

Environmental contested case hearings

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Federal and Texas

Permits required

federal law, but delegated to TCEQ
(CWA, CAA, RCRA, SDWA), RRC

Texas law from TCEQ (TCCA, TSWDA)

federal approval only, EPA (SWDA aquifer exemption), Corps (CWA 404, RHA)

Administrative law

Agencies pass substantive and procedural rules to implement their statutes

CFR (federal), Tex. Admin. Code (state)

Most agency decisions subject to judicial review:

- federal Administrative Procedure Act (APA) 5 USC § 701–706

- Texas APA (Tex. Govt. Code § 2001), to challenge rules & contested case decisions

- Also judicial review provisions in Texas water code (general, TCAA, TSWDA)

the record

All agencies must base their decision on the record before them

judicial review of agency decision is limited to the “administrative record”

i.e. the set of facts presented to the agency before it makes its decision

facts from comments, testimony in a hearing, or facts well-known to the agency

the agencies

Federal

EPA, Corps, any other agency complying with NEPA

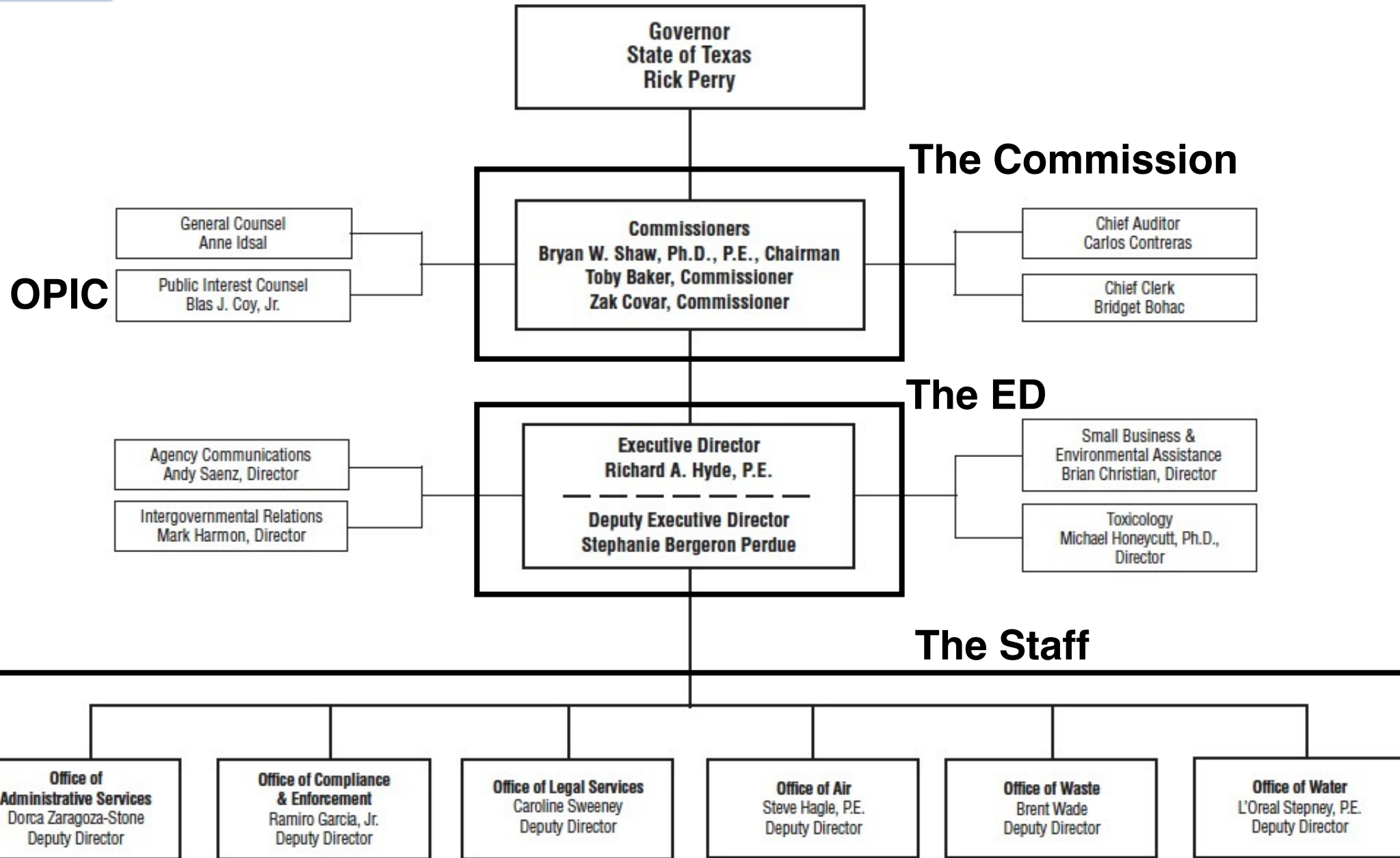
State

TCEQ, RRC,

State Office of Administrative Hearings



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



Office of the Commissioners

Three full-time commissioners are appointed by the governor to establish overall agency direction and policy, and to make final determinations on contested permitting and enforcement matters.

Bryan W. Shaw, Ph.D., P.E., Chairman

Toby Baker, Commissioner

Zak Covar, Commissioner

Staff: [Address/Phone/Fax](#)



Bryan W. Shaw, Ph.D., P.E.



Toby Baker



Zak Covar

Permits and Registrations

Links to information for permitting and registrations.

