SUBJECT: City and county authority over landfill siting

C0MMITTEE: Environmental Regulation — favorable, with amendment

VOTE: 9 ayes — Chisum, Allen, Culberson, Dukes, Howard, Kuempel, Palmer, Talton, Zbranek

0 nays

SENATE VOTE: On final passage, March 11 — voice vote

WITNESSES: For — Bob Gregory, National Solid Waste Management Association, Texas Chapter; Margaret Ligarde, Waste Management; Mary Miksa, Texas Association of Business and Chambers of Commerce

Against — None

BACKGROUND: The Texas Natural Resource Conservation Commission (TNRCC) regulates the management of solid waste under the Solid Waste Disposal Act (Health and Safety Code, chapter 361). The act governs permits for landfills, transfer stations, and other facilities for processing and disposing of solid waste.

Other statutes relevant to the siting of solid waste facilities are found in chapter 363, describing the authority of cities and counties to govern the siting of solid-waste processing and disposal facilities, and chapter 364, concerning the power of county commissioners courts to govern the siting of solid-waste disposal facilities.

Under sec. 363.112, the governing body of a city or county may prohibit the processing or disposal of solid waste in certain areas of its territory. To make such a prohibition, the city or county must, by ordinance or order, designate a specific area of the city or county in which solid waste disposal will not be prohibited. Under sec. 364.012, a county may prohibit the disposal of solid waste in the county if the disposal would threaten public health, safety, or welfare. To make such a prohibition, the commissioners court must adopt an ordinance specifically designating the area of the county in which solid waste disposal is not prohibited.

DIGEST:

SB 486, as amended, would revise Health and Safety Code, sec. 363.112 and sec. 364.012 to specify that these sections would apply to *municipal or industrial* solid waste. It also would amend the law to provide that a city or county could not prohibit the processing or disposal of municipal or industrial solid waste in an area of the city or county for which an application for a permit or other authorization under chapter 361 had been filed or was pending before TNRCC or for which the commission already had issued a permit or other authorization.

TNRCC could not grant an application for a permit to process or dispose of municipal or industrial solid waste in an area where it was prohibited by a city or county ordinance or order, unless that ordinance or order had violated the provisions of SB 486 by prohibiting processing or disposal in an area for which an application had been filed or for which TNRCC had issued a permit. TNRCC could establish procedures by rule for determining whether an application was for processing or disposal in an area where it had been prohibited by a city or county ordinance or order.

SB 486, as amended, would provide that Health and Safety Code, secs. 363.112 and 364.012, including the restrictions added by this bill, would not apply in cases involving industrial plants that have private storage and disposal operations on their own property within 50 miles of a plant or operation that is the source of the waste. Under SB 486, the solid waste practices of these types of facilities also would not be affected by county commissioners court rules regulating collection, handling, storage, and disposal of solid waste under sec. 364.011.

The bill would delete language providing that sec. 363.112 does not apply to a city or county that adopted certain solid-waste management plans approved by TNRCC. It would delete similar language providing that sec. 364.012 does not apply if the county adopted solid-waste disposal guidelines approved by TNRCC.

The bill would delete the current statutory requirement that an applicant for a solid waste permit submit any additional information that TNRCC deems necessary to ensure that the application is administratively complete no later than the 270th day after the applicant receives notice from TNRCC that more information is needed. Instead, SB 486 would require TNRCC, by rule, to

establish a deadline by which this additional information would have to be submitted.

The bill, as amended, would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. The section of the bill concerning deadlines for administrative completeness would apply only to an application submitted on or after the bill's effective date.

The remaining provisions of SB 486, as amended, would not apply until January 1, 2000, for any application submitted after September 1, 1998, for a facility proposed to be located in a county in which the commissioners court had provided notice by September 1, 1999, of intent to enact an ordinance.

SUPPORTERS SAY:

SB 486 would stop cities and counties from enacting ordinances in response to proposed landfills after the applicants have spent millions of dollars on their applications. It is unfair for a landfill applicant to buy or option land, spend millions of dollars for engineering studies and applications, and then be barred from a site one month before opening it because a city or county has passed an ordinance to stop the application. Under SB 486 as amended, landfill applications still could be protested to the TNRCC and still would be subject to contested case hearings.

SB 486 would continue to allow city and county ordinances to prohibit landfills in certain areas but would limit the application of those ordinances to permit applications filed with TNRCC *after* the ordinances took effect. Limiting the ordinances to prospective application would allow landfill applicants to rely on the ordinance in effect at the time the application for a permit for a new facility was filed.

