

# A DEFENSE OF THE CONTESTED CASE HEARING PROCESS FOR TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ENVIRONMENTAL PERMIT DECISIONS

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I. INTRODUCTION

The contested case hearing process reflects deeply held values of Texans who generally distrust the concentration of power in the hands of government and appreciate the value of providing a meaningful process for public participation in government decisions. Yet, in recent Legislative sessions, Industry groups have made several attempts to eliminate or constrain the contested case hearing process available to affected persons in the processing of an individual environmental permit by the Texas Commission on Environmental Quality (TCEQ). The contested case hearing process serves an important role by

providing an independent forum for the adjudication of factual disputes and subjecting TCEQ's permitting decisions to examination by persons particularly affected by a decision. By all indications, TCEQ's permitting process will continue to garner attention. In January of 2014, Speaker of the Texas House of Representatives, Joe Strauss, issued an interim charge to the House Committee on Environmental Regulation asking that the Committee study the environmental permitting processes at the TCEQ with particular attention on the contested-case hearing process.<sup>1</sup>

A wide range of stakeholders forged the basic contours of TCEQ's current permitting process through the development of compromise legislation in 1999, which balances the interests of the regulated community with those of the affected public. This permitting process allows for the early identification of issues of concern to facilitate dispute resolution, while also enabling TCEQ to benefit from the knowledge and expertise provided by affected persons. Ensuring that a meaningful opportunity exists for affected persons to participate in a contested case hearing improves the quality of decisionmaking in the permitting process by correcting flawed factual information sometimes contained in applications, and by often bringing to bear a level of expertise in the evaluation of an application that TCEQ, on occasion, simply does not possess.

Part II of this paper examines how the contested case hearing process represents a manifestation of Texans' distrust of concentrated power. Part III considers how the existing process developed legislatively. Part IV discusses how the hearing process plays out in practice. Finally, Part V examines various recent proposals offered to modify the contested case hearing process as used by TCEQ in the permitting process.

## II. THE CONTESTED CASE HEARING PROCESS AS A REFLECTION OF TEXAS' DISTRUST OF GOVERNMENT, PARTICULARLY THE STRICT SEPARATION OF POWERS CLAUSE CONTAINED IN THE STATE CONSTITUTION

Before diving into the minutiae of the legislative and administrative development of the contested case hearing process, it is worthwhile to consider Texas' fundamental approach to the separation of powers as it informs the development of TCEQ's contested case hearing process. Society uses administrative law as a tool to maintain protections against the abuse of power by administrative agencies despite the blending of executive, judicial and legislative functions within those agencies.<sup>2</sup> The contested case hearing process exemplifies this role of administrative law.

In a manner reflective of the distrust of government held by Texas' citizenry, the Texas Constitution adopts a somewhat different approach to the separation of powers than that adopted in the United States Constitution. James Madison authored the federal constitution in response to the deficiencies of decentralized power under the Articles of Confederation and in a manner that reflects a qualified optimism regarding the

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1 Letter from Joe Strauss, Speaker of the House, Texas Legislature, to House of Representatives, Texas Legislature (Jan. 31, 2014), available at [http://www.house.state.tx.us/\\_media/pdf/interim-charges-83rd.pdf](http://www.house.state.tx.us/_media/pdf/interim-charges-83rd.pdf) (listing interim committee charges for the 83rd Legislature).

2 Pete Schenkkan, *Texas Administrative Law: Trials, Triumphs, and New Challenges*, 7 TEX. TECH. ADMIN. L.J. 287, 292 (2006).

role of government to improve society.<sup>3</sup> While Madison recognized that the accumulation of legislative, executive and judicial authority in the same hands constituted, “the very definition of tyranny,”<sup>4</sup> he also felt that a strict separation of powers could not be maintained as a practical matter.<sup>5</sup> So, he rejected as unnecessary an express declaration that the three branches of government may not be intermixed, such as Jefferson had proposed for the Constitution of the State of Virginia.<sup>6</sup>

The original Texas Constitution developed in 1836 reflects a much greater distrust of centralized government than did the federal constitution. Delegates to Texas’ original constitutional convention chose to adopt language patterned after language earlier advocated by Thomas Jefferson that strictly separated the legislative, judicial and executive functions of government.<sup>7</sup> These delegates faced the task of developing a constitution for the Republic of Texas in the face of an advancing Mexican army, uncertain of when they may need to disband for safety, and while receiving pleas from assistance from others such as William Travis, who was at the same time battling Mexican troops at the Alamo.<sup>8</sup> Unsurprisingly, such circumstances imbued the Texas Constitution with a certain distrust of government power.

The Constitutional Convention of 1876 also occurred under conditions that hardly engendered support for the concentration of power in the hands of either government or economic special interests.<sup>9</sup> During this “Gilded Age,” corruption characterized government at all levels.<sup>10</sup> At that time, memories of the Civil War were still fresh, and the citizenry had “suffered under a corrupt and autocratic regime that featured a carpetbag legislature, a despised governor, and his appointed judges.”<sup>11</sup> Outside of Texas, a commentator at the time had noted that, in cooperation with the railroads, Standard Oil had done everything with the Pennsylvania Legislature but refine it.<sup>12</sup>

It is within these crucibles of 1836 and 1876 that Texas developed its strict constitutional separation of powers clause:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to

3 Harold H. Bruff, *Separation of Powers under the Texas Constitution*, 68 TEX. L. REV. 1337, 1338 (1990).

4 THE FEDERALIST NO. 47, at 239 (James Madison) (Oxford World Classics ed., 2008).

5 THE FEDERALIST NO. 48 (James Madison).

6 *Id.*

7 TEX. CONST. art. I, § 1 (1836) (“The powers of this government shall be divided into three departments, viz: legislative, executive, and judicial, which shall remain forever separate and distinct.”); *State v. Rhine*, 297 S.W.3d 301, 315–16 (Tex. Crim. App. 2009) (Keller, J., concurring).

8 John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH. L. REV. 1089–90, 1119–20.

9 Texas also revised its constitution in 1845 in its effort to gain statehood, at which time the separation of powers clause was modified to its current language maintaining an explicit strict separation of powers.

10 Bruff, *supra* note 3, at 1338.

11 *Id.* at 1339.

12 H.D. Lloyd, *Story of a Great Monopoly*, 47 ATLANTIC MONTHLY 317, 322 (Mar. 1881).

another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.<sup>13</sup>

Not coincidentally, relatively shortly after adopting this approach to limit the power of government, the Texas citizenry also took action to limit the power of economic interests by creating the Texas Railroad Commission (RRC)—arguably the first modern regulatory agency in the United States.<sup>14</sup> Thus began a long-running debate over how the separate functions may be combined within a single governmental entity while still maintaining the necessary safeguards against the abuse of this concentrated power. That debate continues to this day, as evidenced by conflicting testimony on Senate Bill 957 during the 2013 legislative session.<sup>15</sup>

The Framers of the Texas Constitution could not have imagined the complex statutory scheme that has evolved to address environmental issues, but they would have been familiar with analogous nuisance disputes that were then handled by the courts.<sup>16</sup> Twenty years before adoption of the 1876 constitution, the Texas Supreme Court had noted that what constitutes a nuisance “has been enlarged as refinements and sanitary movements have advanced” such that, “in fact everything which renders the air impure and disagreeable, which from its locality is inconvenient and offensive, is a nuisance that the law will abate.”<sup>17</sup>

To a certain degree, TCEQ’s consideration of permit applications fills a role previously played by the courts in resolving nuisance suits. The governing statutes for Texas’ air, waste and water permitting programs define pollution in a manner that mirrors traditional nuisance concepts.<sup>18</sup> As the United States Fifth Circuit Court of Appeals has noted, “[n]uisance principles form the core doctrinal foundation for modern environmental statutes.”<sup>19</sup> To a significant degree, judicial nuisance cases serve as the progenitors of the modern contested case hearing. As the Texas Supreme Court has noted, “[m]any disputes that were once litigated in the courts are now, for all practical purposes,

13 TEX. CONST. art. II, § 1.

14 Ronald L. Beal, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE 1.1 at 1–2 (2009).

15 See, e.g., Debate on Tex. S.B. 957 before the Senate Comm. on Natural Res., 83rd Leg., R.S. (Mar. 19, 2013).

16 See *Burditt v. Swenson*, 17 Tex. 489, 496 (Tex. 1856) (“What constitutes a nuisance is well defined.”); *Hamm v. Gunn*, 113 S.W. 304, 305–06 (Tex. Civ. App. 1908, no writ) (“The right to abate nuisances is a well-established doctrine of courts of equity, for it is a maxim of our law that the owner of property must so use it as not to materially injure another.”).

17 *Burditt*, 17 Tex. at 496.

18 See TEX. HEALTH & SAFETY CODE ANN. § 382.003(3) (West 2014) (contaminants that “are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation or property; or interfere[s] with the normal use and enjoyment of animal life, vegetation, or property”); *id.* § 361.003(39) (“contamination of, any land or surface or sub-surface water in the state that renders the land or water harmful, detrimental, or injurious to humans, animal life, vegetation”); TEX. WATER CODE ANN. § 26.001(14) (West 2014) (contamination that “renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property”). See also *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 463 (Tex. 1993) (Doggett, J., dissenting).

19 *Cox v. City of Dallas*, 256 F.3d 281, 289 (5th Cir. 2001).

litigated in the agencies.”<sup>20</sup> Society has developed the environmental permitting process to more efficiently, comprehensively and prospectively address pollution issues than forcing such matters upon the courts through the proliferation of nuisance suits that can only address a problem after it has already occurred.<sup>21</sup>

The permitting process is intended to prospectively consider the adverse impacts of an activity in a manner that reduces the need for nuisance suits.<sup>22</sup> A meaningful contested case hearing process appropriately provides affected persons an opportunity to preemptively address the impacts of a facility in a manner that reduces the need for a nuisance suit after an activity has commenced. In fact, allowing robust public participation makes it more likely that a nuisance suit by an affected person will be unnecessary, thereby furthering one of the overall objectives of environmental statutes of reducing the need for such suits.

This is not to say that the permitting process has simply replaced nuisance suits, or renders nuisance suits unnecessary.<sup>23</sup> In issuing a permit, TCEQ is making a decision that often significantly impacts property rights, but the agency is not adjudicating property rights.<sup>24</sup> The TCEQ permitting process is premised on an educated guess as to the impacts of a proposed facility at best, and the agency’s decision that a permit meets the minimum regulatory requirements of general applicability does not resolve whether a particular activity constitutes a nuisance under a specific set of circumstances.<sup>25</sup>

Even so, when considering a permit application, TCEQ must make certain determinations of fact and law to find that the applicable requirements have been met.<sup>26</sup> Several Texas Courts of Appeal have adopted a six part test in examining whether an agency is exercising a quasi-judicial power: 1) the power to exercise judgment and discretion; 2) the power to hear and determine or to ascertain facts and decide; 3) the power to make binding orders and judgments; 4) the power to affect the personal or property rights of private persons; 5) the power to examine witnesses, to compel the attendance of witnesses, and to hear the litigation of issues on a hearing; and 6) the power to enforce

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20 State v. Thomas, 766 S.W.2d 217, 219 (Tex. 1989).

21 City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 317 (1981) (finding that federal Clean Water Act had displaced federal common law nuisance claims).

22 *Id.*

23 Texas Ass’n of Bus. 852 S.W.2d at 451.

24 Texas Comm’n on Env’tl. Quality v. City of Waco, 413 S.W. 3d 409, 423 (Tex. 2013).

25 See 30 TEX. ADMIN. CODE § 305.122(d) (2013) (Tex. Comm’n on Env’tl. Quality, Characteristics of Permits, Consolidated Permits) (“The issuance of a permit does not authorize any injury to persons or property or an invasion of other property rights, or any infringement of state or local law or regulations.”). See also City of Dallas v. Stewart, 361 S.W.3d 562, 570 (Tex. 2012) (“[T]he question of what is and what is not a public nuisance must be judicial, and it is not competent to delegate it to the local legislative or administrative boards.”).

26 Miller v. R.R. Comm’n, 363 S.W.2d 244, 247 (Tex. 1962) (Greenhill, J., concurring); TEX. GOV’T CODE ANN. § 2001.141 (West 2014); 30 TEX. ADMIN. CODE § 80.17(a) (2012) (Tex. Comm’n on Env’tl. Quality, Burden of Proof, Contested Case Hearings).

decisions or impose penalties.<sup>27</sup> The more an executive officer exercises these powers, the more judicial is the character of his or her action.<sup>28</sup>

### III. TCEQ'S CONSIDERATION OF A PERMIT APPLICATION IS OFTEN QUASI-JUDICIAL IN NATURE

Where both the facts and the law governing an application are undisputed such that consideration of the permit involves little adjudication of disputes or the exercise of discretion, and the decision is not challenged by persons holding vested rights, then TCEQ's consideration of a permit is less judicial in nature. As the majority of permit applications do not encounter opposition during the permitting process, concerns regarding whether TCEQ's action undermines the strong separation of powers set forth in the Texas Constitution are minimized. But, where affected persons raise issues of law and fact that require TCEQ to exercise judgment in deciding facts in a manner that impacts the rights of other persons, then TCEQ is exercising a more quasi-judicial function under this test. Under such circumstances, where TCEQ's permitting action is blending executive and judicial functions, greater concern is warranted with regard to the undermining of the checks and balances created by the separation of powers. As reflected in the legislative history of the Texas Administrative Procedure Act further discussed below, the contested case hearing process provides a valuable structural check on TCEQ's power that counterbalances this concern.<sup>29</sup>

#### **A. UNDERLYING DUE PROCESS FOUNDATIONS OF THE CONTESTED CASE HEARING PROCESS**

It is wrong to assume that eliminating statutory requirements for contested case hearings would eliminate the need to hold evidentiary hearings. Neither Texas constitutional principles nor legislative history nor case law supports further relaxation of restraints on administrative action. It is generally accepted today that the process due in administrative hearings need not fully measure up to that accorded parties in court.<sup>30</sup> However, an objective review of the case law shows the gap is narrow.

This narrow gap is consistent with Texas's long tradition as a strong property-rights state. Well before the advent of the state's Administrative Procedure Act, the law was settled that, while the State through its administrative agencies may restrict private property rights under the State's police power, the processes by which the restrictions are

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27 *Parker v. Holbrook*, 647 S.W.2d 692, 695 (Tex. App.—Houston[1st Dist.] 1982, writ ref'd n.r.e.); *Town of South Padre Island v. Jacobs*, 736 S.W.2d 134, 144 (Tex. App.—Corpus Christi 1986, writ denied); *Martinez v. Hardy*, 864 S.W.2d 767, 773 (Tex. App.—Houston [14th Dist.] 1993, no writ).

28 *Parker*, 647 S.W.2d at 695; *Town of South Padre Island*, 736 S.W.2d at 144; *Martinez*, 864 S.W.2d at 773.

29 See *infra* Section III.

30 See *Office of Pub. Util. Counsel v. Pub. Util. Comm'n*, 185 S.W.3d 555, 576 (Tex. App.—Austin 2006, pet. denied).

imposed must not be unjust or unreasonable.<sup>31</sup> The action of an agency must be based on proof and must not be capricious.<sup>32</sup> The mere holding of a hearing cannot justify the restriction.<sup>33</sup> “The right to cross examination is a vital element in a fair adjudication of disputed facts. The right to cross examine adverse witnesses and to examine and rebut all evidence is not confined to court trials, but applies also to administrative hearings.”<sup>34</sup> At the least, parties must “be accorded a full and fair hearing on disputed fact issues.”<sup>35</sup>

## B. DEVELOPMENT OF THE TEXAS ADMINISTRATIVE PROCEDURE ACT TO CODIFY DUE PROCESS PROTECTIONS AND PROVIDE UNIFORMITY

For quite awhile, sparring over the proper type of judicial review for agency decisions served as the primary obstacle to passage of an administrative procedure act by the Texas Legislature. Ultimately, the Legislature’s decision to abandon its insistence on imposing a *de novo* standard of judicial review was premised on the assumption that an opportunity would exist for an adversarial proceeding before the agency during which a more complete record would be developed than had historically often been the case. In other words, the Legislature felt that affected persons deserved an opportunity for a complete development of the facts, and if that development could not occur through the development of evidence by the trial court during a *de novo* review, then it would need to happen through a contested case hearing before the agency.

Even though the development of an administrative procedure act for Texas moved at a glacial pace, the need for one had been recognized by thoughtful analysts in Texas by the mid-1940s. They had early expressed concern over the manner in which the burgeoning administrative state of the 1930s and 1940s transcended the conventional executive-legislative-judicial system of dividing power in our governments. This period bred many nominally temporary social welfare and wartime agencies at the federal level. Many of these agencies proved to not be temporary. In the colorful analogy of attorney C.C. Small, writing in the Texas Bar Journal in 1947, “Great difficulty is experienced in ridding ourselves of the vast number of temporary bureaus that sprang up during the war. Once a barnacle gets rooted into the Ship of State, it takes a real political storm to displace it.”<sup>36</sup> Mr. Small went on to reflect the sentiment of many in the Texas legal

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31 *Brown v. Humble Oil & Refining Co.*, 87 S.W.2d 1069, 1070 (Tex. 1935) (finding in favor of Railroad Commission imposition of well-spacing regulation, although common law property right allowed a landowner an unlimited number of wells upon his or her land).

32 *Id.*

33 *Id.*

34 *Richardson v. City of Pasadena*, 513 S.W.2d 1, 4 (Tex. 1974).

35 *City of Corpus Christi v. Pub. Util. Comm’n of Texas*, 51 S.W.3d 231, 262 (Tex. 2001) (also noting that the requirement of a full and fair hearing “includes the right to cross-examine adverse witnesses and to present and rebut evidence”); *Flores v. Employees Retirement Sys. of Tex.*, 74 S.W.3d 532, 539 (Tex. App.—Austin 2002, pet. denied). A full and fair hearing generally includes “notice of hearing; the opportunity to present argument and evidence and to rebut and test opposing evidence and argument by cross-examination or other appropriate means; appearance with counsel; and a decision by a neutral decision maker based on evidence introduced into the record of the hearing.” *Smith v. Houston Chemical Serv. Inc.*, 872 S.W.2d 252, 278 (Tex. App.—Austin 1994, writ denied).

36 C.C. Small, *Judicial Review of Administrative Orders*, 10 TEX. B.J. 362 (1947).



community at the time that, “[a]dministrative agencies lean too far toward the idea that ‘the individual is nothing, the State is everything.’”<sup>37</sup>

Passage of the federal Administrative Procedure Act (“Federal APA”) in 1946,<sup>38</sup> and the release that same year of a model state administrative procedure act,<sup>39</sup> set in motion efforts by Texas lawyers to develop and enact an administrative procedure act for Texas.

During the 1950s, Southern Methodist University Professor Whitney Harris ardently advocated for a state administrative procedure act. As Professor Harris couched it, “Left to its own devices, [the administrative process] threatens to convert traditional democratic processes into a new form of government by the few— an absolutism of bureaucracy. . . .”<sup>40</sup> Another lawyer writing in the Texas Bar Journal in the early 1950s stated his belief that, “[t]he greatest danger in the extension of executive and administrative powers lies in the fact that it destroys the constitutional separation of the powers of government, which is the very basis of a republican form of government. The separation of the powers of government is the means by which the people in a democracy retain control of their government.”<sup>41</sup> This level of apprehension about the risks to individual liberty that attend agency decisionmaking, combined with constitutional limitations on the power of the judiciary to rectify agency missteps, made forging an administrative procedure act particularly difficult.

