RESEARCH ORGANIZATION *focus report*

Texas House of Representatives *March 19, 1999*

Public Participation in Environmental Permitting

The nature and the extent of public participation in environmental permitting decisions are the subject of debate among regulated businesses, environmental groups, and others affected by permit decisions. This issue, which has surfaced in Texas' past two legislative sessions, is being revisited in the 1999 session.

The Texas Natural Resource Conservation Commission (TNRCC) regulates and issues permits for all facilities and activities that could adversely affect the state's air or water quality. In making permit decisions, TNRCC has the difficult task of considering issues raised by concerned citizens without abridging the rights of permit applicants.

Much of the debate about public participation in environmental permitting focuses on the contested case hearing process. This process allows permit opponents to participate in an evidentiary hearing on the permit if they are granted standing by TNRCC. Contested case hearings examine technical aspects of the proposed permit and whether or not the applicant has complied with permit conditions and statutory requirements.

Representatives of regulated businesses claim that contested case hearings often subject them to long, costly, and unnecessary proceedings that hinder their efforts to do business in Texas and create no real benefits for either the public or the environment. They also claim that the hearings are misused by people who want to delay facilities or force concessions from permit applicants but who lack valid reasons for doing so.

Representatives of many environmental public interest groups and other entities affected by permit decisions maintain that contested case hearings are the only way for members of the public to participate meaningfully in permitting decisions. They contend that public participation has been curtailed sharply in recent years and point out that contested case hearings are granted for only a fraction of environmental permits.

SB 1546 by Bivins, enacted by the 1995 Legislature, has served as a flash point for discussions of contested case hearings. Some public interest groups say that TNRCC's interpretation of SB 1546 and the rules the agency adopted to implement it unfairly limit public participation in contested case hearings. As a further complication, three recent court decisions have reversed decisions by TNRCC's three-member commission to deny requests for standing in contested case hearings.

Contested Case Hearings

The public can participate in environmental permitting decisions in several ways. Citizens can submit written comments to TNRCC, take part in public meetings called by the agency, or request contested case hearings.

Public meetings are required for certain kinds of permits or permit modifications. (See page 3.) TNRCC also may call a public meeting if an application generates an unusual amount of interest. To participate in a more formal contested case hearing, a member of the public must be granted legal standing by the three-member commission.

Contents

TNRCC also offers a voluntary alternative dispute-resolution procedure that can be used early in the permitting process to help resolve informally the problems surrounding contested applications. The mediator is an impartial third party either provided by the commission at no cost or hired by the participants at their expense. If no voluntary settlement can be reached, the issue may go to a contested case hearing.

The contested case hearing, a formal evidentiary hearing before an administrative law judge, lies at the crux of the debate over public participation in environmental permitting. When a member of the public requests such a hearing, TNRCC commissioners must decide whether or not the individual requesting the hearing deserves standing. Someone who wishes to be granted standing in a contested case hearing must prove a "personal justiciable interest." In addition, the request must be judged "reasonable" and "supported by competent evidence."

According to TNRCC, a person has a personal justiciable interest only if he or she would be affected personally by the permit decision. A personal interest is not one that a person shares with the general public. To qualify as a personal interest, a proposed activity must impair or deny a person's right to the advantage gained from his or her property or from use of an adjacent natural resource.

"Justiciable" means that the matter falls within TNRCC's regulatory authority and jurisdiction. Such matters include the protection of human health and safety and of the state's natural resources. The commission has no authority to rule on matters such as the effect a facility may have on property values or scenic views but may consider "land-use compatibility" in certain hazardous- and solid-waste applications.

Upon receiving a request for a hearing on a pending application, TNRCC commissioners hold a public meeting to discuss the application. If the commission decides that the person requesting the hearing does not have a personal justiciable interest, or that the request is not reasonable or supported by competent evidence, the request is denied. The person seeking the hearing may then appeal the commission's decision to a state district court. If the request for a contested case hearing is granted, TNRCC refers the permit application to the State Office of Administrative Hearings (SOAH).

