNRCC could adopt rules as necessary to implement and administer the standard permit section and could delegate to the executive director the authority to issue, amend or revoke a standard permit.

**Permits-by-rule.** TNRCC could adopt permits by rule for certain types of facilities if it was found on investigation that those facilities would not make a significant contribution of air contaminants to the atmosphere. TNRCC, by rule, would specifically define the terms and conditions for a permit-by-rule under this section. TNRCC could not adopt a permit-by-rule authorizing a source defined as a major source under the federal Clean Air Act, and TNRCC's general power to control the state's air quality could not be limited by the bill's permit-by-rule provisions

**Standard exemptions.** The bill would also remove references to "certain types of facilities" under the standard exemption provision in Health and Safety Code sec. 382.057 (a). This would allow TNRCC to continue to issue standard exemptions for changes within a facility that would not make a significant contribution of air contaminants into the atmosphere, but the kinds of exemptions that currently are issued for facilities like restaurants, fireplaces, and concrete batch plants would come under the bill's new provisions regarding permits-by-rule or standard permits.

To reflect this change, the heading of Health and Safety Code, sec. 382.058 would change from: *Limitation on commission exemption for construction of certain concrete plants* to "Permits by rule or standard permits for construction of certain concrete plants. " References to standard exemptions

in the section would be deleted and replaced with references to standard permits and permits by rule.

**Miscellaneous.** CSSB 766 also would allow TNRCC to adopt rules related to charging and collecting fees for permits-by-rule, VERPs, and MPPs.

The bill would add standard permits and permits-by-rule to the other permits and exemptions that TNRCC already is allowed to consolidate into a single permit. The commission could authorize changes in a federal source even before an operator obtained the federal operating permit if the changes were *de minimis* or if the owner obtained a construction permit or permit amendment and was operating under a standard permit or permit by rule.

**Deadlines.** No later than January 15, 2001, TNRCC, would have to prepare a report on the number of companies that had obtained or applied for VERPs and the emission reductions anticipated to result from the issuance of such permits. The report would go to the governor, the lieutenant governor, the speaker, and the chairs of the Senate Committee on Natural Resources and the House Committee on Environmental Regulation.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. As soon as practicable, after that date, TNRCC would adopt any rules necessary to implement the bill.

SUPPORTERS SAY:

CSSB 766 would significantly reduce air pollution by strongly encouraging companies to volunteer to give up their grandfathered status. The grandfathered exemption resulted from the enactment in 1971of a very restrictive pre-construction permit program that is far more strict than most permitting programs in other states. CSSB 766 would provide companies with strong incentives to join the program by certain deadlines but would stop short of mandating that they do so, and plants would be granted flexibility in how to make emission reductions. Two new kinds of permits would be created by the bill, VERPS and MPPs, which would result in significant reductions of pollution and yet would be flexible enough to appeal to a wide variety of facilities. Other facilities could obtain standard permits, which could be issued outside of the rulemaking process for the first time, tempting even more facilities to volunteer for the program.

The bill, for the first time since 1971, would create an opportunity for a pre-existing facility to obtain a permit without having to demonstrate the use of current BACT. The ability to obtain permits under the program proposed by the bill would end on September 1, 2001, and after that date any facility that remained grandfathered would face an uncertain future. The bill also would include a short amnesty from enforcement actions for grandfathered facilities that previously should have obtained a permit due to a facility modification but failed to do so. If the bill were not enacted, it would be likely that a large number of companies with grandfathered facilities would remain grandfathered as they would have no incentive to modify their plants.

Voluntary programs work better in Texas than state mandates. The state reduced releases and disposal of chemicals by as much as 41 percent from 1988-1996, at a time when manufacturing activity increased by 30 percent. Many of these reductions were the result of voluntary programs.

The Clean Industries 2000 program, for example, is a facility-based voluntary reduction program open to industrial facilities whose managers agree to reduce hazardous waste generation and releases of toxic pollutants by 50 percent by the year 2000. With 186 participating facilities, Clean Industries 2000 is one of the largest voluntary waste reduction programs in the nation, both in terms of membership and in the size of voluntary reduction commitments.

CSSB 766 would result in substantial air pollution emissions reductions at a time when it is crucial for Texas to reduce air pollution to further the historical improvement in air quality that Texas has enjoyed of late, and in a few areas, to satisfy federal mandates. The state is struggling to develop acceptable plans for the four urban areas in the state that the federal Environmental Protection Agency (EPA) has designated as “non-attainment” for not meeting certain national ambient air quality standards (NAAQS).

