Public Participation: Tools & Obstacles in the TCEQ permitting process[1]

There are a number of legal tools that are intended to aid the public in participating in government decision-making and in protecting their health, property, and environment.

Among them are: Texas Public Information Act, Texas Open Meetings Act, and Texas Administrative Procedure Act, along with the governing statutes and rules that apply to various stage agencies, groundwater districts, and other local governments.

This paper will focus on the TCEQ permitting process and the various stages that allow for public participation in that process. More specifically, this paper will focus on permitting matters that fall within the SB 709 process. It will describe the process and note the various opportunities for the public to engage in the process, along with obstacles to that participation.

Applicability of SB 709 procedures

The TCEQ administrative hearing process was revised in 2015 by Senate Bill 709. But SB 709 applies only to certain permit applications at TCEQ. The chart below identifies the permit and permit amendment applications that are subject to the SB 709 procedures:

SB 709 Matters	Non SB-709 Matters
Water Quality (Water Code Ch. 26)	Water Rights (Water Code Ch. 11)
Injection Wells (Water Code Ch. 27)	Water Service Areas (Water Code Ch. 13)
Solid Waste (Health & Safety Code Ch. 361)	Water Quality, Air, and Solid Waste Applications submitted to TCEQ before September 1, 2015.
Air (Health & Safety Code Ch. 382)	

For the most part, the SB 709 process generally does not apply to renewals that do not involve a significant change in the permit or at the facility. The process also does not apply to certain activities that can be authorized by a registration, general permit, or standard permit.

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Application Review Process

After a permit application is submitted to TCEQ and after staff have determined that the application is "administratively complete," notice of receipt of the application and intent to obtain a permit is published and mailed to certain landowners and to persons who requested to be on a mailing list. Staff thereafter commence their technical review of the permit application.

Typically, an applicant seeking a permit that is subject to a contested case hearing engages with TCEQ staff throughout the application technical review process. The staff's technical review frequently results in multiple "notice of deficiency" letters, identifying deficiencies in the application or seeking clarification of certain representations in the application. This application review process may take months. Further, communications between staff and the applicant are not always confined to formal notice of deficiency letters and responses; they may also consist of informal meetings, emails, and phone discussions. In short, the applicant has ample access to TCEQ staff during the application review process—and the opportunity to address staff's concerns with supplemental technical information.

Ultimately, once TCEQ staff have concluded their technical review, a draft permit is prepared by staff, with input from the permit applicant. Staff may prepare various iterations of the draft permit, in response to comments and concerns from the applicant. Once the applicant and staff agree on the terms of the draft permit, a notice is published announcing that the technical review process is complete and a draft permit has been prepared by the Executive Director (ED). This indicates that in staff's view, the application complies with applicable statutes and rules.

Opportunities for meaningful public input during the technical review process are limited. Although the public may submit comments during this review period, staff do not have to consider those comments while reviewing the application or preparing the draft permit. Moreover, information that was relied on or that forms the basis for the application is not always available or accessible—even if the application is posted online. The public may have to submit Public Information Act requests to obtain all relevant information regarding the application—so that they can provide meaningful input. This can be an expensive process, and it does not always yield useful results. Finally, even if members of the public desire to provide input that could be useful to the application review process, the only mechanism available for doing so is the online comment process. That is, while the permit applicant has the name and contact information for the staff who are involved in reviewing the permit application, the public does not typically possess that information, and so, they cannot easily share their concerns with the persons who are actively reviewing the permit application.

Ethical considerations: If an application is subject to an opportunity for a contested case hearing, what obligation does the applicant have to retain all materials (*e.g.,* notes, communications, field notes, surveys, samples, modeling files) that were relied on for purposes of selecting the site, preparing the application, and participating in the TCEQ application review process? What obligation does the TCEQ staff have to retain such materials, including initial iterations of the draft permit, informal communications with the applicant's representatives and consultants, and internal communications and memoranda? At what point in the process should the applicant or TCEQ make this information available and readily accessible to the public?

Public Comments & Public Meetings

After the technical review is completed and a draft permit is prepared, notice of a preliminary decision is published and mailed. The public is invited to submit written comments, identifying any concerns they have with the draft permit and the permit application. Importantly, anyone who may be considering submitting a request for a contested case hearing must identify, in their comments, issues they may seek to raise in a contested case hearing, if one is granted. *See* Tex. Gov't Code § 2003.047(e-1); 30 Tex. Admin. Code § 55.021(d)(4). Typically, the public has 30 days from the date notice of the draft permit was published to submit their comments.