SOAH's Role in Permit Hearings

The Legislature created SOAH in 1991 as an independent agency staffed with administrative law judges to hear contested case hearings and other cases brought by state agencies. Judges in SOAH's Natural Resources Division have expertise to conduct technical or specialized hearings. SOAH regularly hears TNRCC cases involving environmental and water-rights permits, enforcement matters, and water utilities.

SOAH hearings are similar to civil trials held without juries. Statements of witnesses are made under oath and are considered evidence. The permit applicant has the burden of proof to show that the application is technically correct. Interested persons may submit comments during the initial phase of the trial, but the hearing is based on legally admissible evidence.

Parties to the case must take part in the "discovery" phase before and during the hearing. During discovery, opposing parties can question each other on their positions and request supporting evidence. Parties also can present testimony, offer evidence, cross-examine witnesses, and object to the introduction of evidence.

When the hearing is over, the administrative law judge prepares a recommendation called a proposal for decision (PFD) and issues it to the agency that referred the case. In the case of environmental permits, the PFD goes back to the three-member TNRCC, which then may adopt, modify, or vacate it and issue a final decision. The commission often arranges to hear arguments from the parties concerned before issuing a final decision. Final orders by the commission can be appealed to state district court.

Supporters and opponents of this process agree that the threat of a contested case hearing gives additional leverage to the protesting group, since applicants are eager to avoid a lengthy and expensive hearing. For this reason, an applicant may be willing to change certain parameters of the permit — for example, by adding emission controls or buying additional land for the site as a buffer from surrounding populated areas.

In fiscal 1997, TNRCC referred 187 cases to SOAH, the majority being water utility, certificate, and rate cases. Only 34 were environmental permitting cases. Only three of those cases (two involving landfills and one involving an industrial hazardous-waste facility) went through full contested case hearings, and four remain open. The other 27 cases were settled, withdrawn, or consolidated.

The Question of Standing

Using justiciable interest as the test for determining standing in a contested case hearing has legal precedent in both state and federal law. Such a test helps to ensure that

TNRCC Permits and the Public

The Texas Natural Resource Conservation Commission (TNRCC) issues different permits for different types of facilities. The type of public participation allowed in these permitting decisions varies according to the type of permit.

Individual permits are required for large facilities that have the greatest potential to pollute, either by volume or class of pollutants, or for those that TNRCC determines could directly affect public health in a significant way. Examples include certain solid-waste landfills and hazardous-waste facilities. These permits include pollution-control plans tailored for a specific facility or kind of facility. In general, the public can request contested case hearings on these permits. A business applying for an individual permit often must gather extensive, site-specific engineering and environmental data. The applicant may be required to comply with specific requirements and to install up-to-date pollution-control technologies.

Standard permits set out specific design and operating requirements for various sources of air pollution, depending on the type of facility or activity. These permits cover installation of certain emission-control equipment, installation or modification of oil and gas facilities, and construction or modification of certain municipal solid-waste facilities. Standard permits are not subject to contested case hearings.

Registrations allow some types of businesses simply to notify TNRCC of their operation as long as they promise to comply with broad requirements to protect public health and the environment. Operation of storage tanks, both above and below the ground, and on-site management of nonhazardous waste can fall in this category. Other types of registration require a technical review and approval by TNRCC before operations can begin. These operations may include sludge application for agricultural purposes and municipal solid-waste transfer stations. Registration-type permits are not subject to contested case hearings.

Permits by rule and ***standard exemptions*** are issued to facilities that 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 exemptions allow some facilities to operate without an air-quality permit as long as they comply with regulations and use certain kinds of emission-control equipment. In certain cases, these operations may be required to register with TNRCC. Standard exemptions also may be granted to facilities that are making a change that will not increase air emissions significantly. About 129 standard exemptions are available for sources as diverse as landfills, restaurants, and fireplaces. Under TNRCC rules, public participation is required for some permits by rule and standard exemptions, but not for others.