Four urban areas in Texas currently are designated as non-attainment areas for ground-level ozone: Houston/Galveston-Brazoria, Dallas/Fort Worth, Beaumont/Port Arthur-Orange, and El Paso. El Paso is also classified an non-attainment for particulate matter and carbon monoxide. Four other areas in the state are considered by TNRCC to be approaching non-attainment status for ground-level ozone: Austin, Corpus Christi, San Antonio and Tyler-

Longview. CSSB 766 would help Texas meet the NAAQS so the state would not lose federal funds or risk losing control over its regulatory programs.

**VERPs.** The bill's September 1, 2001, permit application deadline for Voluntary Emission Reduction Permits (VERPs) would be a strong incentive for companies to take advantage of the VERP permit. It is possible that the 77th Legislature in 2001will repeal the grandfathered exemption for facilities that do not apply for a VERP, forcing industries to comply with the formidable permitting requirements of the Texas pre-construction program in a very short time. The permitting process can involve extensive analysis of air emissions and their health effects and require installing complex and expensive technologies to control and reduce emissions. VERPS would give industries a chance to upgrade their facilities at a pace that would not cause economic chaos.

**BACT.** CSSB 766 would give companies flexibility in fulfilling permitting requirements. Requiring facilities to install equipment that would be at least as beneficial as 10-year old BACT, for example, would allow companies to catch up to current permitting requirements at a reasonable pace that would not result in worker layoffs or plant closings. It is important to keep in mind that 10-year old BACT is not archaic technology. Indeed, BACT has changed so little for some types of facilities in the last ten years that 10-year old BACT is the same as BACT today.

In some cases, however, it would be very difficult and expensive for companies to comply with current BACT requirements since current technology cannot be applied to old plants. Many companies in Texas, if faced with a state mandate to comply immediately with BACT, would have to close down their facilities. These companies face the difficult choice of spending large sums of money to attempt to retrofit old facilities or else close down those facilities entirely. Faced with such an expensive proposition, companies located in Texas might choose to re-locate to another state where state permitting requirements are not so restrictive or even Pacific rim countries, Mexico, or the Carribean. This could threaten a large number of jobs in Texas that are located in areas where they are most needed.

Many grandfathered facilities do not have the same life expectancy as a new facility that would be permitted today. It is not fair to require an old facility

that has only a few years of life to spend huge amounts of money on current BACT.

**CARE program.** The state already has solid evidence that voluntary programs for grandfathered facilities work. Since 1997, over fifty grandfathered companies have volunteered to relinquish grandfathered status at various facilities and become permitted sources under the auspices of the voluntary Clean Air Responsibility Enterprise Program (CARE). The CARE program, developed by TNRCC, was created by HB 3019 by Allen, and enacted by the 75th Legislature.

The sources who volunteered are found at 120 separate locations and constitute more than 7,000 individual facilities. According to the TNRCC, these commitments mean that sources of approximately 577,000 tons per year of criteria pollutants will undergo the CARE permitting process. This would account for approximately 63 percent of the total 1997 grandfathered emissions of criteria pollutants.

Twenty-eight of the 48 corporate volunteers have provided estimates of emissions reductions that could result from permitting their grandfathered facilities and they estimate that actual emissions from currently grandfathered facilities would decrease by more than 10 percent and allowable emissions would decrease by even more.

**Emissions trading.** CSSB 766 would allow plant owners to acquire emission reduction credits if they have made a good faith effort to reduce emissions but could not quite satisfy a permitting requirement. If the company could reduce emissions in the state from another source, the people of Texas would ultimately benefit from that reduction.

Allowing companies to participate in emission trading programs would be an excellent way to bring facilities into the program that might otherwise have chosen to remain grandfathered. In some circumstances, it may not be feasible or economically reasonable to reduce one or more pollutants emitted at a grandfathered facility, but another emitted pollutant could be controlled at a reasonable cost. Prohibiting inter-pollutant trading would reduce TNRCC’s flexibility to gain emission reductions that otherwise might be reasonably accomplished.

**Emission reduction credits for special environmental projects.** Allowing emission credits to be gained in exchange for special environmental projects would encourage facilities with special hardship circumstances to volunteer to lose their grandfathered status. Without the ability to trade credits for special projects, they simply could not participate in a voluntary program. If they were forced to comply with pre-construction permit requirements, they would go out of business. Under CSSB 766, they could engage in special projects to tackle a wide range of environmental problems at the discretion of TNRCC, reduce emissions as much as they could, and benefit the environment in other ways.