### 1. EARLY RUMBLINGS WITHIN THE TEXAS BAR FOR AN APA

Professor Harris criticized the existing system of administrative law and procedure for its failure to make regulations easily accessible to the public<sup>42</sup> and for the “substantial evidence *de novo*” review standard by which the judiciary sought to correct errors made by administrative agencies.<sup>43</sup> As he saw it, “[p]erhaps the most serious defect in the system is the absence of uniform rules of procedure” in agency proceedings.<sup>44</sup> He published a proposed administrative procedure act for Texas in 1951 in the *Southwestern Law Journal*.<sup>45</sup> This draft was republished in the *State Bar Journal* the following year for comment by Texas lawyers, and the draft formed the basis of the State Bar’s initial attempt at legislation.<sup>46</sup>

37 *Id.* at 381.

38 Administrative Procedure Act of 1946, Pub. L. No. 404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–559).

39 Model State Administrative Procedure Act of 1946, 9C U.L.A. 179 (1957). *See also* Whitney R. Harris, *An Administrative Procedure Act for Texas*, 5 Sw. L.J. 125, 127 (1951).

40 Harris, *supra* note 39. Professor Harris went on to invoke an allegedly-Aristotelian aphorism that democracies inevitably degenerate into oligarchies; in fact, Aristotle’s thought was substantially more subtle than that. A reasonably accessible public-domain discussion of Aristotle’s thinking in *Politics* may be found in Christopher Shields’ *The Blackwell Guide to Ancient Philosophy* (2003).

41 Bennett B. Patterson, *Procedure Act Opposed*, 16 TEX. B.J. 377, 466 (1953).

42 Whitney R. Harris, *The Administrative Law of Texas*, 29 TEX. L. REV. 213, 216 (1950).

43 *Id.* at 229–30.

44 *Id.* at 229.

45 Harris, *supra* note 39, at 125.

46 Whitney R. Harris, *Administrative Procedure Act*, 15 TEX. B.J. 7 (1952).

In its January 1952 volume, the State Bar's Committee on Administrative Law proposed to the Bar's membership a draft administrative procedure act for the state.<sup>47</sup> The draft called for a Division of Administrative Practice and Procedure to be established in Office of the Secretary of State.<sup>48</sup> One of the purposes of the proposed act was "to separate the prosecuting and adjudicating functions,"<sup>49</sup> and it, therefore, directed the Administrative Practice and Procedure Division to "maintain a staff of qualified hearing officers to be assigned to agencies for hearing contested cases."<sup>50</sup> These hearing officers were to be appointed by the governor.<sup>51</sup> In all cases not tried initially by the ultimate agency decisionmakers, the hearing examiners would serve as the "judges," though their decisions were to be, as they are now, advisory to the agency decisionmakers.<sup>52</sup>

The proposed act defined a "contested case" by first defining a "case," then slightly narrowing that definition:

"Case" means a proceeding in which the legal rights, duties, or privileges of specific parties, as distinguished from the rights, duties, or privileges of the class or group to which such parties belong or of the public generally, are to be determined by an agency in the exercise of its legislative or adjudicative powers, and any other proceeding in which by constitutional or statutory right parties are entitled to a full hearing on facts in controversy. "Contested case" is any case in which there are adversary parties. "Party" is any person entitled to appear in an agency proceeding, including the agency itself but not its members, officers or employees.<sup>53</sup> This is the "internal hearing rights" approach to determining a party's right to a contested hearing; the proposed act provided the hearing right, in this case supplemented by rights granted by statutes external to the proposed administrative procedure act.<sup>54</sup>

The proposed act provided for substantial evidence judicial review, except in cases where some form of *de novo* review was required by legal principles or statute.<sup>55</sup>

## 2. BAR-APPROVED BILL READIED FOR SUBMISSION TO THE LEGISLATURE

The 1952 proposal was massaged over the year, and when it was ultimately approved by the Bar membership for presentation to the Legislature, the term "contested case" had been replaced by the term "formal proceeding." The term "formal proceeding" was defined as "any proceeding in which an order of an agency is required by law or constitu-

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47 *Id.*

48 *Id.* at 8.

49 *Id.*

50 *Id.*

51 *Id.* at 31.

52 *Id.* at 33. The proposed administrative procedure act also included a provision that, in the event of conflicts between the proposed legislation and an agency's organic statute, the latter would prevail. *Id.* at 35. So, a sufficiently-directive organic statute requiring in-house hearing examiners would presumably have overridden the proposed act's general directive regarding independent hearing examiners.

53 *Id.* at 30.

54 See discussion *infra* Section III.B.5, discussing the 1961 Model State Administrative Procedure Act.

55 Harris, *supra* note 46, at 34.

tional right to be based upon evidence regularly adduced at an agency hearing.”<sup>56</sup> Thus, the right to a hearing was not granted by the proposed act itself, but was granted by external law.<sup>57</sup> The 1953 proposed act also retreated from the earlier draft’s requirement that all contested cases must be heard by either the ultimate decisionmakers or by a hearing examiner from the division within the Office of the Secretary of State. The 1953 proposed act allowed hearings to be heard “by a hearing officer regularly employed by the agency to conduct hearings for it,” so long as the hearing officer neither investigated the facts of the proceeding nor, if the proceeding involved a prosecution, performed any prosecuting functions.<sup>58</sup>

The judicial review provisions called for review as provided by other statutes and, in the absence of other statutory direction, directed that the review be on the record created before the administrative agency.<sup>59</sup> However, in specifying this agency record review, the proposal did not actually denote “substantial evidence review” as the standard of review.<sup>60</sup> The proposal specifically provided that, where the review was upon a new record adduced before the court, the court’s review would be as in “an ordinary civil action.”<sup>61</sup>

### 3. THE BAR’S PROPOSAL PROVED CONTROVERSIAL

The January 1953 Bar proposal attracted some strong criticism from members of the Bar.<sup>62</sup> The proposal’s acceptance of *de facto* substantial evidence judicial review, in at least some circumstances, was the largest point of controversy. One critic declared, in a June 1953 Texas Bar Journal article, that:

We therefore propose that instead of the proposed Administrative Procedure Act, a statute should be enacted which would provide that in all controversies before the administrative agencies in the state of Texas, in which private rights and property are involved and determined, an appeal *de novo* shall be permitted to the District Court in the county of the residence of the individual citizen, unless venue is otherwise provided by statute. Upon this trial *de novo*, the judgment of the court shall be based upon the preponderance of the evidence introduced before the District Court without reference to the evidence introduced before the administrative agency, and without the application of the substantial

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56 State Bar Comm. on Admin. Procedure, *Administrative Procedure Act*, 16 TEX. B.J. 14, 15 (1953).

57 The proposed administrative procedure act ultimately adopted in Texas altered this definition slightly, as discussed at length in Robert W. Hamilton and J.J. Jewett, III, *The Administrative Procedure and Texas Register Act: Contested Cases and Judicial Review*, 54 TEX. L. REV. 285, 286–92 (1976). Suffice it to say, the definition limits or expands the universe of proceedings in which trial-like adjudications are a right, so commentators, at least, labor mightily over its nuances.

58 State Bar Comm. on Admin. Procedure, *supra* note 56, at 46.

59 *Id.* at 48–49. The Bar’s Administrative Law Committee wrote, in rebuttal to criticisms of its proposal, that most agency organic statutes required retrial of fact issues in court. Admin. Law Comm., *Administrative Procedure Act: Reply to a Critic*, 16 TEX. B.J. 736, 757 (1953).

60 See State Bar Comm. on Admin. Procedure, *supra* note 56, at 48–49.

61 *Id.* at 48.

62 See, e.g., Bennett B. Patterson, *Procedure Act Opposed*, 16 TEX. B.J. 377 (1953).

evidence rule, and that in the District Court a trial by jury shall be had, when demanded, upon all controverted issues of fact.<sup>63</sup>

This writer also criticized the proposed act as “an effort to dignify an arbitrary and bureaucratic administrative process with some semblance of legal procedure” and, thereby, to add power to the administrative estate at the expense of the judiciary.<sup>64</sup> In apparently acknowledging the widespread nature of this sentiment, the Administrative Law Committee of the State Bar wrote in defense of its proposal:

There are many conscientious lawyers and laymen who would like to see administrative agencies of government abolished, and their functions either eliminated or turned back to the Legislature. Perhaps it is true that enactment of legislation establishing basic principles of due process of law at the administrative level constitutes an acceptance of the inevitability of some bureaucratic government in Texas.<sup>65</sup>

After this controversy, the 1953 Bar-proposed administrative procedure act was not submitted to the Legislature.

#### 4. THE TEXAS CIVIL JUDICIAL COUNCIL WEIGHS IN

In 1956, the Texas Judicial Council initiated a study of state administrative procedure acts that became, in 1957, a report to the Governor.<sup>66</sup> That study reported that “members of the Bar Committee did not appear to be in favor of the broad Texas Administrative Procedures Act which had been proposed by that group earlier.”<sup>67</sup> Therefore, the Council “drafted simplified bill proposals to provide for the ‘adoption, filing, publication and distribution of rules and regulations of state administrative agencies authorized by law to make such rules and regulations.’”<sup>68</sup> It is not possible to know for sure, but likely that the Judicial Council’s foray into the administrative procedure act issue was prompted by the then-Vice-Chair of the House Judiciary Committee, Representative L. DeWitt Hale. He strongly opposed substantial evidence judicial review of agency orders, and such a judicial review provision was a component, albeit vaguely stated, of the State Bar proposal.<sup>69</sup> As a part of its role as the policy-making body for the state judiciary, the Texas Judicial Council worked closely with the House Judiciary Committee on numerous matters bearing on court administration.<sup>70</sup>

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63 *Id.* at 467.

64 *Id.* at 465.

65 Admin. Law Comm., *supra* note 59, at 758.

66 Tex. Judicial Council, *Texas Civil Judicial Council 1929–1979*, 64 (Aug. 1997) available at [http://www.courts.state.tx.us/tjc/publications/TJC\\_1929-1997.pdf](http://www.courts.state.tx.us/tjc/publications/TJC_1929-1997.pdf).

67 *Id.*

68 *Id.*

69 See State Bar Comm. on Admin. Procedure, *supra* note 56, at 48.

70 The Texas Civil Judicial Council was established in 1929 “for the continuous study of and report upon the organization, rules, procedure and practice of the civil judicial system of this State, the work accomplished and the results produced by that system and its various parts, and methods for its improvement.” Act of 1929, 41st Leg., R.S., ch. 19, § 1 (1929) (codified at TEX. GOV’T CODE ANN. § 71.031). The body was renamed as the Texas Judicial Council in 1975.

## 5. 1961 MODEL STATE APA

In 1961, the Uniform Law Commissioners released the Model State Administrative Procedure Act.<sup>71</sup> The 1961 Model State APA had a “contested case” definition that read: “[C]ontested case’ means a proceeding, including but not restricted to ratemaking, [price fixing], and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.”<sup>72</sup> This definition includes what the Uniform Law Commissioners refer to as an “external hearing rights approach”—a party’s right to a hearing must arise from a source other than the APA itself. The State Bar’s 1953 proposed act relied on this same external hearing right approach in defining a “formal proceeding.”<sup>73</sup>

The 1961 model act also provided for substantial evidence judicial review of the record created at the agency: “The review shall be conducted by the court without a jury and shall be confined to the record.”<sup>74</sup>

## 6. THE 1961–1962 CONSTITUTIONAL AMENDMENT AND THE STATE BAR EFFORTS SUPPORTING IT

In 1959, a bill made it through the Legislature that, but for the Governor’s veto, would have made *de novo* review of administrative decisions the rule for appeals from all such decisions.<sup>75</sup> During that session, there had also been a proposed constitutional amendment that, had it not failed in the Legislature, would have removed the separation-of-powers bar to true *de novo* review that the courts had repeatedly found existed.<sup>76</sup> The courts had repeatedly struck down laws directing that “appeals” of administrative agency orders test the reasonableness of the orders by true trial *de novo*.<sup>77</sup>

In the 1961 legislative session, Representative L. DeWitt Hale (by this time, Chairman of the House Judiciary Committee)<sup>78</sup> sponsored House Joint Resolution 32, which was ultimately approved by the Legislature and submitted to the voters in 1962 as a

71 Nat’l Conference of Comm’rs on Uniform State Law, Revised Model State Administrative Procedure Act (1961).

72 *Id.* § 1(2).

73 State Bar Comm. on Admin. Procedure, *supra* note 56, at 15.

74 Nat’l Conference of Comm’rs on Uniform State Law, *supra* note 71, at § 15(f).

75 Tex. H.B. 440, 56th Leg., R.S., § 2 (1959); Tex. Gov. Proclamation No. 41-775, 56th Leg. R.S. (June 1, 1959) (vetoing Tex. H.B. 440 due to constitutionality concerns and fear of inconsistent application of the Railroad Commission’s oil and gas conservation laws by the district courts), available at <http://www.lrl.state.tx.us/scanned/vetoes/56/hb440.pdf>.

76 Tex. Gov. Proclamation No. 41-775, 56th Leg. R.S. (June 1, 1959).

77 *See, e.g.,* S. Canal Co. v. State Bd. of Water Engineers, 318 S.W.2d 619, 623 (Tex. 1958) (“If the issue to be decided and on which evidence is to be heard is the reasonableness of the Board’s order, decision cannot be made from a preponderance of the evidence or entirely free of the substantial evidence rule, for the legal test of the reasonableness of an order of an administrative agency is whether it is reasonably supported by substantial evidence and not whether it is supported by a preponderance of the evidence.”).

78 House Comm. on Judiciary—57th R.S. (1961), Legislative Reference Library of Texas, [http://www.lrl.state.tx.us/committees/cmtesDisplay.cfm?cmteID=1856&session=57-0&from=&passsearchparams=submit=Enter\\*last=Hale&committeename=House%20Judiciary%20Committee&memberchecked=595&session=57&action=search](http://www.lrl.state.tx.us/committees/cmtesDisplay.cfm?cmteID=1856&session=57-0&from=&passsearchparams=submit=Enter*last=Hale&committeename=House%20Judiciary%20Committee&memberchecked=595&session=57&action=search) (last visited May 25, 2014).

constitutional amendment.<sup>79</sup> This resolution provided in the clearest possible terms that the Legislature could enact laws prescribing whatever manner of judicial review of agency decisions the Legislature deemed appropriate, “and the courts of Texas shall have no power or authority to refuse, deny, or change the manner of such appeals, if brought in the manner provided by general law, even though such appeals shall be provided *de novo* as that term is used in appeals from Justice of the Peace Courts to County Courts.”<sup>80</sup>

In 1962, the State Bar submitted the language of H.J.R. 32 to its membership for a referendum vote.<sup>81</sup> The referendum passed the Bar’s membership.<sup>82</sup> Nonetheless, despite legislative and State Bar support, the constitutional amendment failed adoption in the November 1962 general election.<sup>83</sup>

#### 7. LEGISLATIVE ADMINISTRATIVE PROCEDURE ACT INITIATIVES IN THE 1960S AND EARLY 1970S

The 1960s and early 1970s could generally be characterized as a stalemate between those who favored codification of a substantial evidence review limited to the agency record and those who ardently opposed such an approach. During this timeframe, those opposed to the codification of a substantial evidence review limited to the agency record had an important ally in the House Judiciary Committee, and particularly in Representative L. DeWitt Hale, who served as chair or vice-chair of the Committee during much of this period.

Several bills introduced in this period provided for substantial evidence review of agency decisions. The administrative procedure act bill introduced in the House in 1963 provided for substantial evidence review of agency decisions, calling for contested case rights when “the legal rights, duties, or privileges were required by law or constitutional right to be determined after an agency hearing.”<sup>84</sup> The bill died in the House Judiciary Committee.<sup>85</sup>

For the 1971 session, the State Bar again sponsored an administrative procedure act bill, H.B. 761, which was carried by Representative Tim Von Dohlen.<sup>86</sup> This bill was based on the 1961 Model State Administrative Procedure Act, but H.B. 761 altered the “contested case” definition of the Model State APA to drop the “required by law” basis for the right to a hearing.<sup>87</sup> H.B. 761 provided: “‘Contested case’ means a proceeding, including but not restricted to rate-making and licensing, in which the legal rights, duties, or privileges of a party are to be determined by an agency after an opportunity for hearing.”<sup>88</sup> This deviation was carried through to the initially filed version of the 1975

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79 Tex. H.J. Res. 32, 57th Leg., R.S. (1961).

80 *Id.*

81 *Bar to Vote in Oct.: De Novo Amendment*, 25 TEX. B.J. 745 (1962).

82 *Referendum: Bar members approve de novo issue, other two questions*, 25 TEX. B.J. 960 (1962).

83 Tex. Legislative Council, *Amendments to the Texas Constitution Since 1876*, 10 (May 2014).

84 Tex. H.B. 967, 58th Leg., R.S. (1963).

85 *Id.*

86 Tex. H.B. 761, 62nd Leg., R.S. (1971).

87 *Id.*

88 *Id.*

bill that ultimately became the Texas Administrative Procedure Act.<sup>89</sup> H.B. 761 provided for nonjury judicial review on the agency record and did not specify a manner of review, but it explicitly did not change *de novo* review for the Railroad Commission's orders.<sup>90</sup> H.B. 761 was referred to the House Judiciary Committee, chaired by Representative Hale, where it died.<sup>91</sup>

In 1973, H.B. 248, authored by Representatives Von Dohlen and Finney, carried forward a slightly modified version of H.B. 761 from the previous session.<sup>92</sup> The "contested case" definition was altered to read: "'Contested case' means a proceeding, including but not restricted to rate-making and licensing, in which the legal rights, duties, or privileges of a party are to be determined by an agency after an opportunity for an adjudicative hearing."<sup>93</sup> So, the "required by law" language remained absent, but the "hearing" component of the definition was altered to specify that the hearing be an "adjudicative hearing."<sup>94</sup> The text regarding judicial review of agency decisions remained as it had been in H.B. 761 from the previous session.<sup>95</sup> The bill was referred to the House Judiciary Committee, where it died.<sup>96</sup> H.B. 248 had an identical companion Senate bill, S.B. 81, which made it through the Senate.<sup>97</sup> That Senate bill was referred to the House Judiciary Committee, still Chaired by Representative Hale, where it died.<sup>98</sup>

During this same period, Representative L. DeWitt Hale made his own attempts to counter use of substantial evidence reviews limited to the agency record. To this end, as Vice Chair of the House Judiciary Committee in 1965, he authored an administrative procedure act bill that would have nullified those agency decisions subject to *de novo* review while specifying an appeal on the agency record in other cases without explicitly

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89 Tex. S.B. 41, 64th Leg., R.S. (1975). But, as the Hamilton and Jewett article examines, the definition was altered during the 1975 legislative process, and the language ultimately adopted is open to conflicting interpretations. See Hamilton & Jewett, *supra* note 57.

