



Environmental Bog: Contested Case Hearing Reform

Bill Analysis of Senate Bill 709/House Bill 1865

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Background

In 1995, the 74th Legislature enacted S.B. 12, creating the Natural Resource Conservation Division (§2003.047 TEX. GOV'T CODE). This Act transferred jurisdiction to conduct contested case hearings from the Texas Commission for Environmental Quality (TCEQ) to the State Office of Administrative Hearings (SOAH), while leaving final authority to deny requests for contested case hearings with the TCEQ.

During the 76th Legislative session, §2003.047 of the Government Code was further amended to change the procedural requirements for a contested case hearing. This 1999 amendment, which is the current version of the statute, stipulated requirements for public notice, submission of public comments, and affected person status for contesting permitting decisions made by the TCEQ.

Both of these Legislative changes have proved unwieldy. Because of the extremely broad criteria for granting requests for contested hearings, the administrative process involving public participation is largely used to protract time and expense to the applicant for the permit, as well as to drive businesses out of Texas and into other states where the process is faster and more predictable.

Current Process

Not all permits are subject to a contested case hearing. For those that are, the process begins when the TCEQ receives the permit application. Next, the permit goes through Administrative review, technical review, and draft permit process. The first public notice and 30-day comment period begins during the technical review. The second public notice is posted with the completed draft permit. At any point before the close of the second comment period a public hearing can be requested by any "affected person."

If a contested case hearing is requested, the Commission first must decide whether or not to grant the hearing. If denied, the Executive Director can issue a permit. If the hearing is granted, it is referred to the SOAH. Contested cases at SOAH are presided over by Administrative Law Judges (ALJ) and have a similar format to a full court trial. The ALJ considers whether the application complies with federal and state environmental laws. For each case, the ALJ prepares a proposal for decision that makes a recommendation supported by legal analysis. In order for the Commission to make a final decision that differs from the ALJ's proposal it must make a written finding stating the specific reasons and legal basis for their change in accordance with §2001.058(e) TEX. GOV'T CODE.

For permits not subject to a contested case hearing, permits can typically be issued in 4-6 months. However, SOAH is under no timeline to complete a contested case hearing. Given the technical complexity of many of the permits at issue and creative legal arguments, hearings can be significantly prolonged. The total timeframe for permit applications subject to contested case hearings can be anywhere from 374-824 days.

Much Needed Reform

S.B. 709 and H.B. 1865 seek to heighten efficiency and predictability into the contested case hearing process. These bills preserve the public participation aspect of the contested case hearing while codifying recent Texas Supreme Court decisions

that affirm TCEQ's discretion in determining who is and is not an affected party. The bills also maintain the state's objective to protect public health and natural resources while allowing the state to remain competitive and attract businesses otherwise deterred by the lengthy and uncertain permitting process.

SECTION 1. Amends Section 2003.047, Government Code as follows:

- Addition of (d-1) to §2003.047 - Establishes that a draft permit issued by the TCEQ is prima facie evidence that the draft permit meets all state and federal legal and technical requirements and is protective of public health and the environment.
- Addition of (d-2) to §2003.047 – After applicant makes prima facie demonstration pursuant to (d-1), a protesting party is allowed to present evidence that the draft permit does not meet the legal and technical requirements based on the number and scope of issues that have been referred to the commission.
- Addition of (d-2) to §2003.047 – After the protesting party's submittal of evidence, the applicant and the executive director may present evidence to support the draft permit.
- Amendment of (e) to §2003.047 – In referrals to SOAH pursuant to Water Code §5.556, the Commission must provide the ALJ a discrete list of disputed factual issues and specify the date by which the ALJ must complete the proceeding and send a proposal for decision to the Commission, which may not exceed 180 days.
- Addition of (e-1) to §2003.047 – In referrals to SOAH pursuant to Water Code §5.556, unless a matter of due process or other constitutional right arises, the proceeding is to be completed 180 days after the preliminary hearing. Pursuant to (e-1)(1), the ALJ is required to establish a docket control order designed to complete the proceeding and provide a proposal for decision no later than 180 days after the preliminary hearing.

SECTION 2. Amends Section 5.556, Water Code as follows:

- Addition of (c-1) to §5.556 – in determining whether the person seeking a contested case hearing is an affected person, the Commission:
 - (1) may weigh and resolve matters relating to the merits of the application, including whether the application meets the requirements for issuance and the likely impact of the regulated activity on the health, safety, and use of the property of the hearing requester;
 - (2) may evaluate the full administrative record, including the permit application and any supporting documentation, the analysis and opinions of the executive director, and any other expert reports, affidavits, opinions, or data submitted to the commission by the executive director, the applicant or a hearing requester within the applicable deadlines to submit hearing requests and briefing to the commission;
 - (3) may not find that a group or association is an affected party person unless the group or association identifies, by name and physical address in a timely request for a contested case hearing, a member who would be an affected person in the person's own right; and
 - (4) may not find that a hearing requester is an affected person unless the hearing requester timely submitted comments, and may only refer an issue pursuant to Subsection (d) if requested by the affected person who raised the issue in a timely submitted comment.