The main beneficiaries of these types of projects would be small businesses, like sand blasters, metal finishers, and furniture makers. These businesses often have only one source of grandfathered emissions, and if the technology was too expensive to retrofit with the control technology necessary to reduce their emissions to an acceptable level, these facilities would be forced to close. Some of these facilities are significant employers in small towns.

Emission reduction projects would require reduction of net air emissions and would encourage projects like wind generation of electric energy and solar power, which have few other sources of support. Purchasing and destruction of older, more polluting, cars would reduce a major source of mobile source pollution. These projects are required to benefit, preserve, and protect environmental quality to a degree equal to the value that would have accrued from reducing emissions from a grandfathered unit.

**MPPs**. MPPs would give facilities the flexibility to use their financial resources in such a manner that would optimize their emission reductions. It would also encourage them make air quality improvements in the areas of the state that have been classified as either nonattainment or near nonattainment. MPPs would allow new clean facilities to offset older facilities by permitting them together, which would encourage more facilities to volunteer for the program.

Many small sources of grandfathered emissions, especially oil and gas production generators, cannot reasonably retrofit or replace all of their facilities. However, these sources have expressed an interest in volunteering to reduce their emissions and become permitted. The multi-plant permit would allow these facilities to come into the permitting program and reduce

emissions where they would most improve air quality and not allow for any increases in emissions.

Trading emissions between airsheds would not result in increases of emissions anywhere. Wherever facilities are located, total emissions would be reduced statewide. It is impossible to fence in airsheds anyway. MPPs would give TNRCC the flexibility to make reductions where they are needed. Prohibiting trading among airsheds would merely discourage companies from volunteering for the program.

**Contested case hearings.** Requiring every grandfathered facility that came under the voluntary program to be subject to contested case hearings would discourage many companies from volunteering at all. Contested case hearings can take years and millions of dollars to resolve. These are not new facilities, and coming into the program means that they would be reducing rather than increasing emissions. There is no need to hold contested case hearings for existing facilities that are voluntarily reducing their emissions.

**Standard permits.** CSSB 766 would create a new kind of standard permit outside the rulemaking process for the first time, which would be available for new and existing facilities. After August 31, all standard permit applications would be required to use BACT, but the bill would leave a small window of opportunity for grandfathered facilities to obtain a standard permit without using BACT until August 31, 2001. The more flexibility granted to facilities, the more they would volunteer for the program and the more air pollution would be reduced.

**Emission fee caps.** The state cap on fees charged for emissions of regulated pollutants should not be lifted. Emission fees are statutorily prohibited from any use other than to cover the costs required to develop and administer the federal Title V program, and they currently cover the costs of that program. The Legislature has never appropriated all of the monies collected by this fee.

**Repealing grandfathered exemptions for facilities near schools and nursing homes.** Repealing the grandfathered exemption by 2001 for facilities within two miles of schools, nursing homes, or public parks, as some suggest, would cause economic chaos without necessarily protecting children or the elderly. Most grandfathered facilities have very small emissions and just

because a unit is grandfathered does not necessarily mean that it has not installed pollution controls. Indeed, many permitted facilities emit more than grandfathered facilities.

OPPONENTS SAY:

CSSB 766 would fail to do the one thing that would protect Texas' precious air resources from grandfathered emissions: give a date certain by which all grandfathered facilities no longer would be allowed to claim the grandfathered exemption. Instead, CSSB 766 would create a two-year program in which grandfathered facilities could volunteer to take advantage of a more lenient permitting process, but would not end the loophole when that voluntary program ended. The exemption that has allowed grandfathered facilities to escape permitting for 28 years would remain in place.

CSSB 766 merely would require TNRCC to report to the Legislature in 2001 how many grandfathered plants have entered the voluntary program and what emission reductions have resulted. This is unacceptable in view of the fact that 36 percent of all industrial air pollution in Texas is from grandfathered sources. The bill should close the grandfathered loophole by September 1, 2001 and add worker protection language to the bill so companies would not use the loophole as an excuse to lay off workers. There certainly is no guarantee that the 77th Legislature will close the grandfathered loophole, and industries may see no reason to volunteer for the program proposed by CSSB 766.

Millions of pounds of toxic air pollutants are released in Texas annually. Nearly a quarter of those pollutants come from plants that are either wholly or partly grandfathered under Texas law. These are chemicals that cause cancer, birth defects, and respiratory problems, especially for the very young and the elderly. The city of Houston recently released a study showing that Houston's smog problem causes various types of respiratory and cardiovascular ailments that can lead to the premature deaths of as many as 435 people a year. Children are especially vulnerable to air pollution, and over 200,000 children attend schools near grandfathered facilities.