90 Tex. H.B. 761, 62nd Leg., R.S. (1971). The Railroad Commission jealously guarded the process for judicial review of its decisions, and the Railroad Commission's opposition to the 1959 proposed administrative procedure act (Tex. H.B. 440) that passed the legislature was the first reason cited by the Governor in his veto proclamation on that bill. Tex. Gov. Proclamation No. 41-775, 56th Leg. R.S. (June 1, 1959).

91 *Id.*

92 Tex. H.B. 248, 63rd Leg., R.S. (1973).

93 *Id.*

94 This aspect of the definition is also a deviation from the model act, which ultimately found its way into the Texas APA adopted in 1975, where, as noted earlier, it provided considerable fodder for academic analysis. See Hamilton & Jewett, *supra* note 57.

95 Tex. H.B. 248, 63rd Leg., R.S. (1973).

96 *Tex. H.B. 248 Actions*, 63rd Leg., R.S., LEGISLATIVE REFERENCE LIBRARY OF TEXAS, <http://www.lrl.state.tx.us/legis/BillSearch/actions.cfm?legSession=63-0&billtypeDetail=HB&billNumberDetail=248&billSuffixDetail=&startRow=1&IDlist=&unClicklist=&number=100> (last visited May 25, 2014).

97 Tex. S.B. 81, 63rd Leg., R.S. (1973).

98 *Tex. S.B. 81 Actions*, 63rd Leg., R.S., LEGISLATIVE REFERENCE LIBRARY OF TEXAS, <http://www.lrl.state.tx.us/legis/billsearch/actions.cfm?legSession=63-0&billtypeDetail=SB&billNumberDetail=81&billSuffixDetail=&startRow=1&IDlist=&unClicklist=&number=100> (last visited May 25, 2014).

calling for substantial evidence judicial review in such cases.<sup>99</sup> As for proceedings at the agency level, that bill provided for “formal proceedings” when “an order of an agency is required by law or constitutional right to be based upon evidence adduced at an agency hearing.”<sup>100</sup> As otherwise amended, this bill passed out of the House Judiciary Committee but never received a floor vote.<sup>101</sup> In 1969, then-Chairman Hale re-introduced substantially the same bill, but it was referred to the House Committee on State Affairs, where it died.<sup>102</sup>

## 8. 1974 CONSTITUTIONAL CONVENTION

An argument can be made that it was the Texas Constitutional Convention of 1974 that finally cleared a path for those seeking to codify the substantial evidence review limited to the agency record. During 1974, Texas held a constitutional convention, to which the senators and representatives were the delegates.<sup>103</sup> Though the convention failed to agree on a document to submit to the voters for approval, the process of scrutinizing Texas’s governance served as a legitimate educational experience for the delegates and their staffs. A parade of legal authorities testified before the Judiciary Committee of the convention, chaired by Representative Hale,<sup>104</sup> some explaining how they believed a true *de novo* review violated the separation of powers under the Texas Constitution. It is difficult to say that this testimony altered the deeply-held beliefs of some delegates that *de novo* judicial review of agency decisions was preferable, but passage of the Texas Administrative Procedure Act in the next legislative session with little opposition indicates that such testimony may have finally convinced the Legislature that true *de novo* review was not constitutional.<sup>105</sup>

## 9. 1975 PASSAGE OF THE TEXAS ADMINISTRATIVE PROCEDURE ACT

The 64th Regular Session of the Texas Legislature produced somewhat contradictory results with regard to the effort to reform Texas’ administrative procedure. On the one hand, the Texas Administrative Procedure Act (“Texas APA”) passed during that legislative session.<sup>106</sup> The Texas APA statutorily codified the substantial evidence standard of review based on the record created before the agency.<sup>107</sup> However, there were also eight constitutional amendments proposed by that legislature that, collectively, would have wholly replaced the 1876 Constitution, save for its Bill of Rights.<sup>108</sup> The omnibus package of amendments, S.J.R. 11, was a light re-working of the various constitutional

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99 Tex. H.B. 745, 59th Leg., R.S. (1965).

100 *Id.*

101 *Id.*

102 Tex. H.B. 706, 61st Leg., R.S. (1969).

103 Tex.H.R.J. Res. 61, 62nd Leg., R.S. (1971).

104 See [http://www.lrl.state.tx.us/committees/cmtesDisplay.cfm?cmteID=8966&session=64-0&from=session&passsearchparams=session=64\\*\\*from=session](http://www.lrl.state.tx.us/committees/cmtesDisplay.cfm?cmteID=8966&session=64-0&from=session&passsearchparams=session=64**from=session) (last visited June 29, 2014).

105 Texas Administrative Procedure and Texas Register Act, 64th Leg., R.S., ch. 61 (1975). The Texas APA passed the Senate on a voice vote, and it passed the House by a 134-0 vote. 1975 Tex. Sess. Law Serv. 148 (West).

106 Texas Administrative Procedure and Texas Register Act, 64th Leg., R.S., ch. 61 (1975).

107 Tex. Health Facilities Comm’n v. Charter Medical-Dallas, Inc., 665 S.W.2d 446, 452 (Tex. 1984).

108 Tex. S.J. Res. 11, 64th Leg., R.S. (1975).



articles that were almost adopted by the 1974 Constitutional Convention delegates. One of the failed efforts of the 1974 Constitutional Convention would have empowered the Legislature to require true judicial *de novo* review of administrative agency decisions, and this was carried forward in S.J.R. 11 as proposed text in a new Article V (Judiciary Article): “Notwithstanding any other provision of this constitution, the legislature may provide by law for the method of appeal to the courts from rulings, decisions, or other actions of state agencies or political subdivisions of the state.”<sup>109</sup> The entire Article V amendment failed adoption in the November 1975 election.<sup>110</sup>

Unlike bills filed in previous sessions, the Texas APA quickly passed out of committee during the 1975 session. Senator Max Sherman sponsored the bill, S.B. 41, which became the state’s APA.<sup>111</sup> It was considered at the first working meeting of the Senate Intergovernmental Relations Committee that session and was passed out of the committee without amendment that same day.<sup>112</sup> The bill had in it the same “contested case” definition that was in the enrolled version of the bill, which is codified today at § 2001.003(1) of the Texas Government Code.<sup>113</sup> Senator Sherman had the chair of the State Bar’s Administrative Law Section, Dudley McCalla, in attendance to respond to questions from committee members.<sup>114</sup>

To allay concerns at the absence of a *de novo* standard of review, Mr. McCalla assured the committee members that the bill before them would result in more robust agency proceedings. In response to inquiry from Senator Ogg regarding how one could justify judicial review on the agency record, when some agencies, such as the Banking Board, limit the parties to 45 minutes per side to present their cases, Mr. McCalla laid out a broad administrative due process right arising from the bill. He said, “I am in total agreement with you [regarding the fairness the present process]. And, the practitioners before that agency and all others who are familiar with that don’t feel that it is [fair] either, and that is why this bill has evolved as it has.”<sup>115</sup> On being pressed about how the proposed bill would change the 45-minutes process at the Banking Board, McCalla replied that the process would be altered to ensure the development of a more complete record.<sup>116</sup> In response to Senator Ogg’s question as to whether the Banking Board, under the bill, would still be able to arbitrarily limit a party to 45 minutes, Mr. McCalla said,

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109 *Id.*

110 Tex. Legislative Council, *Amendments to the Texas Constitution Since 1876*, 10 (Mar. 2014).

111 Texas Administrative Procedure and Texas Register Act, Tex. S.B. 41, Act of April 22, 1975, 64th Leg., R.S. ch. 61, 1975 Tex. Gen. Laws 136.

112 Tex. S.B. 41 Actions, 64th Leg., R.S., LEGISLATIVE REFERENCE LIBRARY OF TEXAS, <http://www.lrl.state.tx.us/legis/billsearch/actions.cfm?legSession=64-0&billtypeDetail=SB&billNumberDetail=41&billSuffixDetail=&startRow=1&IDlist=&unClicklist=&number=100> (last visited May 25, 2014).

113 Tex. S.B. 41, § 3(2) (as introduced) (Jan. 30, 1975), available at [http://www.lrl.state.tx.us/LASDOCS/64R/SB41/SB41\\_64R.pdf#page=1](http://www.lrl.state.tx.us/LASDOCS/64R/SB41/SB41_64R.pdf#page=1); Tex. S.B. 41, § 3(2) (enrolled version), available at [http://www.lrl.state.tx.us/LASDOCS/64R/SB41/SB41\\_64R.pdf#page=81](http://www.lrl.state.tx.us/LASDOCS/64R/SB41/SB41_64R.pdf#page=81) (last visited July 6, 2014).

114 Minutes, Senate Comm. on Intergov’tl Relations, 2 64th R.S. (Jan. 30, 1975).

115 Audio tape: Public Hearing of the Senate Comm. on Intergov’tl Relations, (Jan. 30, 1975), available at <https://www.tsl.state.tx.us/sites/default/files/public/tslac/ref/senatetapes/64/640490a.mp3>.

116 *Id.*

“Not under this bill.”<sup>117</sup> Senator Ogg asked, “They cannot?” Mr. McCalla replied, “No sir! Full opportunity for cross-examination in order to determine the truth of the matter is provided . . . This act is designed to cure that sort of situation [where cross-examination would be unavailable].”<sup>118</sup>

Section 19 of the bill controlling judicial review of agency decisions was amended both in the House committee (Judicial Affairs) and on the House floor, but it essentially existed throughout this process as it exists today, requiring substantial evidence review, unless another statute directs *de novo* review.<sup>119</sup>

## 10. LOOKING BACK ON THE 1952–1975 EXPERIENCE

The struggle to adopt an administrative procedure act in Texas was, more than anything else, a struggle about how to review the actions of administrative agencies. From the comments of practitioners in the late 1940s and early 1950s, to Chairman Hale’s resistance to a substantial evidence review limited to the agency record in the 1960s and early 1970s, through the comments of Senator Ogg in the process of adopting the current Texas APA, there is a clear trail of skepticism about the fairness of decisionmaking at administrative agencies. In the end, legislators who wanted opportunities for complete “do overs”—*i.e.*, true *de novo* reviews—of agency decisions in judicial courts were forced to accept an overlay of process guarantees at the agency level. These guarantees were premised, as the colloquy of Senator Ogg and Mr. McCalla shows, on an understanding that the historical, trial-like contested case adjudicatory process at agencies would define the floor for processes at agencies.

### C. 74TH REGULAR SESSION (1995) – TRANSFER OF HEARINGS TO SOAH, LIMITING “AFFECTED PERSON” TEST, AND DECLINING TO ELIMINATE THE CONTESTED CASE HEARING PROCESS FOR TCEQ ENVIRONMENTAL QUALITY PERMITS

After passage of the Texas APA in 1975, implementation of the contested case hearing process in the environmental permitting context was largely similar to the implementation of the process in other contexts. In 1995, though, several efforts were made to reform the hearing process for environmental permits. In particular, three legislative actions of note occurred: (1) hearing functions were transferred from hearing examiners at the Texas Natural Resources Conservation Commission (TNRCC) to the recently-created State Office of Administrative Hearings (SOAH); (2) new constraints were imposed on standing to obtain a contested case hearing; and (3) efforts to replace the contested case hearing process with a notice and comment process failed.<sup>120</sup>

117 *Id.*

118 *Id.*

119 All versions of the bill are available online from the Texas Legislature’s website. *Tex. S.B. 41, 64th Tex. R.S.*, LEGISLATIVE REFERENCE LIBRARY OF TEXAS, <http://www.lrl.state.tx.us/legis/billsearch/text.cfm?legSession=64-0&billtypeDetail=SB&billNumberDetail=41&billSuffixDetail=&startRow=1&IDlist=&unClicklist=&number=100>.

120 *Tex. S.B. 12, 74th Leg., R.S. (1995)* (Transfer of hearing functions); *Tex. S.B. 1546, 74th Leg., R.S. (1995)* (Limitation on Affected Person); *H.B. 2491, 74th Leg., R.S. (1995)* (attempting to eliminate contested case hearing process).

In 1995, the Legislature dissolved the Office of Hearing Examiners in the TNRCC and created the SOAH Natural Resources division to take its place.<sup>121</sup> In doing so, the Legislature responded to a report by a TNRCC hearing examiner that her supervisors had pressured her to change her findings in a case involving a waste disposal company's request to expand a landfill.<sup>122</sup> By transferring TNRCC's hearing functions to SOAH, the Legislature intended to ensure that the determination of questions of fact in contested case hearings would be conducted by an independent decisionmaker.<sup>123</sup> As a result of this legislation, TCEQ must use SOAH to conduct all contested case hearings unless a majority of the TCEQ Commissioners decides to conduct a contested case hearing.<sup>124</sup>

During the same legislative session, the Texas Legislature also sought to clarify the scope of persons entitled to a hearing on a permit under consideration by the TNRCC. Prior to 1995, an "affected person" was entitled to a hearing for permits subject to a hearing, but there was no statutory definition of this term in the TNRCC context.<sup>125</sup> Some argued that the lack of a definition of this term had led to an overly broad interpretation of the term.<sup>126</sup> They supported Senate Bill 1546, which imposed a three-part test for determining whether a requester qualified as an affected person: (1) the requestor must have personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing not common with the general public; (2) the person's hearing request must be reasonable; and (3) the person's hearing request must be supported by competent evidence.<sup>127</sup> Others cautioned that the standard set forth in the bill would improperly restrict the ability of citizens to participate in the process and provide important information, but ultimately the bill passed.<sup>128</sup>

As discussed below, the second and third prongs of this test have since been removed. With regard to the requirement that the requestor have a personal justiciable interest, this language tracks that used by the courts to characterize constitutional standing, and so standing to obtain a contested case hearing is governed by the same principles governing judicial standing.<sup>129</sup>

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121 Act of May 28, 1995, 74th Leg., R.S., ch. 106, § 1, 1995 Tex. Gen. Laws 898.

122 House Comm. on Natural Res., Bill Analysis, Tex. S.B. 12, 74th Leg., R.S. (1995).

123 *Id.* (noting that SOAH "could provide a means for independent hearings for the commission's contested cases").

124 TEX. GOV'T CODE ANN. § 2003.047(b) (West 2014).

125 See, e.g., TEX. WATER CODE ANN. § 26.028(c) (amended 1995) (Water Quality Permits); TEX. HEALTH & SAFETY CODE ANN. § 361.089(b) (amended 1995) (Solid Waste Permits); TEX. HEALTH & SAFETY CODE ANN. § 382.056 (amended 1995) (Air Quality Permits); Senate Comm. on Natural Res., Bill Analysis, Tex. S.B. 1546, 74th R.S. (1995). See also *Texas Indus. Traffic League v. R.R. Comm'n of Tex.*, 628 S.W.2d 187, 196 (Tex. App.—Austin 1982), *rev'd on other grounds*, 633 S.W.2d 821 (Tex. 1982) (noting that the Texas APA "does not specify any criterion for admitting parties to hearings before administrative tribunals").

126 House Research Organization, Bill Analysis, S.B. 1546, 74th Leg., R.S. (1995).

127 Act of May 28, 1995, 74th Leg., R.S., ch. 882, § 1, 1995 Tex. Gen. Laws 4380, 4381 (current version at TEX. WATER CODE ANN. § 5.115(a), *amended by* Act of May 30, 1999, 76th Leg., R.S., ch. 1350, § 1, 1999 Tex. Gen. Laws 4570).

128 *Id.*

129 *City of Waco v. Tex. Comm'n on Env'tl. Quality*, 346 S.W.3d 781, 801 (Tex. App.—Austin 2011), *rev'd on other grounds*, 413 S.W.3d 409 (2013).

Also during the 74th Legislative Session in 1995, Representative Gerald Yost filed House Bill 2491, which would have eliminated the contested case hearing process and replaced it with a notice and comment process.<sup>130</sup> While this bill passed the Texas House, it died on the Senate intent calendar.<sup>131</sup> This bill would have allowed the Executive Director to issue a permit after a “public hearing” subject to Commission review, but provided no opportunity for a contested case hearing.<sup>132</sup>

#### D. 77TH REGULAR SESSION (1999) - DEVELOPMENT OF A COMPROMISE: PASSAGE OF HOUSE BILL 801

After the passage of Senate Bill 1546 in 1995, pressure continued to build in both the regulated community and the environmental community to somehow adjust TNRCC’s permitting process. On the one hand, TNRCC’s application of the new “affected person” standard set forth in Senate Bill 1546 had resulted in a steady decrease in the number of contested case hearings being held,<sup>133</sup> which had raised concerns in the environmental community. But, in the fall of 1998, as the 76th Regular Session of the Texas Legislature was approaching, it seemed unlikely that TNRCC would be able to continue this practice under existing law. In three separate cases, Travis County District Courts had found that TNRCC was applying a threshold for standing that exceeded the proper standard even under the new definition of “affected person.”<sup>134</sup> In February of 1998, the Austin Court of Appeals had upheld the earliest of these rulings.<sup>135</sup> In late August of 1998, the Texas Supreme Court denied a petition for review of this decision, leading TNRCC’s general counsel to publicly despair that, “If the commission cannot reject a hearing request that is as weak as this one, then the commission is in trouble.”<sup>136</sup>

At the same time, it was growing increasingly clear that a bill to simply do away with the contested case hearing process could not make it through the legislative process. During the 1997 Legislative Session, Representative Robert Talton had filed a bill to do away with the contested case hearing process and solely provide a notice and comment process much like House Bill 2491 filed in the 1995 Legislative Session.<sup>137</sup> Representa-

130 Tex. H.B. 2491, 74th Leg., R.S. (1995).

131 Tex. H.B. 2491 Actions, 74th Leg., R.S., TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/BillLookup/Actions.aspx?LegSess=74R&Bill=HB2491> (last visited May 25, 2014).

132 Tex. H.B. 2491, 74th Leg., R.S. (1995).

133 Robert Elder, Jr., *High Court Reignites Fight Over Permits*, WALL ST. J., Sept. 9, 1998, at T1.

134 *West Dallas Coal. for Env'tl. Justice v. Heat Energy Advanced Tech., Inc. and Tex. Natural Res. Conservation Comm'n*, No. 96-05388 (126th Dist. Ct., Travis County, Tex. May 14, 1997), *aff'd*, *Heat Energy Advanced Tech., Inc. & Tex. Natural Res. Conservation Comm'n v. West Dallas Coal. for Env'tl. Justice*, 962 S.W.2d 288 (Tex. App.—Austin, 1998, writ denied); *Mary Louise Ladd Holton v. Tex. Natural Res. Conservation Comm'n*, No. 97-06408 (261st Dist. Ct., Travis County, Tex. Nov. 13, 1998) (no appeal taken); *Joe Grissom v. Tex. Natural Res. Conservation Comm'n*, No. 99-00117 (98th Dist. Ct., Travis County, Tex Feb. 23, 1999.), *aff'd*, *United Copper Indus. v. Grissom*, 17 S.W.3d 797 (Tex. App.—Austin, 2000, pet. dism'd).

135 *Heat Energy Advanced Tech., Inc.*, 962 S.W.2d 288.