Counties have had years to pass ordinances concerning landfills, so there is no need to give them more time to try to stop applications now on file by quickly passing ordinances before this bill goes into effect. The bill would give counties until January 1, 2000, to pass ordinances relating to applications filed after September 1, 1998, as long as the county posted a notice by September 1, 1999, of its intention to pass such an ordinance.

This bill would give cities and counties the flexibility to change their designations of suitable landfill areas to reflect changing conditions in the area and to ensure the quality of life for city and county residents. However,

it also would ensure that these changes could not be enacted expressly to stop a certain facility for which a permit application already had been filed or a permit had been issued.

SB 486 would not affect ordinances enacted before the bill's effective date. Any new permit applications for landfills filed with TNRCC after the bill's effective date could not be in areas where the city or county had prohibited their siting. TNRCC would have to adhere to local landfill ordinances enacted before the landfill application was filed with TNRCC.

Requiring a landfill applicant to notify local governments before applying for a permit would encourage local governments to pass ordinances to prevent the siting for political reasons in almost every case. SB 486, in contrast, would encourage local governments to be prospective rather than reactive in their landfill policies and to pass ordinances based on the technical merits of actual sites and their impacts on public health and the environment, rather than in reaction to specific permits.

Opposition to any identifiable site would, in almost every instance, make it politically impossible for a city council or commissioners court to approve the area for a landfill. Despite public resistance, the need for new landfills in Texas is inevitable. If landfills were sited only in remote, unpopulated areas, the cost to transport waste to them would push the cost of waste disposal to rates that would be unacceptable for most Texans. The state must find ways to identify sites that are near enough to the sources of waste to keep disposal costs down while minimizing the effects these sites have on the surrounding community. Fewer and fewer landfill companies are willing to operate in Texas because they know they can be barred from a site after spending millions of dollars to prepare an application for it.

Requiring TNRCC to establish a deadline for submission of material needed to make an application administratively complete would speed up the permit process and encourage applicants to file better applications the first time. An application can fill dozens of binders of information, and TNRCC sometimes must spend a year or more working with an applicant to complete it. This not only is an inefficient use of the agency's time, but it gives rise to the public perception that agency staff work so closely with applicants that they lose their objectivity about the application.

The 270-day timeline for administrative completeness that SB 486 would delete was intended originally to encompass both administrative completeness and technical review. These two functions are now separate.

OPPONENTS SAY:

The section of the bill governing when certain provisions would take effect is very confusing and could be the subject of future litigation. For example, stipulating that most provisions would not apply until January 1, 2000, for certain applicants raises questions as to how the law could be applied after that date and whether the bill intended that current law, as well as the provisions added by SB 486, would not take effect until 2000.

The bill could apply retroactively for certain applications on file before September 1, 1998, because once the bill took effect, counties could not pass ordinances affecting those applications. SB 486 should apply only to applications filed after its effective date and not retroactively to those filed before September 1, 1998. The rules should apply to equally to all applicants. In fact, the whole bill should take effect September 1, 1999, rather than immediately upon enactment.

OTHER OPPONENTS SAY:

The bill should be amended to require permit applicants to post notice of a proposed application well before they file an application with TNRCC. This would allow local governments to examine the request on its technical merits and would give communities time to react to proposed landfills before an applicant spent a lot of money on the permit process. Current law does not require applicants to notify counties of their intent to file an application — notice is required only after an application has been filed.

The bill is unclear in stipulating that a city or county could not prohibit solid waste disposal or processing if an application was *filed or pending.* It should specify instead that an application be administratively complete. Otherwise, applicants could file token applications to prevent counties from enacting ordinances. The bill should set criteria by which the industry would have to abide to ensure a *prima facie* sufficient application, and it should establish sanctions for those who file superficial applications.

NOTES:

The House committee amendment to the Senate-passed bill deleted a clause providing that the bill would take effect September 1, 1999, and added language specifying that the bill would take immediate effect except for

applications submitted after September 1, 1998, for any facility proposed to be located in a county in which the commissioners court had provided notice by September 1, 1999, of intent to enact an ordinance. For such applications, the provisions of the committee substitute governing landfills would not apply until January 1, 2000.

A related bill, SB 487 by Brown, which includes the same provision as in SB 486 that would require TNRCC to establish a deadline for when a solid waste application would be administratively complete, passed the Senate on March 11 and was reported favorably by the House Environmental Regulation Committee on April 19.