**VERPs**. CSSB 766 would actually establish a new kind of grandfathered status by allowing currently grandfathered facilities to obtain a VERP which would allow facilities to use technology that was in effect 10 years ago. Although a permit would be subject to renewal, which might possibly require a technological upgrade in years to come, 10-year old BACT requirements

would not produce the greatest possible pollution reductions. Texas has several near non-attainment areas in the state as well as the four areas that already have been declared non-attainment by the federal government. To protect the citizens in these areas, avoid losing federal funds, and keep the federal government from taking over the state's regulatory programs, the state needs to make pollution reductions as quickly as possible. A mandatory program would achieve greater reductions than a voluntary one.

**BACT.** BACT should be required for all facilities who are casting off their grandfathered status, especially those who are located in a nonattainment or near nonattainment area. Requiring BACT for all grandfathered facilities would not be so onerous for companies because within the very definition of BACT used by TNRCC is a provision that BACT must be a technology that is economically reasonable and technically practicable. Under CSSB 766, grandfathered pollution would be reduced by 25 to 30 percent at only those facilities that volunteer to clean up, while if BACT were required, overall pollution from grandfathered plants could be reduced as much as 50 percent.

CSSB 766 would not require grandfathered facilities that are coming into the permitting process to have to undergo a full public health effects review or allow an opportunity for citizens to request a contested case hearing on a permit. CSSB 766 should require review of public health impacts of pollution from grandfathered plants to make sure that those who live nearby are not suffering adverse effects.

Many grandfathered facilities have never been reviewed for their impact on public health. Poor and minority neighborhoods often are doubly impacted by grandfathered pollution since plants often are located in low-income communities along with other types of polluting facilities. The cumulative effects of pollutants in these areas can be devastating for residents.

Most grandfathered pollution comes from large plants, and the largest single source by far of grandfathered pollution comes from power plants owned by utilities, which do have the resources to bring their plants into compliance. If nothing else, utilities in Texas should be required to shed their grandfathered status immediately while other plants could take advantage of the VERP permits.

**Emissions trading.** The bill would allow deferral of the implementation of

reductions of emissions of certain air contaminants in return for "substantial emissions reductions" of other air contaminants. However, the bill does not define "substantial." The deferral of reductions in certain pollutants would be based on TNRCC's "prioritization as necessary to meet local, regional and statewide air quality needs." This would create an unworkable process by which the agency would be asked to compare apples to oranges and would not specify how public input to this decision would be considered or provided.

It would be difficult, for example, for TNRCC to determine whether nitrogen oxides to reduce smog would be a higher priority than reducing toxic pollutants in a neighborhood close to a plant or whether reducing smog-producing nitrogen oxides would a higher priority than sulphur dioxides that cause acid rain. Agency determinations of this kind could require a lengthy and contentious rulemaking process that would delay bringing grandfathered plants into the permitting process or lead to a higher number of court challenges to permit approvals.

VERPs would allow industrial facilities to defer reductions in certain air pollutants in return for reductions in other kinds of pollutants. Allowing this kind of "inter-pollutant" trading would allow an industrial facility to make reductions in emissions of nitrogen oxides, for example, in return for the right to continue to emit different kinds of toxic pollutants at previous levels. If the neighborhood where this plant was located happened to be in an area where other facilities were clustered, this could result in different environmental protection depending on the neighborhood where someone lived. Poor neighborhoods where older facilities are located probably would bear the brunt of continued emissions.

**Emission reduction credits for special environmental projects.** Allowing polluters in non-attainment areas to obtain VERPS by conducting special environmental projects would do nothing to help air pollution in areas where it is critical to reduce emissions to avoid stricter federal mandates and protect children and older people from pollution. The bill includes no requirement, for example, that the emission reduction project be undertaken in the same area where the grandfathered facility seeking a permit was located.

CSSB 766 would allow grandfathered industrial facilities to obtain a permit without having to achieve even the level of reductions another grandfathered

facility was required to achieve, much less the level of emission limitations required of new industrial facilities of the same type. The facility only would have to make a "good faith effort" to make necessary equipment improvements and emission reductions.

CSSB 766 would allow a grandfathered facility to obtain a VERP and escape making reductions in emissions if the company undertook a project such as creating a wildlife or plant preserve or setting up an environmental education program. The latter types of projects have no direct benefit for air quality. Trying to compare their value to the value of reducing air pollution would be impossible, and any decision would likely be challenged by all sides.