136 Robert Elder, Jr., *High Court Reignites Fight Over Permits*, WALL ST. J., Sept. 9, 1998, at T1.

137 Tex. H.B. 2444, 75th Leg., R.S. (1997).

tive Talton's bill passed out of Committee in the House, but died thereafter in the calendars committee of that chamber.<sup>138</sup>

As the 76th Legislative Session commenced, Tom Uher, Chair of the House Committee on Environmental Regulation, filed House Bill 801, which in its initial form would have also eliminated the contested case hearing process.<sup>139</sup> The Texas Chemical Council championed this bill.<sup>140</sup> While the bill as filed heavily favored regulated industry, Chairman Uher soon realized the need for a more balanced approach and called upon all of the stakeholders involved to negotiate a consensus committee substitute.<sup>141</sup> Organizations including the Texas Chemical Council, Texas Association of Business and Chambers of Commerce, and the Texas Oil and Gas Association represented interests of the regulated community in cooperation with with legal counsel who often represented regulated entities, such as Kinnan Goleman of Brown McCarroll & Oaks Hartline.<sup>142</sup> On the other hand, organizations including Consumers Union, National Wildlife Federation, and Texas Center for Policy Studies represented the interests of the public interest and environmental communities in coordination with legal counsel who frequently represented such interests, including Richard Lowerre of Henry, Lowerre, Johnson, Hess & Frederick.<sup>143</sup>

After much time and labor, these negotiations produced a consensus bill.<sup>144</sup> On April 6, 1999, a letter was signed by the various stakeholders (including entities as diverse as the Texas Chemical Council and Public Citizen) and jointly submitted to members of the legislature.<sup>145</sup> This letter stated that the Committee substitute was a bill "we all can support" and that it "provides for early public notice, issue-driven discovery and contested case hearings, and a more efficient, timely and economical process for all parties."<sup>146</sup> On the next day, the committee substitute was considered and passed out of the

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138 *Tex. H.B. 2444 History, 75th Leg., R.S.*, TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=75R&Bill=HB2444> (last visited May 25, 2014).

139 *Tex. H.B. 801, 76th Leg., R.S. (1999)* (proposing to amend TEX. WATER CODE § 5.552(a) to provide, "Subchapters C-H Chapter 2001, Government Code, do not apply to a proceeding to which [Texas Water Code Subchapter M governing Environmental Permitting Procedures] applies.").

140 Editorial Board, *No Comment*, HOUSTON CHRONICLE, Mar. 1, 1999, at 20A; Editorial Board, *Kill House Bill 801: Don't Let it Linger*, SAN ANTONIO-EXPRESS NEWS, Mar. 13, 1999.

141 Consensus letter to Tom Uher, Chairman, House Comm. on Env'tl. Regulation (Apr. 6, 1999) (on file with author).

142 *See id.*

143 *See id.*

144 *Id.*

145 *Id.*

146 Signatories to this letter on behalf of regulated industry organizations included Mary Miksa on behalf of the Texas Association of Business & Chambers of Commerce, Jon Fisher on behalf of the Texas Chemical Council, and Cindy Morphew on behalf of the Texas Oil and Gas Association. *Id.* Signatories to this letter from firms frequently representing regulated entities included Kinnan Goleman of Brown McCarroll & Oaks Hartline, Jim Morriss of Thompson & Knight, Ken Ramirez of Bracewell & Patterson, and Paul Seals of Akin, Gump, Strauss, Hauer & Feld. *Id.* Signatories on behalf of environmental and public interest organizations included Reggie James on behalf of Consumers Union, Myron Hess on

House Committee on Environmental Regulation.<sup>147</sup> The bill subsequently passed out of the House after the adoption of relatively minor floor amendments offered by Chairman Uher.<sup>148</sup> Although the Senate attached a few amendments to the bill, each of these amendments was stripped from the bill prior to passage.<sup>149</sup>

Because it was a compromise Bill, House Bill 801 created a permitting process that all interests could find something to complain about. From the perspective of the regulated community, the bill had the advantage of producing a more “front loaded” process that facilitated identification of issues in dispute early in the process and provided more certainty in the scope of the contested case hearing process, but it also had the disadvantage of maintaining the contested case hearing process while removing then-existing limitations on who could prompt or participate in the hearing as an affected person. The environmental community and the public interest community could take solace that the contested case hearing process had been preserved, and the scope of persons entitled to a hearing had been clearly restored to that existing prior to 1995, but the requirement that all issues be specified during the comment period raised concerns as to whether the public would be able to meaningfully identify disputed issues so soon after the issuance of a draft permit.

#### **E. 77TH REGULAR SESSION (2001)—ELIMINATION OF THE EXECUTIVE DIRECTOR AS A PARTY IN CONTESTED CASE HEARINGS AND CREATION OF THE DIRECT REFERRAL PROCESS**

During the 77th Legislative Session, TNRCC underwent Sunset review, and so TNRCC’s permitting process was again the subject of legislative attention.<sup>150</sup> But, having undergone such a thorough makeover during the previous session, the resultant changes to the permitting process were relatively limited. Of perhaps most significance, the TNRCC sunset bill removed the Executive Director as a party in hearings on a variety of environmental permit applications.<sup>151</sup> The Legislature took this action in light of the Sunset Commission’s conclusion that having the agency serve as an advocate in contested case hearings on permits contributed to a sense of unfairness in the permitting

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behalf of National Wildlife Federation, and Tom “Smitty” Smith on behalf of Public Citizen. *Id.* Richard Lowerre signed the letter on behalf of Henry, Lowerre, Johnson, Hess and Frederick, a law firm that frequently represented protestants in proceedings before the TNRCC. *Id.* Signatories on behalf of local governments included J.D. Head on behalf of Chambers County and Cathy Sisk on behalf of Harris County. *Id.*

147 1999 H.J. of Tex. 1028, 75th Leg., R.S. .

148 1999 H.J. of Tex. 1378–80, 1441, 75th Leg., R.S. (Second & Third Readings).

149 Compare Tex. H.B. 801 as passed and engrossed in the House on Apr. 28, 1999, 1999 H.J. of Tex. 1567, 75th Leg., R.S., to Conference Comm. Rep. on Tex. H.B. 801 as adopted in the Senate on May 30, 1999, 1999 S.J. of Tex. 4200, 75th Leg., R.S., and as adopted in the House on May 30, 1999, 1999 H.J. of Tex. 4187, 75th Leg., R.S.

150 TEX. SUNSET COMM’N, SUNSET COMM’N DECISIONS: TEX. NATURAL RESOURCE CONSERVATION COMM’N (2000).

151 Tex. H.B. 2912, Act of June 14, 2001, 77th R.S. ch. 965, § 1.18, sec. 5.228(c), 2001 Tex. Gen. Laws 1933, 1940 (removing the Executive Director as a party to permit hearings), *repealed by* Tex. H.B. 2694, Act of June 17, 2011, 82nd R.S. ch. 1021, §10.02, sec. 5.228(c), 2011 Tex. Gen. Laws 2579, 2598 (reinstating the Executive Director as a mandatory party to permit hearings).

process.<sup>152</sup> Rather ironically, in the next Sunset cycle, the Legislature removed this prohibition and imposed a duty on the Executive Director to serve as an advocate in a contested case hearing.<sup>153</sup>

The Texas Legislature also passed Senate Bill 688 during the 77th Legislative session. This bill added an option for an applicant or the Executive Director to request direct referral of an application to SOAH at any point after the Executive Director has completed technical review of the application.<sup>154</sup> This procedure has allowed applicants to bypass the process by which the Commission considers briefing regarding a hearing request and considers the request in public meeting.<sup>155</sup> Alternatively, when a case is directly referred in this manner, no limitation beyond legal relevance applies to the scope of the issues that may be considered during the hearing, and the statute does not include an authorization for the Commission to provide a recommended duration for the hearing.<sup>156</sup>

**F. 82ND REGULAR SESSION (2011)—IMPOSITION OF DISCOVERY LIMITS, ELIMINATION OF STATE AGENCIES AS PARTIES TO CONTESTED CASE HEARINGS, AND REQUIRING THE EXECUTIVE DIRECTOR TO PARTICIPATE IN CONTESTED CASE HEARINGS AS AN ADVOCATE**

After the 77th Legislative Session, the Legislature made adjustments to the types of applications subject to a contested case hearing, but did not make any significant changes in contested case hearing procedures until next sunset cycle in 2011. As initially filed, the TCEQ Sunset Bill made no changes to the permitting process.<sup>157</sup> Representative Chisum, however, offered two floor amendments to the TCEQ Sunset Bill impacting the TCEQ permitting process, both of which were adopted by the House.<sup>158</sup> The first amendment removed the right to a contested case hearing regarding a permit amendment application by an electric generating facility to establish permit conditions necessary for compliance with Clean Air Act hazardous air pollutant requirements.<sup>159</sup> The second amendment in large part grafted House Bill 3037 onto the TCEQ Sunset Bill.<sup>160</sup> House Bill 3037 had sought to make a number of changes to the contested case hearing process.<sup>161</sup> These changes included: (1) shifting the burden of proof to the pro-estant during a contested case hearing, (2) prohibiting a state agency from contesting a permit in the hearing process, (3) requiring the Executive Director to participate in the contested case hearing as an advocate for his or her preliminary decision, (4) prohibiting

152 TEX. SUNSET COMM'N, *supra* note 150, at 48.

153 Tex. H.B. 2694, § 10.02, 2011 Tex. Gen. Laws 2579, 2598.

154 Tex. S.B. 688, Act of June 14, 2001, 77th R.S. ch. 935, §3, sec. 5.557, 2001 Tex. Gen. Laws 1873, 1875.

155 TEX. WATER CODE ANN. § 5.557(b) (West 2014) (exempting direct referral from the process for consideration of a hearing request set forth in TEX. WATER CODE § 5.556).

156 TEX. WATER CODE ANN. § 5.557 (West 2014).

157 Tex. H.B. 2694, 82nd Leg., R.S. (2011) (as filed Mar. 9, 2011).

158 2011 H.J. of Tex. 1969-72, 82nd Leg., R.S. (House Floor Amendment Nos. 39 & 40).

159 *Id.* at 1969-70 (House Floor Amendment No. 39).

160 *Id.* at 1970-72 (House Floor Amendment No. 40); Tex. H.B. 3037, 82nd Leg., R.S. (2011).

161 Tex. H.B. 3037, 82nd Leg., R.S. (2011).

the conduct of discovery after the deadline for pre-filed testimony, and (5) prohibiting the consideration of technical or scientific information in a contested case hearing that had not previously been provided to the Executive Director in the conduct of the staff's technical review of the application.<sup>162</sup> After being considered in a hearing of the House Committee on Environmental Regulation that continued until after two o'clock in the morning, House Bill 3037 passed out of Committee, but died in the House Calendars Committee.<sup>163</sup>

The committee substitute for the TCEQ Sunset Bill that passed out of the Senate Committee on Natural Resources did not include these changes to the permitting process, and discussion regarding the bill on the Senate floor made clear that this was intentional.<sup>164</sup> Senator Joan Huffman, sponsor of the TCEQ Sunset Bill in the Senate, discussed these amendments with Senator Watson during floor consideration of the bill.<sup>165</sup> Senator Watson noted that the provisions of House Bill 3037 added in the House would shift the burden of proof during a contested case hearing on a TCEQ permit.<sup>166</sup> Senator Huffman agreed that this shift was inappropriate, and pointed out that she had stripped both amendments from the bill when she presented it to the Senate Natural Resources Committee.<sup>167</sup> With regard to the elimination of contested case hearings for hazardous air pollutant permit amendments, Senator Huffman stated that she agreed, "it has no place on the Sunset Bill," and that "the concept is not a good one, that Representative Chisum was promoting."<sup>168</sup>

In Conference Committee, provisions regarding the shifting of the burden of proof and the limitation on submission of new technical or scientific information were stripped from the Sunset Bill.<sup>169</sup> The provision eliminating contested case hearings for MACT permit amendments was revised to allow a contested case hearing, but placed limitations on the length of such a hearing.<sup>170</sup> In the conference committee report for the bill, provisions that survived included: prohibiting a state agency from contesting a permit in the hearing process, requiring the Executive Director to participate in the contested case hearing as an advocate, and prohibiting the conduct of discovery after the deadline for pre-filed testimony.<sup>171</sup> Ultimately, the TCEQ Sunset Bill was passed as reflected in the Conference Committee Report.<sup>172</sup>

In this manner, while the most significant changes proposed to the contested case hearing process at that time were rejected by the 82nd Legislature—namely, those shifting the burden of proof and limiting the information allowed to be considered during a contested case hearing—several smaller changes were adopted.

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162 *Id.*

163 *Id.*; 2011 S.J. of Tex. 2254, 82nd Leg., R.S.

164 Tex. H.B. 2694, 82nd Leg., R.S. (2011) (as passed out of Senate Comm. on Natural Res. (May 5, 2011); 2011 S.J. of Tex. 1920 & 2252–58, 82nd Leg. R.S.

165 2011 S.J. of Tex. 2252–58, 82nd R.S.

166 *Id.* at 2252–53.

167 *Id.* at 2253.

168 *Id.* at 2254.

169 Conf. Comm. Report, Tex. H.B. 2694, 82nd Leg., R.S., 50–53 (May 24, 2011).

170 *Id.* at 30–32.

171 *Id.* at 50–53.

172 2011 H.J. of Tex. 6357, 82nd Leg., R.S.; 2011 S.J. of Tex. 4540, 82nd Leg., R.S.



### G. POST-801 CHANGES IN THE TYPES OF APPLICATIONS SUBJECT TO CONTESTED CASE HEARINGS

Since the passage of House Bill 801, the Legislature has expanded the right to a contested case hearing in some respects, while imposing additional constraints on the process in other respects. In particular, the Legislature has expanded the right to a contested case hearing to include applications for concentrated animal feeding operations in the Bosque River Watershed,<sup>173</sup> sludge permits,<sup>174</sup> subsurface drip irrigation systems,<sup>175</sup> water quality permits for quarries on the John Graves Scenic Waterway,<sup>176</sup> the discharge of wastewater from commercial industrial solid waste facilities into publicly operated treatment works,<sup>177</sup> and the reopening of closed landfills.<sup>178</sup> In 2013, an unsuccessful effort was made to expand the right to a contested case hearing to include the land application of domestic septage.<sup>179</sup> The Legislature has also eliminated the right to a contested case hearing since passage of House Bill 801 in several instances, including what have been characterized as emission of *de minimis* quantities of air contaminants,<sup>180</sup>

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173 Tex. H.B. 2912, Act of June 14, 2001, 77th R.S. ch. 965, § 12.02, 2001 Tex. Gen. Laws 1933, \*\*\*\* (Adding Tex. Water Code § 26.503, which defines “sole source impairment zone” in a manner to include only the impaired portion of the Bosque River Watershed, requiring that a CAFO in a sole source impairment zone be authorized by a new or amended *individual* permit, and prohibiting the Commission from issuing a general permit authorizing the discharge of agricultural waste from a CAFO in the sole source impairment zone. This prevented the authorization of such CAFO’s via a general permit authorization, a process that does not include the opportunity for a contested case hearing. Tex. Water Code § 26.040(1)).

174 *Id.* § 9.05, 2001 Tex. Gen. Laws 1933, \*\*\*\*(Adding Tex. Health & Safety Code § 361.121(b), requiring that a responsible person obtain a *permit* for the application of Class B Sludge. Permits issued under the Solid Waste Disposal Act are subject to a contested case hearing. Tex. Health & Safety Code § 361.089. Authorizations granted by registration instead of by permit are exempt from contested case hearings. 30 Tex. Admin. Code § 330.57(b). Prior to the implementation of this legislation, Class B sludge authorizations were granted through the registration process.).

175 Tex. H.B. 2651, Act of May 25, 2005, 79th Leg., R.S., ch. 637, § 1, sec. 32.056, 2005 Tex. Gen. Laws 1591, 1593.

176 Tex. S.B. 1354, Act of May 19, 2005, 79th Leg., R.S., ch. 374, § 2, sec. 26.559, 2005 Tex. Gen. Laws 1054, 1058.

177 Tex. S.B. 1281, Act of May 9, 2005, 79th Leg., R.S., ch. 362, § 1, sec. 1, 2005 Tex. Gen. Laws 1035 (Adding Tex. Health & Safety Code § 361.0901 to require a *permit* in order to receive industrial solid waste for discharge into a publicly owned wastewater treatment plant. As noted above, permits issued under the Solid Waste Disposal Act are subject to a contested case hearing. Tex. Health & Safety Code § 361.089).

178 Tex. H.B. 2912, Act of June 14, 2001, 77th R.S. ch. 965, § 9.04, 2001 Tex. Gen. Laws 1933, \*\*\* (Adding Tex. Health & Safety Code § 361.120(c) providing that, “the reopening of any such facility shall be considered a major amendment as such is defined by commission rules and shall subject the permittee to all of the procedural and substantive obligations imposed by the rules applicable to major amendments.”)

179 Tex. H.B. 3678, 83rd Leg., R.S. (2013).

180 Tex. H.B. 2518, Act of May 18, 2001, 77th Leg., R.S., ch. 1327, § 3, sec. 382.056(a) and (g), 2001 Tex. Gen. Laws 3267, 3268.

concrete batch plants with “enhanced” controls,<sup>181</sup> an application for the injection of non-hazardous brine water from a drinking water treatment plant,<sup>182</sup> and production area authorizations for uranium mines.<sup>183</sup>

#### H. POST-801 EFFORTS TO ELIMINATE THE CONTESTED CASE HEARING PROCESS FOR ALL PERMITS

Despite the failure to eliminate the contested case hearing process during the 74th, 75th and 76th Legislative Sessions, and the endorsement of House Bill 801 by groups representing the regulated community such as the Texas Chemical Council and the Texas Association of Business, efforts to replace the contested case hearing process with a notice and hearing process with no opportunity for an evidentiary hearing have continued. These efforts have included House Bill 2877, filed during the 78th Regular Session of the Legislature in 2003, and Senate Bill 957 during the 83rd Regular Session of the Legislature in 2013.<sup>184</sup> So, in all, legislation to eliminate the contested case hearing process has been filed and failed during five of the last ten regular sessions of the Legislature.

### IV. IMPLEMENTATION OF THE CONTESTED CASE HEARING PROCESS

#### A. USE BY OTHER AGENCIES, AND THE REGULATED COMMUNITY’S SUPPORT FOR THE PROCESS WHEN SOMEONE ELSE’S AUTHORIZATION IS ON THE LINE

A wide range of administrative agencies in Texas use the contested case hearing process for a variety of proceedings. These include the Public Utility Commission (PUC), the RRC, the Office of the Comptroller, the Workforce Commission, the Department of Insurance, groundwater districts, and many others.<sup>185</sup> While the regulated

181 Tex. S.B. 1272, Act of June 1, 2003, 78th Leg., R.S., ch. 361, § 3, sec. 382.05199, 2003 Tex. Gen. Laws 1546, 1547.

182 Tex. H.B. 2654, Act of May 23, 2007, 80th Leg., R.S., ch. 901, § 3, sec. 27.023, 2007 Tex. Gen. Laws 2239, 2240.

183 Tex. H.B. 1079, Act of May 20, 2013, 83rd Leg., R.S., ch. 897, § 1, sec. 27.0513, 2013 Tex. Gen. Laws 2245.

184 Tex. H.B. 2877, 78th Leg., R.S. (2003); Tex. S.B. 957, 83rd Leg., R.S. (2013).

185 TEX. LABOR CODE ANN. §§ 410.151–.169 (West 2014) (regarding contested case hearings on workers’ compensation disputes before the Texas Workforce Comm’n); TEX. WATER CODE ANN. §§ 36.401–.419 (West 2014) (providing for contested case hearings with regard to certain permits issued by groundwater conservation districts); TEX. UTIL. CODE ANN. § 102.006 (West 2014) (providing for contested case hearings with regard to regulation of rates and services of a gas utility); TEX. UTIL. CODE ANN. § 36.105 (West 2014) (providing for hearings on electric rate changes); TEX. UTIL. CODE ANN. § 53.105 (West 2014) (providing for hearings on rate changes by telecommunications utilities); TEX. INS. CODE ANN. § 2703.202 (West 2014) (requiring that the Commissioner of the Texas Department of Insurance order a contested case regarding a premium increase if requested by certain qualifying entities); TEX. INS. CODE ANN. § 2254.004 (West 2014) (requiring a contested case hearing on the request of an insurer to determine whether the rate order is excessive or unfairly discriminatory); TEX. NAT. RES. CODE ANN. § 85.205 (West 2014)

community opposes use of the hearing process in the consideration of TCEQ applications, the members of that same community frequently participate as protestants in contested case hearings before other agencies.

