

**SUBJECT:** Regulatory flexibility for alternatives in pollution control or abatement

**COMMITTEE:** Environmental Regulation — favorable, without amendment

**VOTE:** 7 ayes — Chisum, Jackson, Allen, Dukes, Howard, Kuempel, Talton  
1 nay — Puente  
1 absent — Hirschi

**SENATE VOTE:** On final passage, April 22 — 24-5 (Barrientos, Gallegos, Shapleigh, Truan, Zaffirini)

**WITNESSES:** (*On House companion, HB 3322*)  
For — Jon Fisher, Texas Chemical Council; Mary Miksa, Texas Association of Business and Chambers of Commerce; Ben Seabree, Texas Mid-Continent Oil and Gas Association  
  
Against — Ken Kramer, Sierra Club  
  
On — Andrew Neblett, Texas Natural Resource Conservation Commission

**DIGEST:** SB 1591 would allow the Texas Natural Resource Conservation Commission (TNRCC) to exempt an applicant for a permit or license from a statute or commission rule concerning pollution control and abatement if the applicant proposed to control or abate pollution by an alternative method or apply an alternate standard.

The alternative method could not be inconsistent with federal law and would have to be at least as protective of the environment and the public health as the method that otherwise would have been prescribed by statute or TNRCC rule. The commission's order exempting the applicant would have to provide a description of the alternative method or standard and condition the exemption on compliance with the prescribed method or standard.

The TNRCC would issue rules setting the procedure for obtaining an exemption by rule. The rules would have to provide for public notice and public participation. The TNRCC could establish a reasonable fee for

applying for an exemption. A violation of an order issued under the regulatory flexibility granted by SB 1591 would carry the same punishment as a violation of the rule or statute from which an applicant was exempted.

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

**SUPPORTERS  
SAY:**

SB 1591 would give the state additional regulatory flexibility when granting permits or licenses for pollution control and abatement. In some cases this would result in a higher standard of environmental performance as facilities would more quickly seek out new technology or innovative methods of controlling pollution that otherwise might not fit exactly into the current regulatory scheme.

The bill would not lower pollution standards in any way because it would require that the alternative methods or standards used could not be inconsistent with federal law and would have to be at least as protective of the environment and the public health as the method prescribed in the TNRCC statute or rule that would otherwise apply.

Exemptions would only be granted in the rare cases where state laws are more stringent than federal laws, because the bill would not give the TNRCC the authority to exempt an applicant from federal laws. The bill would, however, allow the TNRCC to quickly implement changes made on the federal level.

The bill could not change any statutory environmental quality standard, and applicants would still have to comply with the intent of existing law. However, the bill would allow different pollution control methods to be used that could be more cost effective for a regulated industry yet provide the same level of protection against pollutants. If more regulatory flexibility is not granted to industries seeking to build or modify facilities in the state, they may take their business elsewhere.

The TNRCC would have discretion to decide what sort of public notice and participation would be appropriate under the regulatory flexibility granted by the bill. The commission would ensure that if a contested case hearing were appropriate, it would be held and would not exempt applicants from requirements if it would be controversial. In fact, the agency would

probably require alternative methods to result in a higher standard of environmental protection.

The Environmental Protection Agency (EPA) has just started a similar federal program, Project XL, allowing companies to seek alternatives to current laws and regulations in return for a higher standard of environmental performance. However, companies have been slow to take advantage of the program because EPA has not sought statutory authority for it. The Texas program proposed by SB 1591, on the other hand, would provide both agencies and regulated industries increased flexibility and would ensure that Texas facilities could participate in both the state and federal program.

The fact that Texas currently regulates minor sources of air emissions and certain kinds of non-hazardous solid waste in a more stringent manner than federal law could cause problems for Texas over federal delegation of the federal Clean Air Act's Title V air permitting program. Delegation would be easier to obtain if state statutes were neither less nor more stringent than federal ones. The regulatory flexibility proposed in SB 1591 would allow the state to adjust Texas laws to match federal statutes in cases where Texas statutory or regulatory requirements were more stringent.

OPPONENTS  
SAY:

SB 1591 would give a blank check to the TNRCC to exempt a permit application from almost any requirement of pollution control statutes and rules. There would be no way for any affected party to know in advance what requirements the agency would exempt an industrial polluter from having to meet. SB 1591 would not address any of the concerns raised by EPA about the state's Title V delegation; instead, the bill would actually complicate federal delegation of the Title V program.

Allowing the TNRCC to exempt an applicant from a statute would essentially allow the executive branch to make new law without the approval of the Legislature. If Congress changes federal environmental laws to allow more leeway in pollution controls, the bill would allow TNRCC to exempt polluters from controls that might previously have been required by state law, and the Texas Legislature would have no say in the matter.

Furthermore, this bill does not specify that citizens would have an opportunity for a contested case proceeding for permits issued under

“regulatory flexibility.” Applicants might gain regulatory flexibility, but citizens could be denied the full due process to which they are entitled.

To properly protect public health and safety, proposed alternative methods should require more extensive agency review than commonly used methods. The real effect of this bill would be to give the TNRCC another major new workload without increasing agency resources.

The EPA's Project XL program requires that alternative approaches to pollution control achieve *superior* environmental performance, that residents of the community near the facility seeking such a permit be actively involved in the the process, and that an applicant have a good compliance record in order to benefit from alternative methods of pollution control, none of which would be required under SB 1591. Also, there is no indication from EPA that changes in state law are necessary for regulated facilities in the state to participate in Project XL.

OTHER  
OPPONENTS  
SAY:

Polluters should only be given an opportunity to be exempted from regulatory requirements if their proposed alternative method would go beyond current pollution control goals and be more protective of the environment and public health, benefitting both the public as well as the polluting facility. Since experimental methods of pollution control are more prone to failure than tested controls that are routinely used, the bill should require more extensive test data for an alternative method before it could be used.

The TNRCC should be required to adopt separate rules for each pollution control program, specifying procedures for obtaining an exemption and requiring the applicant to conclusively prove that the alternative method would provide equal or greater protection against pollution.