On occasion, TCEQ may convene a public meeting, during which the public may provide short oral comments (often 3 minutes or less) regarding the draft permit and application. Public meetings are convened when requested by a legislator or when there is significant public interest. 30 Tex. Admin. Code § 55.154(c). If a public meeting is convened, then, the comment period ends either 30 days after notice of the draft permit is published or at the end of the public meeting—whichever is later. 30 Tex. Admin. Code § 55.152(b).

Public meetings are typically scheduled late in the application review process—after the technical review has been completed and a draft permit has been prepared.[2] Yet, a public meeting may be the first time that affected members of the public have had an opportunity to engage with TCEQ staff and to understand the TCEQ permitting process and the details of the proposed facility and operation that are the subject of the permit application. Nonetheless, members of the public are typically allowed only a few minutes to express their comments or concerns regarding the draft permit and application.

[2] *See generally* Sunset Advisory Commission Staff Report on Texas Commission on Environmental Quality, 2022-20223, 88th Legislature.

It's worth noting that a permit application is often a lengthy document or series of documents with highly technical information. And so, preparing meaningful, informative public comments regarding the application is no simple task. Attempting to do so while participating in a public meeting can be overwhelming.

Even when meaningful substantive comments are submitted to TCEQ, those comments are unlikely to affect the staff's determination that the application satisfactorily addresses all applicable statutory and regulatory requirements—and thus, issuance of a draft permit is appropriate. Instead, after the comment period has ended, TCEQ staff attorneys will prepare a written response to comments, but staff rarely revises the draft permit as a result of public comments.[3]

Ethical considerations: How does TCEQ determine whether there is sufficient public interest in a permit application to warrant a public meeting? Does the public have a say in making that determination? Are there guidelines that the public can review to ensure that they have demonstrated the requisite public interest to warrant a public meeting? Should there be more than one public meeting when a project is likely to attract significant public interest? Should there be an initial public meeting—*before* the technical review of the application has been completed—to provide information to the public about (1) the application review process, (2) the staff conducting the review, (3) the availability and how to access relevant application information, (4) any guidance documents that staff uses to conduct its review, and (5) the importance of preparing meaningful comments? Should the Commission waive fees for members of the public seeking public information related to a pending permit application, via the Public Information Act—so as to ensure the public has access to all relevant information to meaningfully participate in the process? Should the public be allowed more than three minutes to express their comments and concerns at a public meeting that coincides with the end of the public comment period? Should the comment period be extended by an additional week or more after the public meeting—to allow the public to digest information gleaned from the public meeting and submit useful written comments? How does the TCEQ ensure that alternative language interpreters are able to translate technical jargon in an understandable and accessible manner? How does the presence of armed security at a meeting venue impact meaningful public participation?

Opportunity to Request a Hearing

Once the ED has prepared the written response to comments and finalized any revisions to the draft permit—only then does the hearing request period

[3] *See generally* Sunset Advisory Commission Staff Report on Texas Commission on Environmental Quality, 2022-20223, 88th Legislature.

commence.[4] Persons with a justiciable interest who may be affected by the permit, if issued, may request a contested case hearing. Tex. Water Code § 5.115. To do so, they must—according to TCEQ's rules—include certain information:

> identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a hearing; and list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request.

30 Tex. Admin. Code § 55.201(d). For a group or association, additional information is required, consistent with judicial associational standing factors. 30 Tex. Admin. Code § 55.205.

The public notice prepared by TCEQ typically provides the following language to further explain how one would be affected by the proposed facility or activity: "For example, to the extent your request is based on these concerns, you should describe the likely impact on your health, safety, or uses of your property which may be adversely affected by the proposed facility or activities."

Absent from the applicable statutes, the TCEQ rules, and the public notice instructions is any mention that one must possess a property right to demonstrate a personal justiciable interest. Nor is there any legal requirement that one must reside, work, or recreate within one mile of the proposed facility or discharge. Nor do the statutes, rules, and public notice state that an affidavit, sworn declaration, expert report, or other technical documents must be submitted in support of the hearing request. There is no requirement that a hearing requestor must present "evidence" disputing the TCEQ staff's technical memoranda or the representations in the applicant's permit application. Once a hearing requestor has submitted the required information to TCEQ, in writing, nothing more is required of them—at least not according to the relevant statutes, TCEQ rules, or the public notice.