For example, members of the industrial community that advocate elimination of the contested case hearing process in TCEQ matters frequently participate in contested case hearings before the PUC. Texas Industrial Energy Consumers (TIEC) is a voluntary association of companies that operate industrial facilities in Texas, including refineries and chemical manufacturing facilities.<sup>186</sup> This organization has participated as a protestant in many contested case proceedings before the PUC to protest rates for electricity service.<sup>187</sup> These contested case proceedings are not subject to many of the limitations that apply to TCEQ proceedings. Yet, because powerful economic special interests participate in such hearings as both applicants and protestants, there is no legislative movement to limit such hearings. Applications for exceptions to the well spacing and density rules of the RRC serve as a similar example where business entities participate in proceedings both as applicants and as protestants.<sup>188</sup>

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(providing that no rule or order pertaining to the conservation or the prevention of waste of oil and gas may be adopted by the Railroad Commission except after notice and hearing); TEX. NAT. RES. CODE ANN. § 92.004 (West 2014) (providing that the Railroad Commission shall hold a hearing on an application to create a qualified subdivision); TEX. TAX CODE ANN. § 154.1145 (West 2014) (“Unless otherwise provided by this [Tax Code Chapter 154 regarding cigarette taxes], the comptroller shall conduct all hearings required by this chapter in accordance with Chapter 2001, Government Code.”).

186 See *TXU Generation Co. L.P., et. al v. Pub. Util. Comm’n of Tex.*, 165 S.W.3d 821 (Tex. App.—Austin 2005, pet. denied), Amicus Curiae Brief of Texas Industrial Energy Consumers in Support of the Repondent’s Brief on the Merits, 1 (Apr. 13, 2006).

187 See, e.g., *Tex. Pub. Util. Comm’n, Application of CenterPoint Energy Houston Electric, LLC for Approval to Refund Unspent Envtl. Retrofit Funds*, No. 33823, 2007 WL 725034, Feb. 14, 2007 (Interim Order granting motion to intervene by TIEC); *Tex. Pub. Util. Comm’n, Review of Agreements Relating to the Transfer of Nuclear Decommissioning Trust Funds From AEP Tex. Central Co. to Tex. Genco, LP Pursuant to P.U.C. Subst. R. 25.303(d)*, Project No. 30749, 2005 WL 941740, Apr. 20, 2005 (Interim Order granting motion to intervene by TIEC); *Tex. State Office of Admin. Hearings, Petition of El Paso Elec. Co. to Reconcile Fuel Costs*, No. 473-05-0013, 2004 WL 2603756, Nov. 5, 2004 (SOAH Order No. 3 granting motion to intervene by TIEC); *Tex. Pub. Util. Comm’n, Application of Entergy Gulf States, Inc. to Revise Rider IPCR Rates and Implement an Interim Surcharge*, 2007 WL 2766732, Sept. 21, 2007 (Order granting motion to intervene by TIEC); *Tex. Pub. Util. Comm’n, Application of Golden Spread Elec. Coop., Inc. for Approval of Transmission Cost of Service and Wholesale Transmission Rates*, No. 39024, 2011 WL 2280282, June 30, 2011 (Interim Order granting TIEC’s motion to intervene); *Tex. Pub. Util. Comm’n, Application of Sw. Pub. Service Company for Authority to Revise Its Fixed Fuel Factors Pursuant to the Formula Approved in Docket No. 34269*, No. 35538, 2008 WL 1841214, Apr. 18, 2008 (Interim Order granting motion to intervene by TIEC).

188 See, e.g., *Tex. R.R. Comm’n, Application of Willowbend Investments, Inc. For a Rule 38 Exception to Drill The McKee’s Port Unit, Well No. 1D, Newark, East (Caddo Lime) and Newark, East (Barnett Shale) Fields Tarrant County, Texas*, Docket No. 05-0250329 (application for exception to well density rule protested by Western Production Company, an operator of nearby acreage); *Tex. R.R. Comm’n, Application of Samson Lone Star LP for Exceptions to Statewide Rule 38 to drill the Isaacs 210 Lease Well No. 8 and the Isaacs 209 Lease Well Nos. 8*

The contested case hearing process at TCEQ serves a similar function to the hearing process at the PUC or RRC. The availability of the contested case hearing process regarding TCEQ permits furthers the protection of property rights and the health and safety of impacted persons. Industry's selective targeting of the hearing process at TCEQ, while making no effort to do away with the use of the hearing process before agencies such as the PUC or RRC, suggests that this effort has more to do with the political influence of the interests involved than with the merits of the process itself.

#### **B. THE CONTESTED CASE HEARING PROCESS PROVIDES AN AVENUE FOR INPUT FROM A WIDE RANGE OF IMPACTED PERSONS, INCLUDING PROPERTY OWNERS, BUSINESSES, AND LOCAL GOVERNMENTS**

Since the passage of House Bill 801, the hearing process has proven valuable for a wide range of stakeholders who find themselves uniquely impacted by an application. In some cases, well-known environmental organizations represent the interests of affected persons during a hearing, but this is hardly the norm.

Often, a business will participate in a contested case hearing as a protestant to ensure that a permit under consideration by TCEQ complies with all regulatory requirements. For example, when Blue Ridge Landfill TX, LP, applied to the TCEQ seeking to significantly raise the height of its landfill, hearing requests were filed by three Houston television stations alleging that the expansion constituted an incompatible land use as it would block the ability of their nearby Doppler radar towers to monitor weather in the Gulf of Mexico.<sup>189</sup> The Executive Director had simply dismissed such concerns expressed by the public during the comment period, but through the contested case hearing process, these stations were able to develop information and reach an agreement that addressed their concerns.<sup>190</sup> Similarly, in response to the construction and operation of a new landfill in Webb County, an independent oil company joined in the contested case hearing to protect its mineral interests beneath the site.<sup>191</sup>

Quite frequently, nearby landowners find it necessary to pursue a contested case hearing to ensure that an application meets applicable regulatory requirements necessary to protect their property from harm. For example, in the case of an application by Synagro of Texas-CDR, Inc. to apply domestic wastewater treatment plant sludge to over

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and 9, *Canadian, SW. (Granite Wash) and Wildcat Fields, Hemphill County, Texas*, Docket Nos. 10-0220715, 10-0220717, 10-0220718 (application for exception to Texas Railroad Commission well density rule, protested by Chevron USA, Inc.).

189 Tex. Comm'n on Envtl. Quality, *Application by Blue Ridge Landfill TX, LP for an amendment to a Type I MSW Permit; Permit No. 1505A*, Docket No. 2007-0614-MSW, Aug. 2, 2007 (Interim Order).

190 Tex. State Office of Admin. Hearings, *Application by Blue Ridge Landfill TX, LP for an amendment to a Type I MSW Permit; Permit No. 1505A*, No. 582-07-3949, Order No. 13, Nov. 18, 2008 (Interim SOAH order granting withdrawal of KTRK and KHOU as parties due to agreement resolving incompatibility), Order No. 20, Apr. 9, 2009 (Interim SOAH Order granting withdrawal of KRIV as a party due to settlement resolving its concerns related to land use compatibility).

191 Tex. State Office of Admin. Hearings, *Application by Regional Land Management Services, Ltd., for a New Type I Municipal Solid Waste Landfill (MSW Permit No. 2286)*, No. 582-04-0975, Order No. 10, Mar. 13, 2007 (Interim Order admitting Rosetta Res. Operating L.P. as a protesting party).

900 acres in Colorado County, a group of nearby farmers and landowners, as well as the Lower Colorado River Authority, sought a contested case hearing after the Executive Director dismissed their comments.<sup>192</sup> These protesting landowners included a family that had owned the adjacent property since 1837, and this property had been accepted into the Texas Department of Agriculture's Family Land Heritage Program in consideration of its use for over one hundred years as a family farm.<sup>193</sup> These local farmers had much more knowledge regarding the agricultural suitability of the property in the area than did Synagro's asserted experts. Yet, the Executive Director had dismissed the concerns of these landowners as expressed during the comment period.<sup>194</sup> Soon after the submission of pre-filed testimony from these protestants, which included the testimony of a retired soil science professor at Texas A&M University explaining how the site was unsuitable for use as proposed in the permit, Synagro withdrew its application with prejudice rather than defend it at a hearing on the merits.<sup>195</sup>

The contested case hearing process has also played an important role in allowing governmental entities to provide input during the permitting process, particularly local governments. Such governmental entities often have in-house expertise that can assist TCEQ in making the most informed decision. For example, at one point, Tan Terra Environmental Services proposed to locate a landfill in Willacy County that would have been bisected by an existing irrigation canal owned and operated by Delta Lake Irrigation District.<sup>196</sup> The District participated in the hearing to present testimony of its engineering staff regarding the potential impact of the landfill on its canal.<sup>197</sup> In another case, Kinney County, the Cities of Brackettville and Spofford, a soil and water conservation district, and the United States Air Force participated in a contested case hearing to protest a new municipal solid waste landfill proposed near Del Rio.<sup>198</sup> These parties presented expert testimony on the potential for the landfill to increase bird strikes on Air Force planes.<sup>199</sup> This testimony led to the addition of a bird abatement plan.<sup>200</sup> The Commission ultimately denied the application after the administrative law judge refused to grant a request by the applicant to further amend its application to correct deficien-

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192 Tex. Comm'n on Env'tl. Quality, *Application by Synagro of Texas-CDR, Inc. for new Permit No. WQ0004672000*, No. 2005-0070-SLG, Apr. 5, 2005 (Interim Order granting hearing requests).

193 *Id.* at 2–3.

194 Executive Director's Response to Public Comment, Tex. Comm'n on Env'tl. Quality, *Application by Synagro of Texas CDR, Inc., for Tex. Comm'n on Env'tl. Quality Permit No. 04672* (Dec. 15, 2004).

195 Tex. Comm'n on Env'tl. Quality, *Application by Synagro of Texas-CDR, Inc. for new Permit No. WQ0004672000*, TCEQ Docket No. 2005-0070-SLG, May 8, 2006 (Final order dismissing application).

196 Tex. State Office of Admin. Hearings, *Application of Tan Terra Env'tl. Svs., Inc. for MSW Permit No. 2305*, SOAH Docket No. 582-05-0868, p. 4, (Jan. 17, 2006) (Proposal for Decision).

197 *Id.* at 23.

198 Tex. Natural Res. Conservation Comm'n, *An Order Denying Permit No. MSW 2253 to Adobe Eco-Systems, Ltd.*, TNRCC Docket No. 1997-0807-MSW, p. 3 (May 15, 2000) (Final Order denying application).

199 *Id.*

200 *Id.*

cies identified through the hearing process.<sup>201</sup> In denying the application, the Commission noted that the processing of the application had been repeatedly delayed through applicant's actions of amending its application and changing legal counsel.<sup>202</sup>

### C. FEW APPLICATIONS ARE SUBJECT TO HEARING REQUESTS, MUCH LESS A FULL CONTESTED CASE HEARING

Relatively few applications undergo the full contested case hearing process, while those that do generally involve larger facilities with a significant impact. When an application does undergo a contested case hearing, the hearing process often results in more stringent permit terms found necessary to ensure compliance with the minimum requirements of the TCEQ rules. This section only analyzes the statistics for certain types of air, solid waste, and water quality permits. Other types of permits are also subject to House Bill 801, but these categories of permits encompass the primary types of permits of concern in discussing the contested case hearing process at TCEQ.

TCEQ processes more applications for individual water quality permits than any other permitting program at the agency, and these are the least likely to undergo a contested case hearing. Of all applications for either new individual permits or major amendments to existing individual water quality permits submitted in fiscal years 2007 and 2008, only 0.5% underwent the entire House Bill 801 process to receive a decision on the application by the Commission.<sup>203</sup> While no applications for a major amendment of a permit in this period underwent the contested case hearing process, 0.8% of new permits were subject to the full hearing process.<sup>204</sup> TCEQ received no hearing request

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201 *Id.*

202 *Id.*

203 TCEQ received approximately 555 administratively complete applications for the issuance of a new individual water quality permit or the major amendment of an individual water quality permit in fiscal years 2007 and 2008. Tex. Comm'n on Env'tl. Quality, Commissioners Integrated Database, as obtained through Public Information Act request and accessed by author at <http://www10.tceq.texas.gov/epic/CCD/> (last accessed Feb. 6, 2014). Of these, three underwent the full contested case hearing process to a final decision by the Commission. Texas Comm'n on Env'tl. Quality, *Application By Farmersville Investors, LP, For Tex. Pollutant Discharge Elimination Sys. (TPDES) Permit No. WQ0014778001*, TCEQ Docket No. 2008-1305-MWD (July 11, 2011) (Final Order granting permit); Tex. Comm'n on Env'tl. Quality, *Application of South Central, Water Company for Proposed Texas Pollutant Discharge Elimination System, Permit No. WQ0014804001*, TCEQ Docket No. 2008-0473-MWD (June 27, 2011) (Final Order granting permit); Tex. Comm'n on Env'tl. Quality, *Application By Oak Grove Management Company LLC for Tex. Pollutant Discharge Elimination Sys. (TPDES) Permit No. WQ001986000*, TCEQ Docket No. 2009-0398-IWD (Aug. 24, 2010) (Final Order granting permit). For purposes of this article, matters processed in a consolidated manner are counted as a single application. Thus, authorizations with multiple permittees are counted as a single application.

204 In fiscal years 2007 and 2008 combined, TCEQ received a total of 265 applications for new individual water quality permits and approximately 289 applications for the major amendment of a water quality permit. Tex. Comm'n on Env'tl. Quality, Commissioners Integrated Database, as obtained through Public Information Act request and accessed by author at <http://www10.tceq.texas.gov/epic/CCD/> (last accessed Feb. 6, 2014). TCEQ also received 1053 renewal applications. *Id.*

regarding the vast majority of water quality permit applications subject to House Bill 801 submitted in this period.<sup>205</sup> In many cases, hearing requests were withdrawn early enough for the Executive Director to issue the permit without a consideration of the application by the Commission at all, although in several cases the applicant withdrew its application after drawing several hearing requests.<sup>206</sup> In all, TCEQ referred only 6% of applications for new individual water quality permits to SOAH, while referring only 2% of applications for the amendment of a water quality permit to SOAH.<sup>207</sup> In most individual water quality permit applications referred to SOAH, the application was remanded to the Executive Director for issuance of the permit after protests were withdrawn, although in a few cases the remand occurred due to the withdrawal of an application.<sup>208</sup> Of the four applications referred to SOAH that underwent a full contested case hearing on the merits of the application, one was issued after a single hearing,<sup>209</sup> two of the permits

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205 Of the approximately 265 applications for new individual water quality permits, hearing requests were received on forty-six applications, or 17% of applications. *Id.* Similarly, of 289 applications for the major amendment of an individual water quality permit, TCEQ received hearing requests with regard to only twenty-nine applications, or 10% of applications. *Id.*

206 In thirteen of the forty-six applications for a new permit subject to a hearing request on a new application, the applicant withdrew the application prior to processing of the hearing requests, and in eleven cases the hearing requesters withdrew their hearing request prior to its consideration by the Commission. *Id.* In five of the twenty-nine cases where hearing requests were filed on an application for a major amendment, the applicant withdrew the application prior to processing of the hearing requests, and in twelve other cases the hearing requesters withdrew their hearing requests and the permits were granted. *Id.*

207 Out of 265 applications for new individual water quality permits declared administratively complete in fiscal years 2007 and 2008, sixteen applications were referred to SOAH. Tex. Comm'n on Env'tl. Quality, Commissioners Integrated Database, as obtained through Public Information Act request and accessed by author at <http://www10.tceq.texas.gov/epic/CCD/> (last accessed Feb. 6, 2014). Out of two 289 applications for major amendments to individual water quality permits declared administratively complete in fiscal years 2007 and 2008, only five applications were referred to SOAH. *Id.*

208 Of the sixteen applications for new individual wastewater permits filed in this period referred to SOAH, nine were remanded due to a withdrawal of all protests, and two were remanded due to the withdrawal of the application. *Id.* One was remanded due to the absence of protestants at the preliminary hearing. *Id.* Of the five major amendment applications filed in this period referred to SOAH, three were remanded to the Executive Director for issuance of the permit due to withdrawal of all protests. *Id.*

209 Tex. Comm'n on Env'tl. Quality, *Application By Oak Grove Management Company LLC for Tex. Pollutant Discharge Elimination Sys. (TPDES) Permit No. WQ001986000*, TCEQ Docket No. 2009-0398-IWD (Aug. 24, 2010) (Final Order granting permit).

were issued after being remanded to SOAH for a second hearing,<sup>210</sup> and the last has been dismissed as moot.<sup>211</sup>

Applications for the issuance of a new prevention of significant deterioration (PSD) air permit for a major source, or the major amendment of a PSD permit, were somewhat more likely to undergo the full H.B. 801 process, although TCEQ processed significantly fewer of these applications than water quality applications.<sup>212</sup> In particular, in fiscal years 2007 and 2008 combined, TCEQ received thirty-three administratively complete applications for new PSD permits, and fifty-five applications for the major amendment of a PSD permit, with two other applications categorized as applications for both a new permit and a major amendment.<sup>213</sup> Approximately one in three applications for a new PSD permit received at least one hearing request, and approximately one in six applications for the major amendment of a PSD permit received at least one hearing request.<sup>214</sup> Out of the thirty-three applications for new PSD permits submitted in fiscal years 2007 and 2008, five have been referred to SOAH.<sup>215</sup> Similarly, TCEQ referred to SOAH only two

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210 Texas Comm'n on Env'tl. Quality, *Application By Farmersville Investors, LP, For Tex. Pollutant Discharge Elimination Sys. (TPDES) Permit No. WQ0014778001*, TCEQ Docket No. 2008-1305-MWD (July 11, 2011) (Final Order granting permit); Tex. Comm'n on Env'tl. Quality, *Application of South Central, Water Company for Proposed Texas Pollutant Discharge Elimination System, Permit No. WQ0014804001*, TCEQ Docket No. 2008-0473-MWD (June 27, 2011) (Final order granting permit).

