

Vinson & Elkins

Waterkeeper v. TCEQ

*Heralding a Decisive Battle in the
(R)Evolutionary War over Contested Cases*

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A Routine Skirmish?



- Applicant seeks air permit
- Protestants request CCH
- Parties exchange competing briefing on “affectedness”
- Commission denies CCH requests and issues permit
- Travis County District Court remands to TCEQ for a CCH
- Fifteenth Court of Appeals reverses
- Protestants petition for review at Texas Supreme Court

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Or a Decisive Battle?

- Texas Supreme Court grants review



Opening Battle Lines...

- Parties' merits briefs hold to traditional positions
 - Applicant & TCEQ (via OAG):
 - Concedes CCH required if requested by “affected person”
 - But substantial evidence supported Commission denial of CCH
 - **Texas law allows judicial review on merits of permit issuance only if and after CCH is held**
 - Protestants:
 - Right to CCH exists so long as “affected person” is credibly alleged and evidenced
 - Merits of permit/application do not affect the decision to deny a CCH
 - Request for CCH and rehearing motion following denial satisfy exhaustion requirements
 - Judicial review cannot use “substantial evidence” standard unless a CCH is held



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Who Wins?



...All Men are Created Equal...

- The Contested Case Hearing was designed for disputes over pecuniary interests allocated by the government (a judicial function)
- TCEQ permitting rules establish emission limits and impose air quality standards, the achievement of which protects everyone equally (an executive function)

The (R)Evolutionary War (1975-2015)

- 1975: APTRA
- 1990: H.B. 801
 - New procedural requirements for ED evaluation of permit applications
 - Opportunity to request reconsideration of ED decisions
 - *Prohibiting* a CCH unless requested by “affected person,” not *requiring* a CCH whenever requested by an “affected person”
 - Presumption in favor of ED decision in any CCH
- 2015: S.B. 709
 - Eliminated requirement to re-prove entirety of CCH—referred application
 - Confirmed Commission authority to consider whether the merits of an application/permit are sufficiently in doubt as to warrant any adjudication



“The assertion that ‘all men are created equal’ was of no practical use in effecting our own separation from Great Britain; and it was placed in the Declaration not for that, but for future use.” – Lincoln’s Speech at Lewistown, Illinois (1858)

- TCEQ ED decisions prevail unless the Commission grants reconsideration or a CCH
- The denial of a CCH and reconsideration requests means the Commission is satisfied with the ED’s decision
- The Commission’s CCH decision is not reviewable: The Commission is free to consider its need for a quasi-adjudication of specified issues at its sole discretion
- Regardless of whether a CCH is held, the Commission’s order granting a permit stands on its merits if support by substantial evidence
- Exhaustion of administrative remedies requires both a request for a CCH and a request for reconsideration of the ED’s decision – not necessarily the grant of either

A Declaration of Independence from...

- Pointless debates over whether someone in the “general public” is “affected” differently than someone else in the general public, especially when—as a matter of law—permit requirements protect everyone equally
- Ignoring or devaluing the work of the ED and her staff
- Do-loop litigation
- Commission control over judicial review of its own decisions



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The Best Chance for a Lasting Peace?



Supplement – Texas Water Code Sec. 5.115

Sec. 5.115. PERSONS AFFECTED IN COMMISSION HEARINGS; NOTICE OF APPLICATION. (a) For the purpose of an administrative hearing held by or for the commission involving a contested case, "affected person," or "person affected," or "person who may be affected" means a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest.

(a-1) The commission shall adopt rules specifying factors which must be considered in determining whether a person is an affected person in any contested case arising under the air, waste, or water programs within the commission's jurisdiction and whether an affected association is entitled to standing in contested case hearings. For a matter referred under Section 5.556, the commission:

(1) may consider:

- (A) the merits of the underlying application, including whether the application meets the requirements for permit issuance;
- (B) the likely impact of regulated activity on the health, safety, and use of the property of the hearing requestor;
- (C) the administrative record, including the permit application and any supporting documentation;
- (D) the analysis and opinions of the executive director; and
- (E) any other expert reports, affidavits, opinions, or data submitted on or before any applicable deadline to the commission by the executive director, the applicant, or a hearing requestor; and

(2) may not find that:

- (A) a group or association is an affected person unless the group or association identifies, by name and physical address in a timely request for a contested case hearing, a member of the group or association who would be an affected person in the person's own right; or
- (B) a hearing requestor is an affected person unless the hearing requestor timely submitted comments on the permit application.

Supplement – Texas Water Code Sec. 5.556

- Sec. 5.556. REQUEST FOR RECONSIDERATION OR CONTESTED CASE HEARING.** (a) A person may request that the commission reconsider the executive director's decision or hold a contested case hearing. A request must be filed with the commission during the period provided by commission rule.
- (b) The commission shall act on a request during the period provided by commission rule.
- (c) The commission may not grant a request for a contested case hearing unless the commission determines that the request was filed by an affected person as defined by Section 5.115.
- (d) The commission may not refer an issue to the State Office of Administrative Hearings for a hearing unless the commission determines that the issue:
- (1) involves a disputed question of fact;
 - (2) was raised during the public comment period; and
 - (3) is relevant and material to the decision on the application.
- (e) If the commission grants a request for a contested case hearing it shall:
- (1) limit the number and scope of the issues to be referred to the State Office of Administrative Hearings for a hearing; and
 - (2) consistent with the nature and number of the issues to be considered at the hearing, specify the maximum expected duration of the hearing.
- (f) This section does not preclude the commission from holding a hearing if it determines that the public interest warrants doing so.