Federal operating permits are required in Texas by the federal Clean Air Act. The federal permit program provides three opportunities for public participation: a public comment period, a notice-and-comment hearing, and a public petition period. It provides no opportunities for a contested case hearing. Anyone who may be affected by emissions from a site may request a notice-and-comment hearing, as may a member of the Legislature from the general area of the site. Oral and written arguments are accepted, but interrogation and cross-examination are not allowed. The U.S. Environmental Protection Agency must give final approval of the proposed federal permit.

two parties have a genuine dispute and that each has a real interest in the case.

The right to participate in an administrative hearing is supported by case law and is interpreted liberally, according to a brief filed by TNRCC's Office of Public Interest Council. The issue of standing in contested case hearings, however, is not always clear because the statutes do not clearly define the criteria for standing.

SB 1546, enacted in 1995, allows TNRCC to deny a hearing if a request is deemed "not reasonable" or "not

supported by competent evidence." SB 1546 also requires TNRCC to adopt rules that specify the factors to be considered in determining whether someone is an affected person in a contested case hearing.

In a 1997 ruling, *Heat Energy Advanced Technology, Inc. (HEAT) v. West Dallas Coalition for Environmental Justice*, No. 96-05388 (126th Dist.Ct., Travis County, Tex., May 14, 1997), the Travis County District Court reversed a TNRCC decision to deny standing to a member of a group that had challenged the renewal of a waste permit by an industrial hazardous-waste facility in Dallas. In his opinion, Judge Paul Davis noted that in the past, the courts provided general guidelines regarding standing. To have standing, a person merely needed to be an "affected person," a term not defined by statute. Judge Davis wrote:

> These new [TNRCC] rules have the effect of adding a new procedural layer to the process of contesting the issuance or renewal of a number of types of permits issued by the TNRCC....Now, prior to any contested hearing, there may be an initial hearing on the threshold issue of *standing*. The commission is *no longer required even to hold a contested case hearing* if the requester is not adjudged an "affected person" at this initial hearing on standing. [Emphasis in original.]

In February 1998, the Third District Court of Appeals upheld Judge Davis' decision. In August 1998, the Texas Supreme Court also let the district court decision stand.

Effects of SB 1546 and Judicial Reversals of TNRCC Decisions

Environmental groups single out SB 1546 (Water Code, Sec. 5.115) as having a chilling effect on public participation in contested case hearings. They claim that TNRCC is interpreting the statute to set a significantly higher threshold for public participation in contested case hearings than the statutory language actually requires. Industry groups, in contrast, say the statute merely codifies existing standards and does not restrict standing before TNRCC.

According to some environmental groups, before enactment of SB 1546 the test for standing was applied generously in the belief that citizens might present independent information to TNRCC that the permit applicant would not provide and in order not to risk a court finding that a denial of standing was incorrect. They claim that SB 1546 has led TNRCC to require citizens to present all the evidence they need to prove they can win their case, including a demonstration of harm that might result from the permit, simply to gain standing as a party.

Regulated businesses say that SB 1546 has made it more difficult to obtain standing in contested case hearings only for those who make frivolous requests. They point out that TNRCC needs clear rules to avoid becoming entangled in local land-use battles. Industry groups claim that some people request contested case hearings merely to delay applications and use the threat of a hearing to "blackmail" companies into making expensive permit changes that may or may not benefit the public.

Complicating the situation are recent court opinions that have reversed TNRCC decisions to deny standing in contested case hearings to various parties. In addition to the *HEAT* case, the Travis County District Court has reversed two other TNRCC decisions to deny standing, either because the parties were not deemed affected or because the case was not considered reasonable. In *Holton v. TNRCC*, case 97-06408, a wastewater discharge case, TNRCC did not appeal the district court's ruling, and the case was referred back to SOAH for a hearing on the permit. However, in *Citizens for Healthy Growth et al. v. TNRCC*, case 98-06046, concerning an air permit for United Copper, the commission intends to appeal the ruling to the Third District Court of Appeals.