211 Tex. State Office of Admin. Hearings, *Application of Jeremiah Venture LP for Proposed Texas Pollutant Discharge Elimination System, Permit No. WQ0014785001*, SOAH Docket No. 582-09-1617 (March 20, 2014) Order No. 36 Granting Unopposed Motion to Dismiss. Unopposed Motion to Dismiss, Tex. State Office of Admin. Hearings, *Application of Jeremiah Venture LP for Proposed Texas Pollutant Discharge Elimination System, Permit No. WQ0014785001*, SOAH Docket No. 582-09-1617.

212 In fiscal years 2007 and 2008 combined, TCEQ received eighty-six applications for the issuance or amendment of a prevention of significant deterioration (PSD) permit, as compared to 554 applications for the issuance or amendment of an individual water quality permit. Tex. Comm'n on Env'tl. Quality, Commissioners Integrated Database, as obtained through Public Information Act request and accessed by author at <http://www10.tceq.texas.gov/epic/CCD/> (last accessed Feb. 22, 2014).

213 In this count, applications to both renew and amend an authorization have been counted as amendments. The applications of the U.S. Department of the Army for Permit No. PSDTX1112 and ExxonMobil Corporation for Permit No. PSDTX No. 1121 were each classified as both an amendment and a renewal. *Id.*

214 Of the thirty-three applications for a new PSD permit declared administratively complete in this period, at least one hearing request was received in each of eleven applications. Of the fifty-five applications for the amendment of a PSD permit declared administratively complete in this period, at least one hearing request was received in each of eight applications. *Id.* No hearing requests were filed with regard to the two applications categorized as involving both the issuance of an amendment and new permit. *Id.*

215 Tex. Comm'n on Env'tl. Quality, *Application of Madison Bell Partners, LP for Permit No. PSDTX1105*, TCEQ Docket No. 2008-1786-AIR, 2009 WL 755352 (Mar. 17, 2009) (Interim Order); Tex. Comm'n on Env'tl. Quality, *Application of Aspen Power, LLC for Permit No. PSDTX1089*, TCEQ Docket No. 2008-1145-AIR, 2009 WL 2878497; Tex. Comm'n on Env'tl. Quality, *Application of IPA Coletto Creek, LLC for Permit No. PSD-TX-1118*, TCEQ Docket No. 2009-0032-AIR, 2010 WL 1929774 (May 3, 2010); Tex. Comm'n on



applications for the major amendment of a PSD permit out of fifty-five applications declared administratively complete in this period.<sup>216</sup>

In four of the five applications for a new PSD permit submitted in this period that were referred to SOAH, the contested case hearing process produced a more stringent permit. The sole exception was the application by Madison Bell Partners, L.P. to construct a natural-gas fired power generation plant.<sup>217</sup> This application was remanded to the TCEQ for issuance of the permit within two months of the preliminary hearing due to a withdrawal of all protests.<sup>218</sup>

In all four cases other than the *Madison Bell Partners* matter, the hearing process resulted in a finding by TCEQ that the Executive Director's draft permit did not contain conditions consistent with the requirements of TCEQ's regulations. An application by Aspen Power to install a new wood-waste-fueled boiler proceeded through a full contested case hearing.<sup>219</sup> At the close of that hearing, the ALJ issued a Proposal for Decision (PFD) recommending that the application be denied due to a finding that the draft permit did not meet all requirements of the TCEQ rules.<sup>220</sup> Prior to the consideration of

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Envtl. Quality, *Application of Tenaska Trailblazer Partners LLC for Permit No. PSD-TX-1123*, TCEQ Docket No. 2009-1093-AIR, 2010 WL 4021307 (Dec. 29, 2010); Tex. Comm'n on Env'tl. Quality, *Application of Las Brisas Energy Center LLC for Permit No. PSD-TX-1138*, TCEQ Docket No. 2009-0033-AIR, 2010 WL 2737018 (July 1, 2010) (all referred to SOAH). In one of the 33 applications for a new PSD permit, the applicant decided to pursue the project as a conventional Subchapter B construction permit instead of a flexible permit, and thus the application is not subject to a PSD review. Executive Director's Response to Hearing Requests, Tex. Comm'n on Env'tl. Quality, *Application of Citgo Refining and Chemicals Co. for Permit No.80693*, TCEQ Docket No. 2013-2078-AIR, (March 5, 2014) Hearing requests were received with regard to this application, and it may still be referred to SOAH. *Id.* The Executive Director's Response to Public Comments in that matter was not issued until September 24, 2013. *Id.* Tex. Comm'n on Env'tl. Quality, Commissioners' Integrated Database, as obtained through Public Information Act request and accessed by author at <http://www10.tceq.texas.gov/epic/CCD/> (last accessed July 14, 2014).

216 Tex. Comm'n on Env'tl. Quality, *Application of ExxonMobil Corp. for Permit No. PSDTX992M1*, TCEQ Docket No. 2007-1460-AIR (Nov. 12, 2007) (Interim Order); Tex. Comm'n on Env'tl. Quality, *Application of Flint Hills Res. for Permit No. PSDTX413M8*, TCEQ Docket No. 2008-0293-AIR (Sept. 26, 2008) (Interim Order).

217 Tex. Comm'n on Env'tl. Quality, *Application of Madison Bell Partners, LP for Permit No. PSDTX1105*, TCEQ Docket No. 2008-1786-AIR, Applicant Madison Bell Partners L.P.'s Response to Hearing Requests, p. 1 (Feb. 13, 2009), available at <http://www7.tceq.state.tx.us/uploads/eagendas/hr-rfr/2008-1786-AIR-ApR.pdf> (last visited May 25, 2014); Tex. State Office of Admin. Hearings, *Application of Madison Bell Partners, LP for Permit No. PSDTX1105*, SOAH Docket No. 582-09-3280 (July 21, 2009) (Order No. 3 Granting Motion to Dismiss and Remand).

218 Tex. State Office of Admin. Hearings, *Application of Madison Bell Partners, LP for Permit No. PSDTX1105*, SOAH Docket No. 582-09-3280 (July 21, 2009) (Order No. 3 Granting Motion to Dismiss and Remand).

219 Tex. State Office of Admin. Hearings, *Application of Aspen Power, LLC for a State Air Quality Permit, Prevention of Significant Deterioration Air Quality Permit, & A Hazardous Air Pollutant Major Source Permit*, SOAH Docket No. 582-09-0636, 2009 WL 2878494, \*26 (Aug. 24, 2009) (Proposal for Decision).

220 *Id.*

this recommendation by the Commission, the applicant and protestants reached an agreement incorporating more stringent emission limits to address deficiencies in the application, and the matter was remanded to the Executive Director for issuance of the permit.<sup>221</sup>

SOAH also conducted a contested case hearing regarding an application by IPA Coletto Creek, LLC to construct a new pulverized coal-fired electric generating unit and related facilities at IPA's existing Coletto Creek Power Station.<sup>222</sup> In their PFD regarding this application, the ALJs found that TCEQ rules required a more stringent emission limit for PM/PM<sub>10</sub> than that contained in the Executive Director's draft permit.<sup>223</sup> The final order issued by the Commission adopted this finding and incorporated the emission limit for PM/PM<sub>10</sub> recommended by the ALJs.<sup>224</sup>

A similar outcome resulted from the consideration of an application by Las Brisas Energy Center (LBEC) to construct four electric generating units (EGUs) and related facilities in Corpus Christi. After an initial contested case hearing, the Executive Director took the position that the matter should be remanded to him for further consideration of the proposed material handling operations.<sup>225</sup> The ALJs, however, found that the flaws in the permit went deeper, and so concluded that "numerous aspects of [Las Brisas Energy Center's] air modeling were simply inadequate and provide insufficient assurance that the permits, if issued, would comply with all applicable air quality standards and be protective of human health and the environment."<sup>226</sup> Upon considering this PFD, the Commission remanded the matter for another hearing to, among other things, consider

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221 *Joint Motion for Remand re: Application of Aspen Power, LLC for a State Air Quality Permit, Prevention of Significant Deterioration Air Quality Permit, & A Hazardous Air Pollutant Major Source Permit*, SOAH Docket No. 582-09-0636, TCEQ Docket No. 2008-1145-AIR (Oct. 20, 2009); Marked Agenda, TCEQ Public Meeting Oct. 21, 2009, Item No. 2, available at [http://www.tceq.state.tx.us/assets/public/comm\\_exec/agendas/comm/marked/2009/091021.mrk.pdf](http://www.tceq.state.tx.us/assets/public/comm_exec/agendas/comm/marked/2009/091021.mrk.pdf) (last visited May 25, 2014).

222 *Tex. State Office of Admin. Hearings, Application of IPA Coletto Creek, LLC for State Air Quality Permit 83778 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1118 and for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-18*, SOAH Docket No. 582-09-2045, 2010 WL 462309 (Feb. 8, 2010) (Proposal for Decision).

223 *Id.*

224 *Tex. Comm'n on Env'tl. Quality, Application of IPA Coletto Creek, LLC for State Air Quality Permit 83778 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1118 and for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-18*, TCEQ Docket No. 2009-0032-AIR, 2010 WL 1929774 (May 3, 2010) (Final Order Granting Permit); *Tex. State Office of Admin. Hearings, Application of IPA Coletto Creek, LLC for State Air Quality Permit 83778 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1118 and for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-18*, SOAH Docket No. 582-09-2045, 2010 WL 462309 (May 3, 2010) (Finding of Fact No. 212, Conclusion of Law No. 30).

225 *Tex. State Office of Admin. Hearings, Application of Las Brisas Energy Center, LLC for State Air Quality Permit; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138*, SOAH Docket No. 582-09-2005, 2010 WL 1387854 (Mar. 29, 2010) (Proposal for Decision).

226 *Tex. State Office of Admin. Hearings, Application of Las Brisas Energy Center, LLC for State Air Quality Permit; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138*, Docket No. 582-09-2005, 2010 WL 1387854, at \*73, Mar. 29, 2010 (Proposal for Decision).

additional modeling by the applicant.<sup>227</sup> On remand, the ALJs found that the Applicant's modeling was still flawed, but that the Executive Director had performed modeling that did not suffer from the same deficiencies.<sup>228</sup> Ultimately, the Commission issued the Las Brisas permit in reliance on modeling performed by the Executive Director, with more stringent emission limits than those contained in the draft permit.<sup>229</sup> In its final order granting the Las Brisas Permit, the Commission found that:

Many of the concerns addressed during the hearings on this matter were raised by the Protestants early in this proceeding and well before the original hearing. This demonstrates that the length of the hearings likely could have been shortened if LBEC had properly addressed those concerns before the original hearing.<sup>230</sup>

In this manner, the Commission itself formally acknowledged that the length of the process in the Las Brisas matter was largely due to the Applicant's failure to address problems in its application.

The conduct of a contested case hearing with regard to the application of Tenaska Trailblazer Partners, LLC (Tenaska) to construct a coal-fired electric power generating facility likewise resulted in a finding that the Executive Director's draft permit did not contain sufficiently stringent emissions limits. At the close of the contested case hearing, the ALJs found that emissions limits for nitrous oxides (NO<sub>x</sub>), carbon monoxide (CO), volatile organic compounds (VOCs), particulate matter (PM), lead, mercury, and other hazardous air contaminants needed to be lowered for the permit to comply with applicable regulations.<sup>231</sup> Ultimately, the Commission did not adopt all of the ALJ's proposed

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227 Tex. Comm'n on Env'tl. Quality, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit*; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138, TCEQ Docket No.2009-0033-AIR (July 1, 2010) (Interim TCEQ Order remanding matter to SOAH).

228 Tex. State Office of Admin. Hearings, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit*; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138, SOAH Docket No. 582-09-2005 (Dec. 1, 2010) (Proposal for Decision on Remand).

229 Tex. Comm'n on Env'tl. Quality, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit*; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138, TCEQ Docket No. 2009-0033-AIR (Feb. 22, 2011) (Final Order Granting Permit). For example, the emission limit for PM/PM<sub>10</sub> was more stringent in the final permit issued. Compare draft permit Total PM/PM<sub>10</sub> emission limit of 0.033 lb/MMBtu with final permit limitation of 0.025 lb/MMBtu. Tex. State Office of Admin. Hearings, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit*; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138, SOAH Docket No. 582-09-2005, 2010 WL 1387854 (Mar. 29, 2010) (Proposal for Decision). Tex. Comm'n on Env'tl. Quality, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit*; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138, TCEQ Docket No. 2009-0033-AIR (Feb. 22, 2011) (Final Order Granting Permit) (Finding of Fact No. 237).

230 Tex. Comm'n on Env'tl. Quality, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit*; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138, TCEQ Docket No. 2009-0033-AIR, p.41 (Feb. 22, 2011) (Final Order Granting Permit) (Finding of Fact No. 296).

231 Tex. State Office of Admin. Hearings, *Application of Tenaska Trailblazer Partners, L.L.C. for State Air Quality Permit 84167, HAP-13, and PSD-TX-1123*, 2010 WL 4021306, \*47 (Oct. 1, 2010) (Proposal for Decision).

revisions, but included in the final permit the stricter limits for NO<sub>x</sub>, CO, and particulate matter found necessary by the ALJ.<sup>232</sup>

SOAH recommended granting the Tenaska application and the IPA Coletto Creek LLC Application if additional conditions were added to each permit in each case to meet the minimum requirements of TCEQ's rules.<sup>233</sup> In all three of these cases—Tenaska, Las Brisas, and Coletto Creek—the Commission ultimately issued the permits.<sup>234</sup> Considering these three permit applications and the Aspen Power application, four out of the thirty-three applications submitted to the TCEQ for a new PSD permit in the 2007 and 2008 fiscal years progressed through the entire contested case hearing process, and only three proceeded through the entire process to a final decision on the application. In all four of these cases that progressed through the hearing process, the permit ultimately issued contained additional conditions as recommended by SOAH that the TCEQ itself found necessary to ensure compliance with TCEQ's rules.<sup>235</sup>

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232 Tex. Comm'n on Env'tl. Quality, *Application of Tenaska Trailblazer Partners, L.L.C. for State Air Quality Permit 84167, HAP-13, and PSD-TX-1123*, TCEQ Docket No. 2009-1093-AIR (Dec. 29, 2010) (Final Order Granting Permit). Compare limitations for NO<sub>x</sub>, CO, PM/PM<sub>10(filter)</sub>, PM/PM<sub>10(total)</sub>, and HF from Emission Point 54 (Pulverized Coal Burner) in draft permit and final permit.

233 Tex. State Office of Admin. Hearings, *Application of Tenaska Trailblazer Partners, L.L.C. for State Air Quality Permit 84167, HAP-13, and PSD-TX-1123*, SOAH Docket No. 582-09-6185, \*2 (Oct. 1, 2010) (Proposal for Decision). Tex. State Office of Admin. Hearings, *Application of IPA Coletto Creek, LLC for State Air Quality Permit 83778 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1118 and for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-18*, SOAH Docket No. 582-09-2045, 2010 WL 462309, \*67 (Feb. 8, 2010) (Proposal for Decision).

234 Tex. Comm'n on Env'tl. Quality, *Application of Tenaska Trailblazer Partners, L.L.C. for State Air Quality Permit 84167, HAP-13, and PSD-TX-1123*, TCEQ Docket No. 2009-1093-AIR (Dec. 29, 2010) (Final Order Granting Permit). Tex. Comm'n on Env'tl. Quality, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138*, TCEQ Docket No. 2009-0033-AIR (Feb. 22, 2011) (Final Order Granting Permit). Tex. Comm'n on Env'tl. Quality, *Application of IPA Coletto Creek, LLC for State Air Quality Permit 83778 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1118 and for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-18*, TCEQ Docket No. 2009-0032-AIR, 2010 WL 1929774 (May 3, 2010) (Final Order Granting Permit).

235 Tex. Comm'n on Env'tl. Quality, *Application of Tenaska Trailblazer Partners, L.L.C. for State Air Quality Permit 84167, HAP-13, and PSD-TX-1123*, TCEQ Docket No. 2009-1093-AIR (Dec. 29, 2010) (Final Order Granting Permit). Tex. Comm'n on Env'tl. Quality, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit; Nos. 85013, HAP 48, PAL41, and PSD-TX-1138*, TCEQ Docket No. 2009-0033-AIR (Feb. 22, 2011) (Final Order Granting Permit). Tex. Comm'n on Env'tl. Quality, *Application of IPA Coletto Creek, LLC for State Air Quality Permit 83778 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1118 and for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-18*, TCEQ Docket No. 2009-0032-AIR, 2010 WL 1929774 (May 3, 2010) (Final Order Granting Permit). *Joint Motion for Remand re: Application of Aspen Power, LLC for a State Air Quality Permit, Prevention of Significant Deterioration Air Quality Permit, & A Hazardous Air Pollutant Major Source Permit*, SOAH Docket No. 582-09-0636, TCEQ Docket No. 2008-1145-AIR (Oct. 20, 2009); Marked Agenda, TCEQ Public Meeting Oct. 21, 2009, Item

Of the two applications referred to SOAH for the amendment of a PSD permit, one was remanded prior to the preliminary hearing due to a withdrawal of all protests, and SOAH recommended the other for approval after a contested case hearing.<sup>236</sup> Thus, of the fifty-five applications for the major amendment of a PSD permit declared administratively complete in the 2007 and 2008 fiscal years, only one progressed through the entire House Bill 801 contested case hearing progress to a final decision on the application.

In fiscal years 2007 and 2008, TCEQ's Municipal Solid Waste Program received twenty-two administratively complete applications subject to the House Bill 801, with eight applications for new permits, thirteen applications for amended permits, and one application characterized as both a new application and an amendment.<sup>237</sup> Of the nine applications for a new permit, at least one contested case hearing request was received for five of the applications: an application by Republic Waste Services to construct and operate a new transfer station,<sup>238</sup> an application by Darling International, Inc. to authorize the processing of grease trap waste,<sup>239</sup> an application of GOPDQ NET LLC for the authorization of a new liquid waste processing facility,<sup>240</sup> an application by the Blossom Prairie Landfill for the construction and operation of a new landfill,<sup>241</sup> and an application by Fort Clark Springs Association for an arid-exempt landfill.<sup>242</sup>

Republic asked that its application be directly referred to SOAH.<sup>243</sup> All hearing requests were denied with respect to Darling's application,<sup>244</sup> Prairie Blossom Landfill and GOPDQ withdrew their applications. All hearing requests were withdrawn with

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No. 2, available at [http://www.tceq.state.tx.us/assets/public/comm\\_exec/agendas/comm/2009/091021.mrk.pdf](http://www.tceq.state.tx.us/assets/public/comm_exec/agendas/comm/2009/091021.mrk.pdf) (last visited May 25, 2014).