The ED, Office of Public Interest Counsel, and the applicant have an opportunity to respond to the hearing requests and to recommend whether, in their view, the hearing requests should be granted or denied. Irrespective of the ED's and the

[4] Certain Air quality permit applications require a hearing request within 15 days of the initial notice of receipt of application. If a hearing request is submitted during those initial 15 days, then, a later opportunity to request a hearing becomes available after a response to comments has been prepared and issued.

applicant's recommendations, a hearing requestor is under no obligation to submit a reply to the responses to the hearing request. The hearing requestor is not required to rebut or offer any additional information or expert reports, in response to the ED's and the applicant's responses.

After all hearing requests, responses, and replies have been submitted to TCEQ, the matter is set for consideration by the TCEQ commissioners at a public meeting. Typically, no oral comments or arguments are allowed by the hearing requestors at the public meeting. The commissioners deliberate among themselves and make a decision, which is memorialized in a written Order. The written Order does not typically include findings of fact or conclusions of law—even if all hearing requests are denied.

If a person demonstrates that they satisfy the definition of an affected person—that is, that they possess "a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing"—and if they raised a relevant disputed issue of fact that was also raised in their comments, then, the Commission must grant the hearing request and refer the relevant disputed fact issues to SOAH for a hearing. The Commission enjoys no discretion to deny a hearing request if all requirements have been met. Tex. Water Code § 5.556; 30 Tex. Admin. Code § 55.211(c). Alternatively, the Commission may refer a hearing request to SOAH to address the sole issue of whether a hearing requestor is an affected person. 30 Tex. Admin. Code § 55.211(b)(4). If a hearing request is referred to SOAH, it must be processed as a contested case under the APA—allowing the parties to present relevant evidence on the issue and an opportunity to cross-examine witnesses. *Id.* § 55.211(b)(4); Tex. Gov't Code §§ 2001.081-.102. The Commission also possesses the discretion to refer an application to SOAH for a hearing, even if no hearing request has been granted—if doing so is in the public interest. 30 Tex. Admin. Code § 55.211(d).

Issues for consideration: If there is a dispute regarding the hearing requestor's stated assertions about how they will be impacted, should the hearing request be referred to SOAH to resolve the disputed issue? Should the applicant be allowed to submit an expert report in an attempt to dispute the assertions raised in the hearing request—without a referral to SOAH? If so, should there be a limited discovery period to allow for an exploration of the basis for the expert's opinions and an opportunity to cross-examine the expert? Should TCEQ issue some guidance or adopt rules to explain under what circumstances "evidence" submitted by the applicant and/or TCEQ staff will be considered in evaluating a hearing request? If the Commission relied on staff memoranda or expert reports submitted by the applicant in determining that all hearing requests should be denied, should the Commission's Order include findings of fact and conclusions of law to explain the basis for the Commission's decision and inform the public about how the

Commission evaluates hearing requests, responses to hearing requests, and information attached to those filings?

Referral to SOAH

If a hearing request is granted, then, the matter is referred to SOAH and an ALJ (or two) is assigned. The ALJ will convene a preliminary hearing, during which the administrative record[5] is offered and admitted into evidence—establishing a rebuttable prima facie demonstration that:

> (1) the draft permit meets all state and federal legal and technical requirements; and
> (2) a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.

Tex. Gov't Code § 2003.047(i-1); *see also* 30 Tex. Admin. Code § 80.17(c). The ALJ will subsequently name parties to the hearing—sometimes, after hearing witness testimony by the prospective protesting party.

Following the preliminary hearing, the entire contested case hearing process must be completed—with a proposal for decision prepared for the Commissioners—within 180 days of the preliminary hearing. Tex. Gov't Code § 2003.047(e-2)(1); 30 Tex. Admin. Code § 80.252(c). The ALJ(s) typically require 60 days to prepare the PFD, leaving 120 days to conduct the hearing. During this time, the parties may engage in written discovery, depositions, and site visits. They also typically submit prefiled written testimony and exhibits—to facilitate an efficient hearing process. The ALJ may hear and rule on pretrial matters and discovery disputes. And ultimately, a hearing on the merits is convened, during which all parties are provided an opportunity to present their evidence and to cross-examine witnesses. The trial-like hearing on the merits may last a couple days or a couple weeks, depending on the number of parties and witnesses, the issues presented, and the complexity of the case. The APA and the Texas Rules of Evidence apply to the contested case. Throughout the hearing process, the applicant bears the burden of proof. 30 Tex. Admin. Code § 80.17.