The reversals place TNRCC in a difficult situation. Many observers believe that these cases will make TNRCC more hesitant to deny standing to those requesting contested case hearings on environmental permits. A *Wall Street Journal* article on September 9, 1998, quoted Geoff Connor, former general counsel for TNRCC, as saying that the HEAT decision had "clearly lowered the bar" for participation in contested case hearings on environmental permits and that "if the commission cannot reject a hearing request that is as weak as this one, then the commission is in trouble."

The Current Debate

In the past two legislative sessions, several lawmakers have tried unsuccessfully to enact legislation to replace contested case hearings in Texas with a notice-and-comment hearing process, similar to that used by the U.S. Environmental Protection Agency (EPA). In general, notice-and-comment hearings are open to any member of the public, but they are not formal hearings involving introduction of evidence, discovery, and cross-examination of witnesses in a formal, quasi-judicial proceeding before a SOAH administrative law judge.

A similar proposal this session, HB 801 by Uher, as introduced, would replace contested case hearings on environmental permit applications with a notice-and-comment public hearing process. At a February 15 hearing on HB 801 by the House Environmental Regulation Committee, business and industry groups indicated support for restricting or eliminating contested case hearings, while many environmental and public interest groups opposed doing away with the hearings. The companion bill, SB 402 by Armbrister, has been referred to the Senate Natural Resources Committee.

During the 1997 session, a coalition of more than 80 environmental and public interest groups proposed bills that they called the "right to know, right to act" package. The announced purpose was "to ensure that all citizens could participate meaningfully and effectively in the pollution control permitting and enforcement activities of state agencies." They said the bills would reverse past actions by the Legislature and TNRCC that have limited public participation in environmental proceedings. The only bill enacted from the package was HB 1367 by Hirschi, requiring TNRCC to submit an annual report of enforcement actions.

Supporters of replacing contested case hearings with notice-and-comment hearings say that this would significantly increase the opportunity for public participation in permit hearings. They argue that a notice-and-comment hearing is more informal and less intimidating than a contested case hearing and is a much better forum in which to air fears and complaints about a proposed facility.

Most experts agree that those opposing a permit application in a contested case hearing need to hire lawyers and expert witnesses to present technical arguments effectively. Most ordinary citizens do not have the resources to become involved in what is essentially a costly civil trial. Any citizen, however, can attend a public notice-and-comment meeting to ask questions and to inform TNRCC staff of facts and arguments the agency may have missed. In most cases, agency officials also are required to respond to those protesting a permit and explain the rationale for their decision. A public meeting allows the permit applicant, TNRCC staff, and neighbors of the proposed site to exchange ideas freely. State officials then may take public input into account when making permitting decisions.

Supporters maintain that TNRCC staff scientists and engineers have the expertise to make scientifically sound recommendations on highly technical matters, whereas SOAH's administrative law judges in the Natural Resources Division often may not have the expertise necessary to make an informed decision on a particular permit.

To maintain the viability of manufacturing facilities in Texas and the associated jobs, businesses must be able to react quickly to changing trends in the economy. Regulated entities in Texas are hesitant to make changes that they know may trigger long and expensive hearings. This puts Texas industries at a disadvantage with their competitors in other states. Also, the threat of contested case hearings may discourage businesses from locating in Texas, since they are unwilling to risk facing an expensive contested case hearing after making a significant investment to buy land and apply for a permit.

Contested case hearings have been abused by people who oppose permits without a valid technical reason. Under the current process, permitting actions that have no environmental impact can be impeded by contested case hearings that consume time and resources with no benefit to the public.