Some of the possible projects included in the bill would have questionable clean air benefits. For example, when industrial companies in California began purchasing old "high-emitting" autos, the result was that no more old autos were retired than before, when they were retired just by attrition, and no net pollution emission reductions have resulted from that program.

**MPPs.** MPPs would allow a company with multiple plants in Texas to reduce air emissions at plants in some communities while continuing to emit unacceptable levels of air pollution in other areas. This could result in more air contaminants being emitted in those areas that already have many facilities. The people who live in these areas already must bear the cumulative impacts of clusters of facilities that usually are located in low-income or minority neighborhoods. This also would allow facilities to take credit for reductions that they might already be mandated to make if some of their facilities are in areas designated by the EPA as a non-attainment area.

The MPP would not require that plants be located in the same area or airshed so one geographic area could benefit from pollution reductions at one plant while another would be allowed to continue to pollute at historic levels. This would raise serious environmental equity concerns. MPPs would lump all types of pollutants into one permit allowing what can be termed "inter-pollutant trading," allowing, for example, one contaminant to be reduced at a permitted plant in exchange for continued toxic emissions at a grandfathered plant.

MPPs would allow an existing grandfathered plant to pollute at its highest historic annual rate rather than an average of its emissions over a period of

several years. This would allow a plant to lock in an emissions rate reflecting an unusually high year of pollution.

**Contested case hearings.** CSSB 766 would leave citizens out of the VERP or standard permit process since there would be no opportunity for citizens to request contested case hearings, which are part of the normal permitting process for sources of air pollution. Not only would this be unfair for the public, but also to other companies who have acted responsibly in the past. Most chemical companies that once were grandfathered, for example, have voluntarily gone through the permitting process, and when they did so they had to face the possibility of contested case hearings on their individual permits. There is no reason why grandfathered facilities, which have claimed the privileges of an exemption for 28 years, should not have to do the same.

**Standard permits.** The bill would expand standard permits so they would be available to new sources of air pollution as well as grandfathered plants and would deny citizens the right to request a contested case hearing for either kind of application. No limitation would be put on the volume of emissions that might be authorized under a standard permit, so TNRCC could significantly expand the use of standard permits to include facilities that should have to apply for an individual permit.

OTHER OPPONENTS SAY:

**Grandfathered power plants.** The bill should be amended to require immediate reductions by grandfathered power plants, which are the largest source of grandfathered pollution in Texas. These costs then could be recovered by the utilities from their customers.

**Repeal the grandfathered exemption.** The bill should be amended to require all grandfathered facilities to operate with BACT by June 1, 2001. After that, it should be mandatory for these plants to apply for permits, and those permits, like all new source review permits, should be subject to a mandatory health effects review and the contested case hearing process. By 2003, formerly grandfathered plants should have be required to cut their reductions by 50 percent.

**Prohibit inter-pollutant or inter-regional trading of emissions.** Companies should not be able to trade emission credits with other facilities in different

locations, nor should they be able to substitute one polluting emission for another. The bill should be amended to prohibit these activities.

**Emission fees.** The bill should eliminate pollution fee caps which essentially allow large polluters to enjoy a "volume discount" for the large amounts of pollution they emit. This is because under current law industries pay a certain amount per ton for each type of pollutant they emit, but the fee is capped at 4,000 tons. This would be unfair to smaller industries that pay full price for all the pollution they emit with no discount of any sort. The extra money from fees could be used to help small business comply with pollution control requirements.

**Repealing grandfathered exemptions for facilities near schools and nursing homes.** The bill should be amended to repeal the grandfathered exemption by 2001 for facilities within two miles of schools, nursing homes, or public parks.

NOTES:

The sponsor of the bill intends to accept an amendment requiring certain reductions from electric utilities similar to provisions in SB 7 by Sibley, the electric utility restructuring bill.

CSSB 766 included several provisions not found in the Senate-passed version of SB 766, including a section allowing the issuance of a VERP permit if an operator acquired enough emission credits to offset the operator's emissions and allowing TNRCC to grant emission credits for various emission reduction and environmental protection projects.

A related bill, HB 2390 by Maxey, which would end grandfathered exemptions for industry permits by June 1, 2001, and give industry two years to submit their permit plans, was left pending in the House Environmental Regulation Committee on March 29.

A related bill, SB 1456 by West, would end grandfathered exemptions for facilities located within two miles of a school by January 1, 2003. Owners of those facilities would be required to submit to TNRCC by January 1, 2001, a plan to incorporate BACT into the facility by 2003 or they could be subject

to an administrative penalty. SB 1456 was referred to the Senate Natural Resources Committee.