At the end of the hearing, the parties submit written legal briefs—with citations to the hearing transcript and exhibits, which comprise the evidentiary record. The ALJ then prepares a Proposal for Decision (PFD) with proposed findings of fact and conclusions of law, and the parties may submit Exceptions to the PFD and

[5] The administrative record consists of: "the application, the draft permit prepared by the executive director of the commission, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application" Tex. Gov't Code § 2003.047(i-1); *see also* 30 Tex. Admin. Code § 80.118.

replies to exceptions. The TCEQ commissioners are then tasked with making the final permit decision, with findings of fact and conclusions of law, based on the PFD and the evidentiary record. If the commissioners amend the PFD, the amendment must be based on the evidentiary record developed at SOAH and must be accompanied by an explanation of the basis for the amendment. Tex. Gov't Code § 2003.047(m). The commissioners may also remand the matter to SOAH to take additional evidence. *Id.*

Although the SOAH hearing process must be completed within a short 4 month time period (allowing 2 months for the preparation of a PFD), this expedited process is resource-intensive for protesting parties. While the applicant and the ED's staff have had months, if not years, to become familiar with the proposed facility, operation, and permit application, the protesting parties must quickly acquaint themselves with highly technical information and prepare their direct case. Legal counsel and expert witnesses are often essential. And the hearing typically takes place during the work week and in Austin, though the hearing requestors may reside elsewhere.[6] The entire process is onerous and expensive for protesting parties. In addition, TCEQ rules allow transcript costs to be assessed against protesting parties—further increasing the expenses incurred by affected persons seeking to protect their justiciable interests. 30 Tex. Admin. Code § 80.23(d)(1).

In the end, a successful outcome for protesting parties does not necessarily mean denial of the requested permit. Evidence presented during the hearing may indicate a need for additional provisions to ensure the safety of the environment and surrounding residents. Such an outcome benefits not only the protesting parties, but also TCEQ, the health and safety of the public and the environment.

Absent a contested case hearing, there is no opportunity for the parties to vet the representations in the permit application or to cross-examine the experts who have offered opinions in support of the application. The Commission is also deprived of this opportunity—absent a contested case hearing. And so, there is no way to ensure the reliability or veracity of the representations in the permit application and supporting documents. This is not to suggest that applicants are prone to misrepresent facts or to intentionally present unreliable expert analyses and opinions. But applicants make mistakes, and science is not always precise. Applicants' analyses and modeling may be based on assumptions that are not supported by facts on the ground. Protesting parties often possess an intimate familiarity with the surrounding environment, and thus, their participation in a

[6] Sometimes the hearing may be conducted virtually. In the past, a protesting party could request that a hearing or portions of a hearing be convened locally, in the area where the facility or operation is proposed to be located and where protesting parties reside. It is unclear whether SOAH maintains a budget for ALJs to hold hearings in areas outside of Austin.

hearing can help ensure that any permitting decision is based on site-specific conditions.

Issues for consideration: How can the burdens and expense associated with the hearing process be addressed to encourage meaningful public participation by affected persons? When is a remand to SOAH appropriate, and how does it impact protesting parties? Should protesting parties be subject to assessment of transcript costs? Does this have a chilling effect on public participation? How should the administrative record be used during the hearing? *Compare* 30 Tex. Admin. Code § 80.127(h) ("The ALJ shall admit the administrative record into evidence for all purposes.") *with id.* § 80.17(a) (applicant bears the burden of proof by a preponderance of the evidence) & Tex. Gov't Code § 2003.047 (establishing that the "filing" of the administrative record establishes a prima facie demonstration, but not requiring that the administrative record be admitted into evidence for all purposes). If the administrative record is offered into evidence for all purposes, during the hearing on the merits, should the rules of evidence apply—requiring a sponsoring witness who can authenticate the representations in the application and who is available for cross-examination? If the administrative record that was filed with SOAH includes inaccurate or obsolete information or an outdated draft permit, should the prima facie presumption be considered automatically rebutted? How does an inaccurate or incomplete administrative record impact protesting parties, preparing for a hearing on the merits based on the administrative record that was filed at SOAH? What is the appropriate remedy if the administrative record is incomplete, includes inaccurate information, or fails to include the correct version of the draft permit that is the subject of the hearing?