- 236 Tex. Comm'n on Env'tl. Quality, *ExxonMobil Oil Corp. Application for Permit No. PSDTX992M1*, TCEQ Docket No. 2007-1460-AIR (Jan. 5, 2007); Tex. Comm'n on Env'tl. Quality, *Flint Hills Res. Application for Permit No. PSDTX413M8*, TCEQ Docket No. 2008-0293-AIR (Aug. 9, 2006).
- 237 Tex. Comm'n on Env'tl. Quality, Commissioners Integrated Database, as obtained through Public Information Act request and accessed by author at <http://www10.tceq.texas.gov/epic/CCD/> (last accessed Feb 6, 2014).
- 238 Tex. Comm'n on Env'tl. Quality, *Application of Republic Waste Services of Texas, Ltd. for Municipal Solid Waste Permit No. MSW-2356*, TCEQ Docket No. 2009-2058-MSW, 2011 WL 6778467, \*1 (Dec. 15, 2011) (Final Order Granting Permit).
- 239 Tex. Comm'n on Env'tl. Quality, *Application by Darling International, Inc. for new Municipal Solid Waste Permit No. 2353*, TCEQ Docket No. 2008-1446-MSW, 2009 WL 762309 (Mar. 3, 2009) (Final Order granting permit and denying all hearing requests).
- 240 Tex. Comm'n on Env'tl. Quality, *Application by GOPDQ NET LLC for Municipal Solid Waste Permit Major Amendment for Permit No. 2350*, TCEQ Docket No. 2009-1637-MSW (Feb. 14, 2008).
- 241 Tex. Comm'n on Env'tl. Quality, *Application by Blossom Prairie Landfill for Municipal Solid Waste Permit No. 2358*, TCEQ Docket No. 2009-1523-MSW (Aug. 22, 2008).
- 242 Tex. Comm'n on Env'tl. Quality, *Application of Fort Clark Springs Association for new Municipal Solid Waste Permit No. 2354*, TCEQ Docket No. 2008-1247-MSW (July 26, 2007).
- 243 Tex. State Office of Admin. Hearings, *In the Matter of the Application of Republic Waste Services of Texas, Ltd. for MSW Permit No. 2356*, SOAH Docket No. 582-10-2069, p. 2 (Sept. 26, 2011) (Proposal for Decision).
- 244 Tex. Comm'n on Env'tl. Quality, *Application by Darling International, Inc. for new Municipal Solid Waste Permit No. 2353*, TCEQ Docket No. 2008-1446-MSW, 2009 WL 762309 (Mar. 3, 2009) (Final Order granting permit and denying all hearing requests).

regard to Fort Clark Springs Association's application.<sup>245</sup> Republic's permit application underwent a full contested case hearing, after which SOAH recommended that the permit be granted, and the Commission granted the permit.<sup>246</sup> In this manner, of the nine applications for new MSW permits submitted in the 2007 and 2008 fiscal years, only one progressed through the entire H.B. 801 process to a decision by the Commission.

Of the twelve applications for amended municipal solid waste permits declared administratively complete in the 2007 and 2008 fiscal years, two of the applications were subject to at least one hearing request: an application by Zapata County for a lateral and vertical expansion of its landfill,<sup>247</sup> and an application by Ruffino Hills for a transfer station.<sup>248</sup> TCEQ denied all requests for hearing on the Zapata County Landfill application.<sup>249</sup> The Ruffino Hills application was referred to SOAH after the Commission granted hearing requests<sup>250</sup> and then was remanded from SOAH to the Executive Director for issuance of the permit after all protests were withdrawn prior to the commencement of the hearing.<sup>251</sup> Thus, no application for the amendment of a municipal solid waste permit declared administratively complete in fiscal year 2008 underwent the full contested case hearing process.

#### **D. THE SUBMISSION OF DEFICIENT APPLICATIONS AND TCEQ'S WILLINGNESS TO NEGOTIATE ON SUCH APPLICATIONS CONSTITUTE THE PRIMARY CAUSES OF DELAY IN THE PERMITTING PROCESS**

While representatives of the regulated community frequently complain that the contested case hearing process unduly extends the time required to obtain a permit, the truth is that the applicants' and TCEQ's approach to the permitting process are the primary drivers of delays in the permitting process.

TCEQ's technical staff, as well as the Commissioners themselves, have demonstrated a tremendous willingness to allow the modification of permit applications at any point in the permitting process, which greatly reduces the incentive of applicants to provide a high-quality initial application. Even a consideration of the permits mentioned above reflects this pattern. The Commission found it necessary to remand all three water quality applications involved for a second hearing to allow the applicant to fully address

245 Tex. Comm'n on Envtl. Quality, *Application of Fort Clark Springs Association for new Municipal Solid Waste Permit No. 2354*, TCEQ Docket No. 2008-1247-MSW (July 1, 2008).

246 Tex. Comm'n on Env. Quality, *Application of Republic Waste Services of Texas, LTD., for Type V Permit No. MSW-2356*, Docket No. 2009-2058-MSW (Final order granting permit).

247 Tex. Comm'n on Env. Quality, *Application of Zapata County for Major Amendment of MSW Permit No. 783*, Docket No. 2007-1792-MSW, 2009 WL 650458, Jan. 20, 2009 (Final Order Denying hearing requests and granting permit).

248 Tex. Comm'n Env. Quality, *application of Ruffino Hills Transfer Station, LP for an amendment to Municipal Solid Waste Permit No. 1355A*, Docket No. 2011-1071-MSW, 2011 WL 3805417, Aug. 22, 2011 (Interim Order granting hearing requests).

249 Tex. Comm'n on Envtl. Quality, *Application by Zapata County for Major Amendment of Municipal Solid Waste Permit No. 783*, TCEQ Docket No. 2007-1792-MSW, 2009 WL 650458 (Jan. 20, 2009) (Final Order denying hearing requests and granting permit).

250 Tex. Comm'n Envtl. Quality, *Application of Ruffino Hills Transfer Station, LP for Amendment to Municipal Solid Waste Permit No. 1355A*, TCEQ Docket No. 2011-1071-MSW, 2011 WL 3805417 (Aug. 22, 2011) (Interim Order granting hearing requests).

251 *Id.* (SOAH Order No. 10, dated June 25, 2012).

issues that the Commission felt were not adequately resolved after an initial hearing on the merits.<sup>252</sup> With regard to the municipal solid waste matter undergoing a hearing, Republic Waste Services sought an extension of briefing deadlines<sup>253</sup> and was granted an abatement to modify its permit application.<sup>254</sup> Similarly, in the Las Brisas matter, a second hearing was prompted by deficiencies in the application.

In many more cases, the poor quality of applications submitted to TCEQ, and TCEQ's willingness to allow modification of those applications, delays the Executive Director's own technical review of the application and the time required to complete a response to comments. The technical review phase of the permitting process typically occupies the bulk of the time that a permit spends under consideration by the TCEQ. For example, most individual water quality permit applications for either a new permit or a major amendment take less than seven months from the date of application to the end of the Executive Director's technical review, while the total time spent from application to issuance for most of these applications is slightly more than ten months. If shortening the permitting process is the goal, then reforms should focus on how to enable the Executive Director's administrative and technical review to move more quickly since, for the vast majority of applications, these steps occupy far more time in the permitting process than does the public participation process. While TCEQ's limited resources constitute one factor in determining the length of the staff's technical review, other factors include time needed to develop critiques of deficient applications and time spent repeatedly reviewing applications due to changes in those applications. As applicants have full control over the quality of their initial applications, the most effective way to shorten the permitting process is to improve the quality of initial applications. Rather than blaming delays in the process on the public for pointing out flaws in the application, the more effective approach would be to find ways to increase the quality of initial applications and reduce the ability of applicants to alter applications as the permitting process moves forward.

## E. TCEQ ENCROACHMENT ON THE INDEPENDENCE OF SOAH

SOAH's purpose is to provide an independent administrative judiciary capable of objectively resolving administrative disputes.<sup>255</sup> As noted by the administrative law judges when recommending denial of an application by Las Brisas Energy Center, LLC,

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252 Tex. State Office of Admin. Hearings, *Application by Farmersville Investors, LP, for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014778001*, SOAH Docket No. 582-09-2895, 2011 WL 457991, \*2 (Feb. 7, 2011) (Proposal for Decision); Tex. State Office of Admin. Hearings, *Application by Farmersville Investors, LP, for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014778001*, SOAH Docket No. 582-09-2895, 2011 WL 457991, \*2 (Feb. 7, 2011) (Proposal for Decision).

253 Tex. State Office of Admin. Hearings, *Application of Republic Waste Services of Texas, Ltd. for Municipal Solid Waste Permit No. 2356*, SOAH Docket No. 582-10-2069, Order No. 18 (Interim Order granting request to revise schedule for reply briefs).

254 Tex. State Office of Admin. Hearings, *Application of Republic Waste Services of Texas, Ltd. for Municipal Solid Waste Permit No. 2356*, Docket No. 582-10-2069, Order No. 5 (Interim Order granting motion to abate).

255 Tex. Att'y Gen. Op. No. DM-231 (1993).

“as our agency’s core values reflect, our role is simply to call balls and strikes.”<sup>256</sup> To effectively perform this role, SOAH must operate with a certain level of independence. TCEQ’s interactions with SOAH over the past several years call into question whether TCEQ respects this critical need to preserve SOAH’s independence in the adjudicatory process.

Unfortunately, on several occasions in recent years the TCEQ Commissioners have taken it upon themselves to reverse the call of the umpires. One example involved the processing of applications by Texcom Gulf, Disposal, L.L.C. (“Texcom”) for waste disposal well permits in Montgomery County near Conroe. Lone Star Groundwater Conservation District (“Lone Star”) participated in the contested case hearing as a party, presenting evidence questioning Texcom’s assumptions regarding permeability values and the behavior of nearby faults.<sup>257</sup> After the initial hearing and consideration of this evidence, the ALJs found that Texcom had based its groundwater modeling on improper assumptions.<sup>258</sup> Rather than recommend denial of the application, the ALJs proposed that the Commission require additional testing prior to operation of the facility.<sup>259</sup>

Upon considering this PFD, the Commission remanded the matter to SOAH to allow the applicant an opportunity to present additional modeling based on the more conservative permeability and transmissivity assumptions the ALJs had found appropriate, as well as alternative disposal options.<sup>260</sup> On remand, Denbury Onshore, LLC, a company holding oil, gas, and mineral interests for the acreage where Texcom proposed to operate the injection wells, joined the proceedings as a party.<sup>261</sup> Denbury presented evidence that the ALJs found persuasive, indicating that injected wastewater could move between geologic formations in a manner that Texcom had denied.<sup>262</sup> Further, the City of Conroe, participating as a party, presented evidence regarding the ability of its own wastewater treatment plant to serve as an alternate disposal option for the waste Texcom proposed to treat.

Upon the close of the hearing on remand, the ALJs issued an extensive PFD concluding that the preponderance of the evidence did not demonstrate that the injected

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256 Tex. State Office of Admin. Hearings, *Application of Las Brisas Energy Center, LLC for State Air Quality Permit Nos. 85013, HAP 48, PAL41, and PSD-TX-1138*, SOAH Docket 582-09-2005 (Dec. 1, 2010).

257 Tex. State Office of Admin. Hearings, *Application of Texcom Gulf, Disposal, L.L.C. for Tex. Comm’n on Env’tl. Quality Underground Injection Control Permit Nos. WDW410, WDW411, WDW412, and WDW413*, SOAH Docket No. 582-07-2376, pp. 2, 33, 39-40 (Apr. 25, 2008) (Proposal for Decision).

258 *Id.* at 43–44.

259 *Id.* at 64.

260 Tex. Comm’n on Env’tl. Quality, *Application of Texcom Gulf, Disposal, L.L.C. for Tex. Comm’n on Env’tl. Quality Underground Injection Control Permit Nos. WDW410, WDW411, WDW412, and WDW413*, TCEQ Docket No. 2007-0204-WDW (Dec. 12, 2008) (Interim Order remanding matter to SOAH).

261 Tex. State Office of Admin. Hearings, *Application of Texcom Gulf, Disposal, L.L.C. for Tex. Comm’n on Env’tl. Quality Underground Injection Control Permit Nos. WDW410, WDW411, WDW412, and WDW413*, SOAH Docket No. 582-07-2376, pp. 4, 15 (Apr. 25, 2008) (Amended Proposal for Decision after Remand).

262 *Id.* at 47–53.



waste would not migrate back to the surface.<sup>263</sup> Further, the ALJs found that the Conroe wastewater treatment plant constituted a reasonable alternative to the proposed injection wells.<sup>264</sup> Accordingly, the ALJs recommended that Texcom's application be denied.<sup>265</sup>

Despite the extensive factual record reflected in the PFD, the Commissioners reversed numerous proposed findings of fact on issues such as the character and behavior of the geologic formations and features involved, as well as the potential for migration of injected wastewater.<sup>266</sup> As for the availability of the Conroe wastewater treatment plant, the Commissioners concluded that the wastewater treatment plant was not a reasonable disposal alternative.<sup>267</sup> In short, the Commissioners disregarded the ALJs' factual analysis and instead substituted their own judgment of the facts.

In at least one case, a decision by the Commission to substitute its judgment for that of the ALJ on a factual question raised dissent between the commissioners themselves. In considering the application of Lerin Hills, Ltd. for a wastewater permit, a majority of the Commission voted to reject the ALJ's recommendation to deny the permit.<sup>268</sup> The ALJ had conducted an exhaustive review of evidence related to the lowering of water quality in the receiving waters resulting from the discharge and concluded that this change constituted a greater than *de minimis* change in water quality in violation of TCEQ's anti-degradation policy.<sup>269</sup> Chairman Shaw and Commissioner Garcia voted to reject this recommendation, and rejected and modified numerous findings of fact made by Judge Kilgore.<sup>270</sup> But Commissioner Soward voted against such a rejection of the ALJ's analysis, noting:

You had expert witnesses and the ALJ sat there and listened to them and evaluated them, evaluated their testimony, observed their demeanor, evaluated the credibility, and still said no. So, I'm concerned about overruling the ALJ who I

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263 Tex. State Office of Admin. Hearings, *Application of Texcom Gulf, Disposal, L.L.C. for Tex. Comm'n on Env'tl. Quality Underground Injection Control Permit Nos. WDW410, WDW411, WDW412, and WDW413*, SOAH Docket No. 582-07-2376, pp. 96–97 (Apr. 25, 2008) (Amended Proposal for Decision after Remand).

264 *Id.* at 80–90 (reasonable alternatives analysis), 96–97 (groundwater analysis).

265 *Id.* at 118–119.

266 Tex. Comm'n on Env'tl. Quality, *Application for Permit Nos. WDW410, WDW411, WDW412, and WDW413 to Texcom Gulf Disposal, LLC*, TCEQ Docket No. 2007-0204-WDW (Apr. 7, 2011) (Final Order granting permits).

267 *Id.*

268 Texas Comm'n on Env. Quality, *Application by Lerin Hills, Ltd. for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014712001*, TCEQ Docket No. 2007-1178-MWD (July 7, 2009) (Final Order granting permit).

269 Tex. State Office of Admin. Hearings, *Application by Lerin Hills, Ltd. for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014712001*, Docket No. 582-08-0690, 2009 WL 635590 \*17–\*21 (Mar. 4, 2009) (Proposal for Decision recommending denial of permit).

270 Tex. Comm'n on Env'tl. Quality, *Application by Lerin Hills, Ltd. for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014712001*, TCEQ Docket No. 2007-1178-MWD (July 7, 2009) (Final Order granting permit).

think did an excellent job of evaluating all of the evidence that she had in front of her. That's her job.<sup>271</sup>

The Commission's final order in the Lerin Hills matter indicated that its reversal of the ALJ was premised on a policy disagreement regarding the role of quantitative evidence in applying a narrative standard.<sup>272</sup> Even so, this rationale did not address all changes to findings of fact made by the final order.<sup>273</sup> Furthermore, the ability of the Commission to formulate after-the-fact policy rationales for its decisions does not entirely allay concerns when the Commission demonstrates a consistent pattern of reversing proposals for decision recommending denial of applications.

A broader view of TCEQ's consideration of SOAH proposals for decision for fiscal years 2009 through 2013 reveal that the *Texcom* and *Lerin Hills* cases are not isolated occurrences. During this period, TCEQ considered thirty contested SOAH proposals for decision on the merits of permits subject to House Bill 801.<sup>274</sup> In sixteen of these cases, SOAH initially recommended issuance of the permit, and TCEQ issued an order consistent with SOAH's recommendation.<sup>275</sup> In nine separate cases, however, the Commission

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271 Audio recording, May 20, 2009 TCEQ Agenda Meeting, at 1:00:14 – 1:00:40.

272 Texas Comm'n on Env'tl. Quality, *Application by Lerin Hills, Ltd. for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014712001*, TCEQ Docket No. 2007-1178-MWD (July 7, 2009) (Final Order granting permit).

273 For instance, the final order issued by the Commission reversed several findings of fact related to changes in dissolved oxygen, for which numeric criteria exists. Compare Tex. State Office of Admin. Hearings, *Application by Lerin Hills, Ltd. for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014712001*, SOAH Docket No. 582-08-0690 (Mar. 4, 2009) (Proposed Order denying permit) to Tex. Comm'n on Env'tl. Quality, *Application by Lerin Hills, Ltd. for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014712001*, TCEQ Docket No. 2007-1178-MWD (July 7, 2009) (Final Order granting permit).

274 2013 *Marked Commission Agendas*, TEX. COMM'N ON ENVTL. QUALITY, <http://www.tceq.state.tx.us/agency/agendas/comm/mcindex13.html> (last visited May 25, 2014).