SECTION 3. Provides that changes in this law only apply to an application for a permit filed with the TCEQ on or after the effective date of this Act.

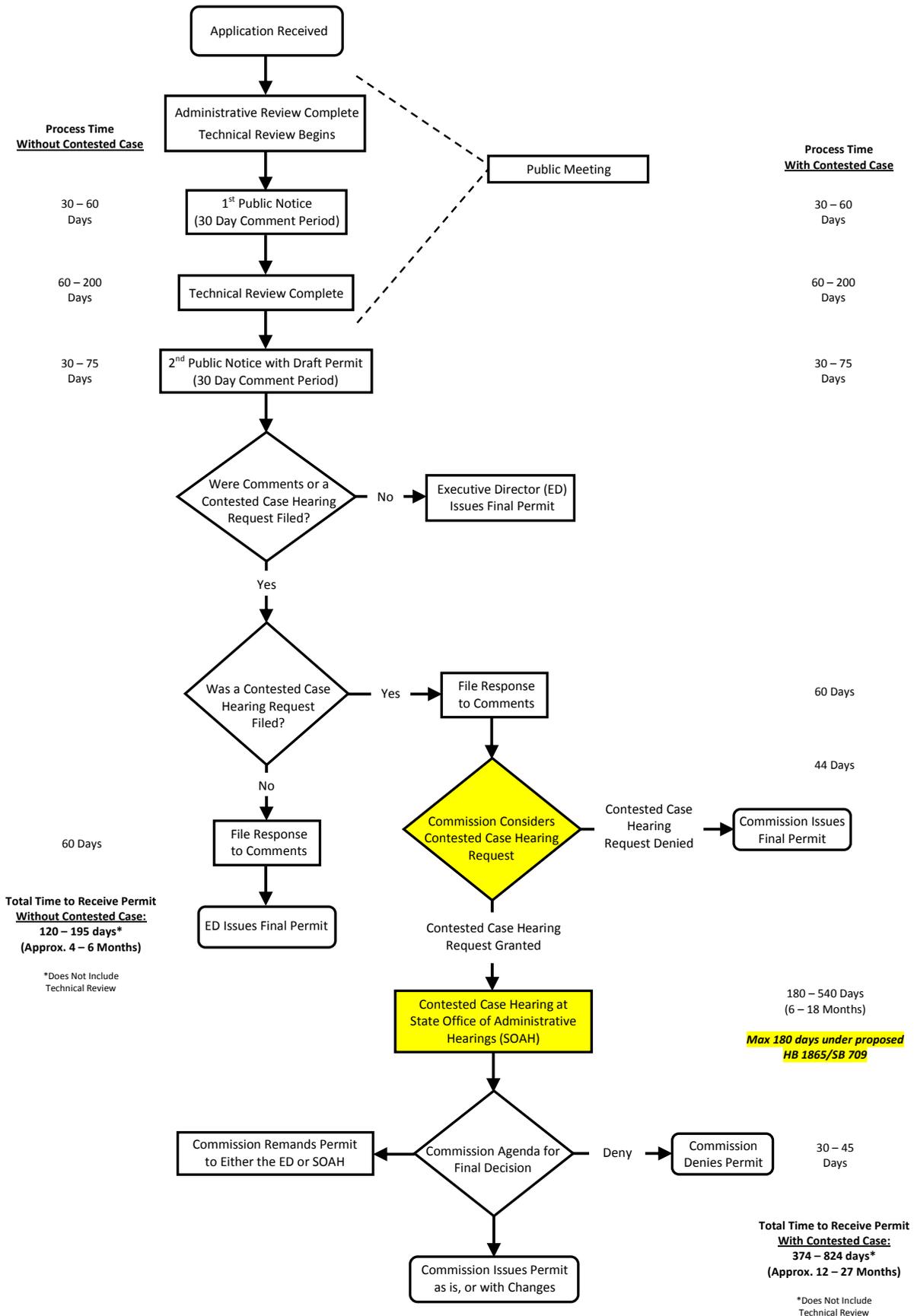
SECTION 4. Effective Date: September 1, 2015.

Conclusion

The road through contested case hearings is paved with good intentions, namely the desire to allow public participation. Senate Bill 709 and House Bill 1865 preserve those good intentions while streamlining the permitting process so that it is protective, predictable, efficient, and economically beneficial for Texas. Legislating a shortened timeframe will allow Texas to be economically competitive with other Gulf Coast states and will limit the ability of those seeking to manipulate the process and cause protracted delays. Contested case hearings could then be used for what they were created: allowing directly affected parties a public opportunity to voice their concerns.

Current TCEQ Permitting Process

(H.B. 801 Process, 76th Legislature, 1999)



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