

SUBJECT: Referring permit applications directly to contested case hearings

COMMITTEE: Environmental Regulation — committee substitute recommended

VOTE: 6 ayes — Chisum, Kuempel, Bosse, Dukes, Geren, Howard
0 nays
3 absent — Bonnen, Uher, Zbranek

SENATE VOTE: On final passage, March 22 — 30-0, on Local and Uncontested Calendar

WITNESSES: For — Mary Miksa, Texas Association of Business and Chambers of Commerce
Against — Reggie James, Consumers Union; Tom “Smitty” Smith, Public Citizen
On — Claire Arenson, Texas Natural Resource Conservation Commission

BACKGROUND: Many types of environmental permit applications are subject to contested case hearings. A contested case hearing is a formal evidentiary hearing before an administrative law judge 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 the application, amendment, or renewal is subject to a contested case hearing depends on several 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 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.

HB 801 by Uher, et al., enacted by the 76th Legislature, created new TNRCC procedures for contested case hearings on certain permit

applications. The act required earlier notice of applications, detailed public comments, and a narrowing of contested issues prior to a referral to the State Office of Administrative Hearings (SOAH) for a hearing.

DIGEST:

CSSB 1071 would establish procedures for direct referral to contested case hearings for permit applications. Immediately after the TNRCC executive director issued a preliminary decision on a permit application, on request of either the applicant or the executive director, TNRCC would have to refer the application directly to SOAH for a contested case hearing on whether the application met all applicable statutory and regulatory requirements. Portions of the Water Code that require a public meeting and response to public comments would not apply to an application referred directly to SOAH, nor would the Government Code provision requiring TNRCC to provide the administrative law judge with a list of disputed issues. TNRCC would have to provide for public comment and for the executive director's response to be entered into the administrative record of a decision on an application.

TNRCC would have to adopt rules to implement the direct referral process as soon as necessary for the rules to take effect on or before January 1, 2002.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2001.

**SUPPORTERS
SAY:**

CSSB 1071 would streamline the permit application process and prevent unneeded delays. Historically, certain types of permit applications always have resulted in a contested case hearing. Under current law, all applications must go through a public hearing and comment process, even if they are destined to go to a contested case hearing. This is repetitive and unnecessary, as it results in two similar opportunities for public input, at which the same comments and concerns are expressed, and can add a delay of at least 70 to 150 days to the permit application process.

The bill would not harm the public interest because the public still could participate in a contested case hearing. Also, TNRCC would have to include public comments and the executive director's responses as part of the administrative record.

OPPONENTS
SAY:

CSSB 1071 would reduce significantly the public's ability to participate in environmental permitting decisions. To participate in a hearing, a member of the public must be judged an "affected person" and granted legal standing by 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. Also, 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. Without the public hearing and comment provisions in current law, most members of the public effectively would be excluded from voicing their concerns on permit applications.

NOTES:

The committee substitute would require public comment and the executive director's comments to be included in the administrative record for all permit applications, whereas the Senate engrossed version of the bill would have applied those provisions only to a permit under a delegated or authorized federal program if comment and response were required for permit decisions under that program. The Senate version would have required TNRCC or the general counsel, on request of the applicant, to request referral to a contested hearing.