Environmental permitting and contested case hearings

Charles Irvine
March 4, 2019
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 (waiver of sovereign immunity):

  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 codes (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, PUC

State Office of Administrative Hearings (SOAH)
Texas Commission on Environmental Quality

February 27, 2019

Governor
State of Texas
Greg Abbott

The Commission

Commissioners
Jon Niermann, Chairman
Emily Lindley, Commissioner

The ED

Executive Director
Toby Baker
Deputy Executive Director
Stephanie Bergeron Perdue

OPIC

General Counsel
Mary Smith
Public Interest Counsel
Vic McWherter

External Relations
Ryan Vise, Director
Intergovernmental Relations
Ferrell Fields Damen, Director

Chief Auditor
Mike Hardison
Chief Clerk
Bridget Bohac

Toxicology, Risk Assessment, & Research
Michael Honeycutt, Ph.D., Director

The Staff

Office of Administrative Services
Kelly Keel Linden, Deputy Director

Office of Compliance & Enforcement
Ramiro Garcia, Jr., Deputy Director

Office of Legal Services
Margi Liguori, Deputy Director

Office of Air
Tonya Baer, Deputy Director

Office of Waste
Brent Wade, Deputy Director

Office of Water
L'oreal Stepney, P.E., Deputy Director
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.

Jon Niermann, Chairman
Emily Lindley, Commissioner
Vacant, Commissioner
Staff: Address/Phone/Fax

Jon Niermann
About the chairman and his activities

Emily Lindley
About the commissioner and her activities

Vacant
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 renewals, registrations, 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
Rio Grande LNG, LLC
Permit No. 140792/PSDTX1498
Map Requested by TCEQ Office of Legal Services for Commissioners' Agenda

The facility is located in Cameron County. The circle (green) in the left inset map represents the approximate location of the facility. The inset map on the right represents the location of Cameron County (red) in the state of Texas.

Texas Commission on Environmental Quality
GIS Team (Mail Code 197)
P.O. Box 13087
Austin, Texas 78711-3087
Date: 8/22/2018

Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the applicant and the requestor information from the requestor.

This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries. For more information concerning this map, contact the Information Resource Division at (512) 239-0800.

Please see Map Appendix A for complete list of Requesters.
Nancy Hentschel

Nancy Hentschel had previously submitted a hearing request on April 1, 2016, and subsequently withdrew the hearing request in writing on May 16, 2016 by requesting that her hearing request be reclassified as a request for a public meeting. Ms. Hentschel submitted another hearing request on July 5, 2017, which the ED analyzes below.

Ms. Hentschel's hearing request substantially complies with the requirements of 30 TAC §55.201(c) and (d). Ms. Hentschel is an adjacent landowner. In her hearing request, Ms. Hentschel states that she will need time to prepare and present legal and environmental evidence. Ms. Hentschel's hearing request does not raise any relevant and material issues. Ms. Hentschel's hearing request failed to identify her personal judiciable interest affected by the permit application.

The Executive Director recommends that the Commission find that Nancy Hentschel is not an affected person under 30 TAC §55.203.

VI. Conclusion

The Executive Director recommends that the Commission find that Nancy Hentschel's hearing request does not establish that she is an affected person, and deny the hearing request of Nancy Hentschel.
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 (you cannot later adopt comments submitted by others).

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 requesters have standing

60 days to review >8000 page application.
Location

Preferred by SOAH & Agency: 300 W. 15th Street

Licensing hearings often at one of the local SOAH offices

Preliminary hearing usually, but not always close to the permitted activity

SOAH can sometimes be persuaded to have part or all of the merits hearing elsewhere (close to the permitted activity)

Must make these arguments at the preliminary hearing.

Be prepared to justify it (e.g. lots of local lay witnesses who will be discouraged if they have to travel to Austin)
Schedule

SB 709: 180 days from preliminary hearing to PFD for TCEQ hearings. Can be extended though.

In reality, less than four months to hearing on merits (ALJ gets 60 days after closing arguments to write PFD).

Four months, means as little at two months of discovery against some parties. Be prepared for aggressive discovery.

Use the 1-3 months before the preliminary hearing to find and prepare experts and draft discovery.

Negotiate schedule carefully: SOAH rules or TCEQ rules. Big difference! (e.g. SOAH rules allow discovery against all parties until ten days before the hearing).