- [Permits and Licenses You Might Need](#)
- [Status of Permits and Registrations](#)
- [Environmental Permitting: Participating in the Process](#)

TCEQ Permitting Programs:

- [Air Permits](#)
- [Bioenergy](#)
- [Dry Cleaner Registration](#)
- [Edwards Aquifer Plans](#)
- [Landscape Irrigation](#)
- [Mining and Mineral Extraction](#)
- [On-Site Sewage Facilities, Including Septic Systems](#)
- [Petroleum Storage Tanks \(PSTs\)](#)
- [Public Water Systems \(permit by rule\)](#)
- [Radioactive Materials](#)
- [Stormwater Permits](#)
- [Waste Management Permits and Registrations](#)
- [Wastewater Permits and Registrations](#)
- [Water Rights Permits](#)
- [Watermasters](#)

Complying with Your Permit

- [Compliance Assistance](#)
- [Compliance Histories](#)

We Enforce Permits:

- [Policies and Procedures](#)
- [Reports and Status](#)
- [Supplemental Environmental Projects](#)

Fees and Financial Assurance

- [Fees](#)
- [Financial Assurance](#)

notices

federal and Texas agencies generally must issue a public notice on their pending decisions

The notices invite comments and set a deadline for submission (30d)

Texas notices ask for contested case hearing requests.

submitting comments

In federal matters, comments are critical because they usually are the only time for putting your client's concerns/facts into the record.

In most state matters, comments are less important if you also get a contested case

asking for a hearing

few hearings available on federal permits in Texas

TCEQ-issued air, waste, and wastewater permits usually may have a contested case hearing

exceptions are registrations and standard permits

and GHG permits!

standing

no requirement for standing to comment

to challenge a federal permit, you need to satisfy Art. III standing.

to get a contested case in Texas you need to meet the “affected person” standard

affected person

A person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.

An interest common to members of the general public does not qualify as a personal justiciable interest.

30 TAC § 55.3

factors for affected person

(c) All relevant factors shall be considered, including, but not limited to, the following:

(1) whether the interest claimed is one protected by the law under which the application will be considered;

(2) distance restrictions or other limitations imposed by law on the affected interest;

(3) whether a reasonable relationship exists between the interest claimed and the activity regulated;

(4) likely impact of the regulated activity on the health, safety, and use of property of the person;

(5) likely impact of the regulated activity on use of the impacted natural resource by the person; and

(6) for governmental entities, their statutory authority over or interest in the issues relevant to the application. 30 TAC § 55.29

associations

(a) A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

(1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;

(2) the interests the group or association seeks to protect are germane to the organization's purpose; and

(3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

(b) The executive director, the public interest counsel, or the applicant may request that a group or association provide an explanation of how the group or association meets the requirements of subsection (a) of this section. 30 TAC § 55.23

to get a state hearing

proximity (downstream, within x miles), address

state an interest that is something TCEQ has jurisdiction to protect

check statute and rules applicable to that type of permit (there are differences)

List the disputed issues

If other people are granted a party status, show up at the SOAH preliminary hearing

to get a federal hearing on NRC license

Atomic Safety Act & NRC procedures

Hearing request in the form of “contentions”

Contentions must be timely, material, disputed, and supported by facts or expert opinions, and requester have standing

60 days to review >8000 page application.

burden of proof

30 TAC § 80.17(a) The burden of proof is on the moving party by a preponderance of the evidence

30 TAC § 80.117(b) The applicant shall present evidence to meet its burden of proof on the application followed by the [protestants, OPIC, ED]. Any party may present a rebuttal case when another party presents evidence that could not have been reasonably anticipated.

SOAH hearing

prefiled direct testimony

trial before 1 or 2 Administrative Law Judges who specialize in environmental matters

“relaxed” rules of evidence, because the ALJs like to weigh all the evidence

Closing arguments written, responses, FoF & CoLs.

Proposal for Decision

exhaustion

Sec. 2001.171. JUDICIAL REVIEW. A person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter.

before you appeal

Sec. 2001.145. MOTIONS FOR REHEARING: PREREQUISITES TO APPEAL. (a) A timely motion for rehearing is a prerequisite to an appeal in a contested case except that a motion for rehearing of a decision or order that is final under Section 2001.144(a)(3) or (4) is not a prerequisite for appeal.

how to appeal

Sec. 2001.176. PETITION INITIATING JUDICIAL REVIEW. (a) A person initiates judicial review in a contested case by filing a petition not later than the 30th day after the date on which the decision that is the subject of complaint is final and appealable.

(b) Unless otherwise provided by statute:

- (1) the petition must be filed in a Travis County district court;
- (2) a copy of the petition must be served on the state agency and each party of record in the proceedings before the agency; and
- (3) the filing of the petition vacates a state agency decision for which trial de novo is the manner of review authorized by law but does not affect the enforcement of an agency decision for which another manner of review is authorized.

federal scope of review

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Texas standard of review

if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (A) in violation of a constitutional or statutory provision;
- (B) in excess of the agency's statutory authority;
- (C) made through unlawful procedure;
- (D) affected by other error of law;
- (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
- (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

finality

Sec. 2001.144. DECISIONS; WHEN FINAL. (a) A decision in a contested case is final:

(1) if a motion for rehearing is not filed on time, on the expiration of the period for filing a motion for rehearing;

(2) if a motion for rehearing is filed on time, on the date:

(A) the order overruling the motion for rehearing is rendered; or

(B) the motion is overruled by operation of law;

(3) if a state agency finds that an imminent peril to the public health, safety, or welfare requires immediate effect of a decision or order, on the date the decision is rendered; or

(4) on the date specified in the order for a case in which all parties agree to the specified date in writing or on the record, if the specified date is not before the date the order is signed or later than the 20th day after the date the order was rendered.

(b) If a decision or order is final under Subsection (a)(3), a state agency must recite in the decision or order the finding made under Subsection (a)(3) and the fact that the decision or order is final and effective on the date rendered.