

The Contested Case Hearing Process Works Well – No Major Changes Needed

No Need to Take Away Texan's Rights to Preserve Their Private Property Rights and Rights to Clean Air and Clean Water

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1. The current process works

A number of state agencies in Texas have provisions to allow citizens, local governments and private businesses to engage in a contested case hearing to discuss a government permit, license or provision. Thus, for more than 100 years, the Railroad Commission of Texas has been using internal hearings examiner to conduct an administrative hearing to allow those concerned with a government action an opportunity to make their case before an impartial administrative law judge. Most other agencies in Texas – the Public Utility Commission, the Texas Parks and Wildlife Department and others – have in recent decades used the State Office of Administrative Hearings as a separate agency to conduct the hearings, with the agency itself making the final decision. The issues are many – whether enforcement cases at the RRC, sand and gravel mining at the TPWD or electric rate cases at the PUC – but the idea is the same – give those public members with a real outcome in decision a real process to try and influence that outcome. These requests from the public, local government and businesses are actually extremely rare. Most decisions by agencies are not contested.

While the federal government does not have the same process in their decision-making, most states in the US have some provisions for certain kinds of government decisions that allow for administrative hearings, whether at the agency itself or a separate court or agency.

In Texas, most environmental permits and licenses are granted through delegated programs at the Texas Commission on Environmental Quality, whether related to water rights, water quality discharge permits, sand and gravel mines, air quality permits, municipal landfills, grit trap operators or hazardous or industrial waste disposal sites, including

radioactive waste licenses. The Texas Commission on Environmental Quality (TCEQ) is able to grant Contested Case Hearings to property owners, local governments, and businesses who can show they could be adversely affected by a new or expanded facility more than the general public. These statutory provisions are contained in multiple statutes in the Health and Safety Code and standards are slightly different for “standing” depending on the media and section of the code in which the license or permit is being granted. These Contested Case Hearings provide parties with the ability to have a discovery process and put their case before a neutral Administrative Law Judge at the State Office of Administrative Hearings (SOAH).

A few facts about Contested Case Hearings:

- Very few permits receive requests for contested case hearings;
- Even fewer actually go through a full contested case hearing;
- Many “settle” and reach an agreement;
- Only a handful of permits are ever denied by TCEQ because of a contested case hearing and ALJ decision; in fact, most simply result in better permits.

2. We have already in HB 801 (1995) and HB 2694 (2011) limited contested case hearings.

Under changes made under the TCEQ 2011 Sunset Bill (HB 2694 – Wayne Smith) and previously under HB 801:

- Executive director of TCEQ is already a party in hearing;
- Other state agencies can not be parties to contested cases;
- In specific cases, where it is important to assure a swifter decision-making time, the amount of time is limited.
 - radioactive waste licenses (6 months);
 - MACT air permits (120 days) time-limits are already established;
- Affected parties must have an economic or health interest that is greater than the general public.

3. Our own experience has generally been positive with contested case hearings, though we have not always received what we wanted.

Sierra Club and our members have been involved in contested case hearing on a wide variety of environmental issues, including water rights, wastewater discharge permits, enforcement cases, air permits for ASARCO, coal plants and chemical plants, municipal solid waste sites, uranium mines, grit trap operations and radioactive waste sites. On the whole, our experience post-HB 801 has been positive.

Sometimes we gain standing for a contested case hearing, and the hearing leads to an agreement with the applicant to improve the permit, or voluntarily change the site plan. Thus, we worked with a grit trap operator in South Texas to find an alternative site for their important operation that would not impact a local school and homes.

Sometimes we “lose” but the process leads to the agency – often with EPA oversight – improving permit limits when it is found that Best Available Control Technology is different than represented by the applicant. An example are the improvements in ASARCO, where the agency granted the renewal of their permit, but with much greater permit limits and scrutiny. Ultimately, the renewal was not granted because of separate issues related to EPA enforcement, but the process did lead to a better permit.

Sometimes we win, like when Sierra Club helped convince the TCEQ that building a radioactive waste site in West Texas near a fault line was not a good idea.

Sometimes we don't get standing at all like in the current legal situation involving Sierra Club and Waste Control Specialists' radioactive waste site. In that case, we have appealed a decision by the Austin Court of Appeals which denied us standing. We are concerned that the decision by the Court of Appeals is written very broadly and could limit standing opportunities for many Texans on important issues, but we are hopeful that the issue of

standing will be dealt with by the Court of Appeals or the Texas Supreme Court.

Interestingly, when industry complains about the CCH process, they do so only for air permits, air permit renewals, wastewater discharge permits and waste permits. Previous attempts to either limit or do away with the Contested Case Hearing process – such as SB 957 – specifically did not impact other permits and government decisions such as water rights permits, electric rates, natural gas rates, certain types of enforcement cases and water rates. ***In other words, industry groups like the Texas Chemical Council that promoted major reforms or changes to the CCH want to keep contested case hearings for water, gas and electric rates and water rights – which they often use to represent their interests – but cut it off for those concerned about how pollution might impact their private property or businesses.***

4. Do we think changes are needed?

- *Some process standardization among radioactive, water and air statutes involving CCHS may be useful;*
- *Clearer direction on standing decisions might be helpful, given recent Texas Supreme Court and Texas Court of Appeals decisions*
- *Adopting or referring to federal standing requirements might be helpful;*
- *On permit renewals there may be ways to create more efficient process to make sure permit decision don't drag on and on.*

Texas Has Maintained the Contested Case Hearing Process for Good Reasons

- Texas uses the contested case hearing process because Texas respects property rights, and is reluctant to grant overarching power to administrative agencies. The contested case hearing process protects these rights in a manner that the notice and comment process does not even come close to.
- As reflected in Texas' strong Open Meetings Act and Public Information Act, which were adopted around the same time as the current contested case hearing process was created by the Texas Administrative Procedures Act (APA), Texas traditionally has had high standards for open and transparent government. The contested case hearing process furthers this purpose by allowing the affected public to thoroughly examine TCEQ's decisionmaking process.
- The contested case hearing process leverages private resources to supplement limited state resources. TCEQ simply lacks the resources to thoroughly test and examine an applicant's factual representations and analysis. The contested case hearing process allows impacted citizens with greater knowledge of the relevant facts to provide this more thorough information and analysis for the benefit of the State.
- While it may be possible to satisfy federal requirements without the contested case hearing process, it does not necessarily satisfy the due course of law requirement of the Texas Constitution. Prior to implementation of the APA, Texas caselaw required that evidentiary hearings be held on judicial review where no evidentiary hearing was held at the agency if property rights were affected. By exempting TCEQ permitting from APA contested case hearings, the Legislature may simply be changing the venue where the evidentiary hearing occurs.
- True to the purposes of the Texas Administrative Procedures Act, the contested case hearing process is widely used for decisionmaking in a broad array of Texas administrative agencies. SB 957 undermines that effort, moving instead towards a patchwork of administrative procedures that impairs the ability of the public, the courts, and the Legislature to oversee the operation of Executive branch. Creating a

customized decisionmaking process for TCEQ permitting makes no more sense than creating a customized Open Meetings Act or Public Information Act for the TCEQ permitting.

- The model Administrative Procedures Act established the contested case hearing process largely in its current structure, and has been widely adopted. Texas' use of this process for environmental permitting is consistent with the process adopted by many states across the country.