Under old TCEQ rules applicant wants discovery to end early, under new rules they want it to end later.
<table>
<thead>
<tr>
<th>DATE</th>
<th>EVENT</th>
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</table>
| 10/5/2017 | Discovery begins.  
            Deadline for Applicant to file direct evidence, if any.                                    |
| 10/19/2017| Deadline for parties to designate expert witnesses and serve Rule 194 disclosures.  
            Deadline for parties to serve any additional discovery requests.                           |
| 11/9/2017 | Deadline to complete all discovery.                                                               |
| 11/17/2017| Deadline for all parties other than the Applicant and the ED to prefile their direct cases in writing, including all testimony and exhibits, and planned order of witnesses. |
| 12/6/2107 | Deadline for ED to prefile his direct cases in writing, including all testimony and exhibits, and planned order of witnesses. |
| 12/13/2017| Deadline for Applicant to prefile its rebuttal case in writing, including all testimony and exhibits, and planned order of witness. |
| 12/20/2018| Deadline to file objections to and motions to strike any prefiled evidence.  
            Deadline to file dispositive motions.                                                    |
| 12/28/2017| Deadline to file responses to objections and motions to strike prefiled evidence.  
            Deadline to file responses to dispositive motions.                                       |
<p>| 1/4/2018  | Telephonic prehearing conference to rule on objections to prefiled evidence and other pending motions. |
| 1/23/2018 | Parties file closing briefs.                                                                     |
| 1/31/2018 | Parties file responses to closing briefs.                                                         |
| 4/4/2018  | Deadline to issue proposal for decision.                                                          |</p>
<table>
<thead>
<tr>
<th>DEADLINE/DATE</th>
<th>ACTIVITY</th>
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<tbody>
<tr>
<td>October 5, 2017</td>
<td>Discovery begins; objections and responses due 20 days from service. Applicant must file direct case including testimony, proposed order of witnesses, and exhibits</td>
</tr>
<tr>
<td>October 26, 2017</td>
<td>Parties must designate expert witnesses and serve Rule 194 disclosures.</td>
</tr>
<tr>
<td>December 4, 2017</td>
<td>Protestants and OPIC must file their respective direct cases, including testimony, proposed order of witnesses, and exhibits. All discovery on Protestants and OPIC must be completed.</td>
</tr>
<tr>
<td>December 8, 2017</td>
<td>ED must file its direct case, including testimony, proposed order of witnesses, and exhibits. All discovery on ED must be completed.</td>
</tr>
<tr>
<td>December 15, 2017</td>
<td>Applicant must file its rebuttal case in writing, including testimony, exhibits, and proposed order of witnesses.</td>
</tr>
<tr>
<td>December 20, 2017</td>
<td>Settlement Conference may take place.</td>
</tr>
<tr>
<td>January 3, 2018</td>
<td>Objections to prefiled testimony and exhibits must be filed; Dispositive motions must be filed;</td>
</tr>
<tr>
<td>January 11, 2018</td>
<td>Responses to objections to prefiled testimony and exhibits and responses to dispositive motions must be filed.</td>
</tr>
<tr>
<td>January 18, 2018</td>
<td>Final Telephonic Prehearing Conference, if necessary.</td>
</tr>
<tr>
<td>January 18, 2018</td>
<td>11:00 a.m.</td>
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<tr>
<td>January 25-26, 2018</td>
<td>Hearing on the merits.</td>
</tr>
<tr>
<td>January 25-26, 2018</td>
<td>9:00 a.m.</td>
</tr>
<tr>
<td>February 14, 2018</td>
<td>Written closing arguments must be filed. (Applicant has agreed to order the transcript expedited).</td>
</tr>
<tr>
<td>February 22, 2018</td>
<td>Reply briefs must be filed; record closes.</td>
</tr>
<tr>
<td>April 16, 2018</td>
<td>Proposal for Decision due.</td>
</tr>
<tr>
<td>Prop date</td>
<td>item</td>
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<tr>
<td>Tuesday, August 19, 2014</td>
<td>prelim hearing</td>
</tr>
<tr>
<td>Wednesday, August 20, 2014</td>
<td>discovery commences</td>
</tr>
<tr>
<td>Wednesday, October 8, 2014</td>
<td>Applicant prefilled due and end of discovery</td>
</tr>
<tr>
<td>Wednesday, October 15, 2014</td>
<td>Protestant Prefiled</td>
</tr>
<tr>
<td>Wednesday, October 22, 2014</td>
<td>ED Prefiled</td>
</tr>
<tr>
<td>Wednesday, October 29, 2014</td>
<td>Objections</td>
</tr>
<tr>
<td>Monday, November 3, 2014</td>
<td>Responses to objections</td>
</tr>
<tr>
<td>Friday, November 7, 2014</td>
<td>Pre-hearing conf</td>
</tr>
<tr>
<td>Monday, November 10, 2014</td>
<td>Hearing starts</td>
</tr>
<tr>
<td>Thursday, November 13, 2014</td>
<td>Hearing ends</td>
</tr>
<tr>
<td>Monday, December 1, 2014</td>
<td>Transcript due</td>
</tr>
<tr>
<td>Monday, December 15, 2014</td>
<td>Closing arguments</td>
</tr>
<tr>
<td>Monday, December 22, 2014</td>
<td>Replies to closing arguments</td>
</tr>
<tr>
<td>Thursday, February 19, 2015</td>
<td>PFD</td>
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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.
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.
(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.