Often people object to a new facility out of fears that it may, for example, affect their property values. A contested case hearing is not the proper venue for this kind of dispute and is unfair to the applicant when used in this way. It is not the fault of regulated entities that cities and counties either do not have or do not exercise their power to control land use. If the Legislature or local governments determine a need to enact zoning laws or increase local land-use control, they should do so. This would create a proper forum for the public to vent frustrations over facility siting decisions.

Although the average annual number of permits that end up in contested case hearings is relatively small, the mere threat of such hearings affects many more permit applicants. Even when an application is correct, the time and expense of a hearing are so great that the applicant may have to bend to unreasonable demands that are expensive and yet yield no environmental benefits.

EPA uses the public notice-and-comment system when granting federal operating permits. If Texas were to adopt the EPA system, it would help the state keep federal delegation of environmental programs, because there would be no difference in hearing requirements between state and federal programs. The federal government grants delegation of environmental programs to states if their programs fulfill certain federal requirements. To comply with federal requirements, TNRCC now must create a hybrid notice-and-comment hearing that runs parallel to the contested case hearing process.

Finally, there is no evidence that states without a contested case hearing process are less effective in protecting the public and the environment against pollution hazards. Many states do not provide an opportunity for contested case hearings.

Opponents of replacing contested case hearings with notice-and-comment hearings say that this would severely weaken the rights of the public to participate in environmental permit decisions. The contested case hearing is the most effective form of public participation and the best way to inform decision-makers. Furthermore, TNRCC has the authority to deny any frivolous hearing request.

SB 1546 has weakened public participation in environmental decision-making since TNRCC has interpreted the law to limit participation in contested case hearings. In fact, a whole series of bills enacted in the name of streamlining the regulatory process have created barriers to public participation. More and more industries, for example, have been authorized to obtain permits by rule or standard exemption with no opportunity for contested case hearings.

Industries have exaggerated the time and expense involved in contested case hearings. Only a fraction of TNRCC's permitting cases reach a contested case hearing because, in most cases, permit opponents have neither the time nor the money to participate. As a result, permits are seldom denied as a result of contested case hearings. However, the process often results in a safer facility because conditions attached to the permit improve protection of public health.

In contrast, the notice-and-comment process is ineffective. The public loses the right to pursue discovery and cross-examination under oath and to offer sworn testimony of experts. In the area of environmental permitting, unverifiable testimony, such as that resulting from public comment, is of little help or consequence to those making permit decisions. In addition, it is almost impossible for citizens to develop meaningful testimony in the time usually allowed for notice-and-comment hearings.

Negotiations work only if both parties have incentives to negotiate in good faith. Without the possibility of a contested case hearing, citizens would have no leverage to force regulated industries to negotiate. Since notice-and-comment meetings do not delay permitting, both the TNRCC and the entities seeking permits may simply disregard such meetings.

Texas does not have to switch to notice-and-comment hearings to gain and keep delegation of federal environmental programs. Texas obtained delegation authority for wastewater discharge permits in 1998, and EPA had no problem with Texas' contested case hearings process. Indeed, the EPA requires states to allow an opportunity for judicial review of permit decisions. A state cannot meet this standard if it narrowly restricts the class of people who may challenge permit decisions, as Texas has begun to do since enactment of SB 1546.

— by Ann Walther

House Research Organization
Texas House of Representatives
Capitol Extension
Room E2.180

P.O. Box 2910
Austin, Texas 78768-2910
(512) 463-0752
FAX (512) 463-1962

Steering Committee: Henry Cuellar, Chairman • Peggy Hamric, Vice Chairman

Tom Craddick, Dianne White Delisi, Harold Dutton, Roberto Gutierrez, Bob Hunter, Carl Isett, Mike Krusee, Brian McCall, Elliott Naishtat, Joe Pickett, Bob Turner, Leticia Van de Putte, Steve Wolens

Staff: Tom Whatley, Director; Greg Martin, Editor; Rita Barr, Office Manager; Kellie Dworaczyk, John J. Goodson, Ann Walther, and Kristie Zamrazil, Analysts