275 Tex. Comm'n on Env'tl. Quality, *Application of City of Aledo, for TPDES Permit No. WQ0010847001*, TCEQ Docket No. 2007-0020-MWD (Sept. 29, 2008) (Final Order issuing permit); Texas Comm'n on Env'tl. Quality, *Application of Waste Management of Texas, Inc., for Permit No. MSW-66B*, TCEQ Docket No. 2006-1931-MSW (Oct. 1, 2008) (Final Order issuing permit); Tex. Comm'n on Env'tl. Quality, *Application by Hidden View Dairy for Amendment to TPDES Permit No. WQ0003197000*, TCEQ Docket No. 2007-0831-AGR (Jan. 23, 2009) (Final Order issuing permit); Tex. Comm'n on Env'tl. Quality, *Application of Regional Land Management Services, Ltd. for MSW Permit No. 2286*, TCEQ Docket No. 2003-0729-MSW (Feb. 27, 2009) (Final Order issuing permit); Tex. Comm'n on Env'tl. Quality, *Application by Marlin Atlantis White, Ltd. for TPDES Permit No. WQ0014570001*, TCEQ Docket No. 2006-1572-MWD (Apr. 17, 2009) (Final Order issuing permit); Tex. Comm'n on Env'tl. Quality, *Application of Galilee Partners, L.P., for a new TPDES Permit No. WQ0014640001*, Docket No. 2007-0016-MWD (Apr. 27, 2009) (Final Order issuing permit); Tex. Comm'n on Env'tl. Quality, *Application of TCB Rental, Inc. for New Wastewater Permit, proposed TPDES Permit No. WQ0014725001*, TCEQ Docket No. 2007-1765-MWD (Sept. 16, 2009) (Final Order issuing permit); Tex. Comm'n on Env'tl. Quality, *Application of Flint Hills Res., L.P., for an Amendment to Air Quality Permit Nos. 8803A and PSD-TX-413M8 for the West Refinery in Nueces County, Texas*, TCEQ Docket No. 2008-0293-AIR (Oct. 16, 2009) (Final Order issuing permit); Tex. Comm'n on Env'tl. Quality,

moved ahead in either issuing a permit for which SOAH had recommended denying or issuing a permit with conditions SOAH had found inadequate.<sup>276</sup> In another four cases,

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*Application of U.S. Ecology for Class 3 Modification to Permit No. HW-50052-001 and Compliance Plan No. CP-50052-001 for a Commercial Hazardous and Non-Hazardous Industrial Solid Waste Management Facility in Nueces county, Texas, TCEQ Docket No. 2008-1599-IHW (Nov. 24, 2009) (Final Order issuing permit); Tex. Comm'n on Env'tl. Quality, Application of IPA Coletto Creek, LLC for State Air Quality Permit 83778 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1118 and for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-18, Docket No. 2009-0032-AIR (May 3, 2010) (Final Order issuing permit); Tex. Comm'n on Env'tl. Quality, Application of Oak Grove Management company, LLC for TPDES Permit No. WQ0001986000, TCEQ Docket No. 2009-0398-MWD (Aug. 24, 2010) (Final Order issuing permit); Tex. Comm'n on Env'tl. Quality, Application for Industrial Solid Waste Permit No. 87758 to TexCom Gulf Disposal, LLC, TCEQ Docket No. 2007-0362-IHW (Feb. 17, 2011) (Final Order issuing permit); Tex. Comm'n on Env'tl. Quality, Application of the City of Patton Village for TPDES Permit No. WQ0014926001, TCEQ Docket No. 2009-0913-MWD (Apr. 11, 2011) (Final Order issuing permit); Tex. Comm'n on Env'tl. Quality, Application of Aggregate Industries – WCR for New Air Quality Permit No. 83755, TCEQ Docket No. 2009-1842-AIR (June 27, 2011) (Final Order issuing permit); Tex. Comm'n on Env'tl. Quality, Application of South Central Water Company for New Wastewater Permit, Proposed TPDES Permit No. WQ0014804001, TCEQ Docket No. 2008-0473-MWD (June 27, 2011) (Final Order issuing permit); Tex. Comm'n on Env'tl. Quality, Application of Republic Services of Texas, Ltd., for Type V Permit No. MSW-2356, TCEQ Docket No. 2009-2058-MSW (Dec. 15, 2011) (Final Order issuing permit).*

276 *Tex. Comm'n on Env'tl. Quality, Application by Williamson County for Permit No. MSW-1405, Docket No. 2005-0337-MSW (Feb. 17, 2009) (Final Order issuing permit with operating hours contrary to findings of ALJ); Tex. Comm'n on Env'tl. Quality, Application of Waste Management of Texas, Inc., for Permit No. MSW-249D, TCEQ Docket No. 2006-0612-MSW (Oct. 20, 2009) (Interim Order instructing SOAH to remove groundwater monitoring requirements found necessary by ALJ); Tex. Comm'n on Env'tl. Quality, Application for Permit Nos. WDW410, WDW411, WDW412, and WDW413 to Texcom Gulf Disposal, LLC, TCEQ Docket No. 2007-0204-WDW (Apr. 7, 2011) (Final Order granting permits, contrary to ALJ's recommendation of denial); Texas Comm'n on Env'tl. Quality, Application by Lerin Hills, Ltd. for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014712001, TCEQ Docket No. 2007-1178-MWD (July 7, 2009) (Final Order granting permit contrary to ALJ's recommendation of denial); Tex. Comm'n on Env'tl. Quality, Application by NRG Texas Power LLC for State Air Quality Permit 79188, Prevention of Significant Deterioration Air Quality Permit PSD-TX-1072, and Hazardous Air Pollutant Major Source Permit No. HAP-14, TCEQ Docket No. 2007-1820-AIR (Dec. 11, 2009) (Final Order granting permit contrary to ALJ's recommendation of denial); Tex. Comm'n on Env'tl. Quality, Application by Uranium Energy Corp. for Issuance of Class III Injection Well Permit No. UR030705, Aquifer Exemption Order, and Production Area authorization No. 1 in Goliad County, Texas, TCEQ Docket Nos. 2008-1888-UIC and 2009-1319-UIC (Mar. 7, 2011) (Final Order granting permit in reversal of ALJ's recommendation of either remand or denial); Tex. Comm'n on Env'tl. Quality, Application of Las Brisas Energy Center, LLC for State Air Quality Permit Nos. 85013, HAP48, OAL41 and PSD-TX-1138, Docket No. 2009-0033-AIR (Feb. 22 2011) (Final Order granting permit contrary to ALJ's conclusion that the applicant had not presented evidence sufficient to meet burden of proof); Tex. Comm'n on Env'tl. Quality, Application of Tenaska Trailblazer Partners, L.L.C. for State Air*

SOAH altered its position after issuance of its initial PFD without being under Commission order to do so, and the Commission's ultimate decision was consistent with SOAH's altered recommendation.<sup>277</sup> During this five-year period, TCEQ only adopted one recommendation by SOAH that a permit be denied and, in that case, the applicant had steadfastly refused to present evidence in support of its application.<sup>278</sup> In short, this trend shows that TCEQ has little reluctance in reversing an ALJ's finding that could lead to denial of a permit application. Such a lack of deference fails to respect SOAH's intended role as an objective trier of facts.

Texas courts have recognized the value of an independent decisionmaker on questions of fact and have expressed concern when an administrative agency appears to undermine this independence.<sup>279</sup> In the case of *State v. Mid-South Pavers*, the Austin Court of Appeals addressed such a circumstance.<sup>280</sup> *Mid-South Pavers* pursued an administrative hearing under Texas Transportation Code § 201.112 seeking additional compensation of \$2,570,654.76 from the Texas Department of Transportation (TxDOT) after completion of a highway construction project, including \$159,269 for claims related to microsurfacing.<sup>281</sup> This microsurfacing issue boiled down to conflicting testimony by a witness for the paving contractor, David Laumer, who claimed that a TxDOT inspector had instructed him to install multiple layers of microsurfacing, as opposed to testimony of the TxDOT inspector, who claimed to have issued no such instructions.<sup>282</sup> The ALJ found the witness for the contractor to be more credible, and issued findings of fact requiring TxDOT to pay the \$159,269 for the full microsurfacing work.<sup>283</sup> When reviewing the PFD, TxDOT's Executive Director reversed the ALJ's findings of fact on this

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*Quality Permit 84167, HAP-13, and PSD-TX-1123*, TCEQ Docket No. 2009-1093-AIR (Dec. 29, 2010) (Final Order granting permit without all permit conditions the ALJ had determined to be required by rule).

277 Tex. Comm'n on Env'tl. Quality, *Application by IESI Texas Landfill LP for MSW Permit No. 2332*, TCEQ Docket No. 2007-1302-MSW, SOAH Docket No. 582-08-1804 (Nov. 2, 2009) (Final Order Granting Permit) (Initial Proposal for Decision issued May 5, 2009 recommended denial, while Amended Proposal for Decision issued Sept. 4, 2009 recommended that permit be granted); Tex. Comm'n on Env'tl. Quality, *Application of Hays County Water Control & Improvement District No. 1 for Amendment to TPDES Permit No. WQ0014293001*, TCEQ Docket No. 2007-1426-MWD (Mar. 16, 2009) (issuing permit without all conditions recommended by ALJ in proposal for decision); Tex. Comm'n on Env'tl. Quality, *Application of BFI Waste Systems of North America, LLC for Type I MSW Permit No. 1447A*, TCEQ Docket No. 2007-1774-MSW (Sept. 14, 2009) (Final Order granting application in part with longer operating hours than initially recommended by ALJ).

278 Tex. Comm'n on Env'tl. Quality, *Application by Tommy Davis d/b/a Slick Machines for TCEQ Air Permit No. 821991002*, TCEQ Docket No. 2010-0660-AIR (Aug. 22, 2011) (Final Order denying application).

279 See, e.g., *Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 564 (Tex. 2000); *State v. Mid-South Pavers*, 246 S.W.3d 711 (Tex. App.—Austin, 2007, pet. denied).

280 *Mid-South Pavers*, 246 S.W.3d 711.

281 *Id.* at 715, 724.

282 *Id.* at 718–719.

283 *Id.* at 719.

issue based on his own finding that the TxDOT employee was more credible.<sup>284</sup> Consequently, TxDOT denied the claim related to this work.<sup>285</sup>

In considering this agency change to the ALJ's finding of fact, the Austin Court of Appeals found that Texas Transportation Code § 201.112 rendered the general statute governing agency review of an ALJ's PFD (Texas Government Code § 2001.058) inapplicable,<sup>286</sup> much like Texas Government Code § 2003.047(m) primarily governs TCEQ's review of an ALJ's PFD. Similarly, the Court found that the standard for review of the change was that set forth at Texas Government Code § 2001.174,<sup>287</sup> just as the Court noted this standard of review in *Slay v. TCEQ* with regard to § 2003.047(m).<sup>288</sup> As one consequence of this standard, the Austin Court of Appeals found that TxDOT would exceed its authority to modify or reverse a finding by the ALJ if the new finding was not supported by substantial evidence.<sup>289</sup>

Even so, in *Mid-South Pavers*, the Court found it significant that the resolution of disputed facts in a hearing requires weighing the evidence and evaluating the credibility of the witnesses, a role for which the ALJ is in a superior position than an agency head or board reviewing the decision because the ALJ has heard the evidence and observed the demeanor of the witnesses.<sup>290</sup> Further, a neutral decisionmaker is crucial to providing a fair adjudicatory hearing.<sup>291</sup> With regard to TxDOT's reversal of the ALJ's findings on microsurfacing, the Court found it significant that the question in dispute turned solely on a question of witness credibility.<sup>292</sup> Where the record contained no independent evidence to support the Executive Director's decision, the Austin Court of Appeals found that it was arbitrary and capricious for TxDOT to reverse the ALJ's decision on witness credibility.<sup>293</sup> Without having heard the witnesses' testimony while being present to evaluate the witnesses' demeanor, and given the absence of independent evidence to resolve the fact question at issue, the Executive Director was simply in no position to resolve such a question of credibility.<sup>294</sup>

Considering the similarity in the limitations imposed by Texas Transportation Code § 201.112(c) and Texas Government Code § 2003.047(m), governing TCEQ's review of a PFD as well as the similar delegation of the primary fact-finding role to an administrative law judge, TCEQ should exercise with caution its authority to reject the decision of an ALJ and preserve a meaningful role for SOAH as an independent fact-finder, just as the Austin Court of Appeals did in *Mid-South Pavers*.

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284 *Id.*

285 *Id.*

286 *Id.* at 721.

287 *Id.* at 722.

288 *Slay v. Tex. Comm'n on Env'tl. Quality*, 351 S.W.3d 532 (Tex. App.—2011, pet. denied).

289 *Mid-South Pavers*, 246 S.W.3d at 724.

290 *Id.* at 723.

291 *Id.*

292 *Id.* at 726.

293 *Id.* at 727.

294 *Id.*

## F. THE FAR HILLS UTILITY DISTRICT SAGA: A CASE STUDY REFLECTING THE BENEFITS OF THE CURRENT PROCESS

Far Hills Utility District (“Far Hills”) encompasses approximately 320 acres with several residential subdivisions on a peninsula of Lake Conroe, within which it provides both water and wastewater service.<sup>295</sup> Until 2004, Far Hills had sent its wastewater to a treatment facility operated by Montgomery County Utility District No. 2 (MCUD No. 2).<sup>296</sup> Far Hills’ contract for this service ran through 2012, but in early 2004, MCUD No. 2 notified Far Hills that the treatment facility was nearing capacity and needed major repairs.<sup>297</sup> Rather than contribute the funds necessary for the expansion and repair of the MCUD No. 2 plant, Far Hills’ Board decided to construct its own plant.<sup>298</sup>

### 1. FAR HILLS APPLICATION ROUND 1: A DEFICIENT ANALYSIS OF THE WETLANDS ISSUE

To this end, in May of 2004, Far Hills’ Board voted to condemn property owned by Roy Zboyan, which was located just outside of the District’s boundaries.<sup>299</sup> Shortly thereafter, Far Hills filed an application with the TCEQ for the construction and operation of a wastewater treatment plant at this site to discharge into Lake Conroe.<sup>300</sup> The application form submitted by Far Hills included a question of whether the facility would comply with the siting requirements of 30 Tex. Admin. Code § 309.13(a)–(d).<sup>301</sup> One of these requirements prohibits the location of any treatment plant unit in a wetland.<sup>302</sup> Far Hills checked this box “No,” and did not address the presence of wetlands in any other fashion.<sup>303</sup>

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295 Tex. State Office of Admin Hearings, *Proposal for Decision re: Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, 2006 WL 4486602, \*3 (Nov. 27, 2006).

296 *Id.*

297 *Id.*

298 *Id.*

299 *Zboyan v. Far Hills Util. Dist.*, 221 S.W. 3d 924, 929 (Tex. App.—Beaumont 2007, no pet.).

300 Tex. State Office of Admin Hearings, *Proposal for Decision re: Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, 2006 WL 4486602, \*1 (Nov. 27, 2006).

301 Far Hills Utility District New Domestic Discharge Wastewater Permit Application, Supplemental Permit Information Form, Attachment 2, Domestic Admin. Report 1.1, at 12 (Aug. 23, 2004).

302 Tex. State Office of Admin Hearings, *Proposal for Decision re: Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, 2006 WL 4486602, \*2 (Nov. 27, 2006).; 30 TEX. ADMIN. CODE § 309.13(b) (2014).

303 Far Hills Utility District New Domestic Discharge Wastewater Permit Application, Supplemental Permit Information Form, Attachment 2, Domestic Admin. Report 1.1, at 12 (Aug. 23, 2004).

Upon learning of this application, the affected public submitted numerous and extensive comments to the TCEQ.<sup>304</sup> In early December 2004, Far Hills had published notice of its application in *The Courier*, a newspaper published and circulated in the Conroe area.<sup>305</sup> The next month, the Executive Director made a preliminary decision to issue the permit, and notice of that decision was likewise published in *The Courier* in late January 2005.<sup>306</sup> Mr. Roy Zboyan submitted several comments, as did Capps Concerned Citizens (CCC), an organization of which Mr. Zboyan was a member.<sup>307</sup> In these comments, Mr. Zboyan noted the location of wetlands within the area on his property where Far Hills intended to locate its wastewater treatment plant units as well as other concerns.<sup>308</sup> Mr. Zboyan and others specifically objected to Far Hills' claim of compliance with the siting requirements of the TCEQ rules.<sup>309</sup> The public comment period ended at the close of a public meeting on June 13, 2005.<sup>310</sup> In all, TCEQ received comments from almost 200 individuals and entities, along with twenty hearing requests.<sup>311</sup>

In November 2005, Far Hills requested that the matter be directly referred to SOAH.<sup>312</sup> SOAH held a preliminary hearing on January 11, 2006.<sup>313</sup> At that hearing, CCC was admitted as a protestant.<sup>314</sup> The Executive Director had not issued a response to comments prior to the initiation of the contested case hearing process.<sup>315</sup> After the preliminary hearing, the Executive Director subsequently issued its Response to Comments recommending issuance of the permit.<sup>316</sup> Although the Executive Director's office has a regulatory deadline to issue a response to comments within sixty days of the end of the comment period, the process had taken seven months.<sup>317</sup> With regard to comments

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304 Tex. Comm'n on Env'tl. Quality, *Application by Far Hills Utility District for TPDES Permit No. WQ0014555001*, TCEQ Docket No. 2005-1899-MWD, Executive Director's Response to Comments (Jan 25, 2006).

305 Tex. Comm'n on Env'tl. Quality, *An Order Denying the Application of Far Hills Utility District for Proposed TPDES Permit No. WQ0014555001*, TCEQ Docket No. 2005-1899-MWD, SOAH Docket No. 582-06-0568 (Sept. 7, 2007) (Finding of Fact No. 4).

306 Tex. Comm'n on Env'tl. Quality, *Application by Far Hills Utility District for TPDES Permit No. WQ0014555001*, TCEQ Docket No. 2005-1899-MWD, Executive Director's Response to Comments (Jan 25, 2006).

307 *Id.*

308 *Id.*

309 *Id.*

310 *Id.*

311 *Id.*

312 Tex. State Office of Admin. Hearings, *Proposal for Decision re: Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, 2006 WL 4486602, \*1 (Nov. 27, 2006).

313 *Id.*

314 *Id.*

315 *Id.*

316 Tex. Comm'n on Env'tl. Quality, *Application by Far Hills Utility District for TPDES Permit No. WQ0014555001*, TCEQ Docket No. 2005-1899-MWD, Executive Director's Response to Comments (Jan 25, 2006).

317 30 TEX. ADMIN. CODE § 55.156(b)(3) ("The executive director shall file the response to comments with the chief clerk within the shortest practical time after the comment period ends, not to exceed 60 days."). In this case, the comment period ended with the final public meeting on June 13, 2005, and the response to comments was not filed with the Chief

involving the location of wetlands on the property, the Executive Director merely noted that it may be necessary for Far Hills to obtain a permit from the U.S. Army Corps of Engineers, but the Executive Director made no effort to address whether the application complied with TCEQ's own prohibition on the location of wastewater treatment plant units within wetlands.<sup>318</sup> Later, in deposition testimony, the TCEQ permit writer asserted that the Water Quality Standards team evaluated the presence of wetlands, while another staff member from TCEQ's water quality standards team noted that her office had not determined the location of wetlands.<sup>319</sup>

At the time of its deadline to submit pre-filed testimony in April 2006, Far Hills presented Nicholas Laskowski, who said he was working on a study to determine the location of wetlands on the site that he expected would demonstrate compliance, and he would let the parties know of his conclusions when he was done.<sup>320</sup> Mr. Laskowski was a soil scientist in training, having recently graduated with a masters degree in soil science.<sup>321</sup> A few weeks later, Mr. Laskowski supplemented his testimony to say that, upon completing his study, he had found that the Far Hills plant would not be located in wetlands within the jurisdiction of the Corps of Engineers, just as he had anticipated concluding.<sup>322</sup> In the proceeding, Far Hills argued that only wetlands within the jurisdiction of the Corps of Engineers constituted wetlands.<sup>323</sup>

Subsequently, CCC submitted pre-filed testimony of Dr. John Jacob, who was a professor at Texas A&M University and a professional geoscientist with extensive experience in wetlands delineation.<sup>324</sup> Having performed his own study of the site, Dr. Jacob testified that wetlands were indeed present where Far Hills proposed to locate its treatment plant units.<sup>325</sup> CCC further provided testimony and photographs of an area resi-

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Clerk until January 25, 2006. Tex. Comm'n on Env'tl. Quality, *Application by Far Hills Utility District for TPDES Permit No. WQ0014555001*, TCEQ Docket No. 2005-1899-MWD, Executive Director's Response to Comments (Jan 25, 2006).

318 Tex. Comm'n on Env'tl. Quality, *Application by Far Hills Utility District for TPDES Permit No. WQ0014555001*, TCEQ Docket No. 2005-1899-MWD, Executive Director's Preliminary Response to Public Comment, at 22 (Jan. 21, 2005).

319 Tex. State Office of Admin. Hearings, *In the Matter of the Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658 Oral Deposition of June Ella Martinez (TCEQ Permit Writer), at 42-43 (Apr. 11, 2006); *Id.*, Oral Deposition of Lori Hamilton (Water Quality Standards Reviewer), at 57-58 (Apr. 11, 2006).

320 Tex. State Office of Admin. Hearings, *In the Matter of the Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, Direct Testimony and Exhibits of Nicholas A. Laskowski, submitted on behalf of Far Hills Utility District, at 2-3 (Apr. 21, 2006).

321 *Id.* at 1.

322 *Id.*

323 Tex. State Office of Admin. Hearings, *Proposal for Decision re: Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, 2006 WL 4486602, \*9 (Nov. 27, 2006).

324 *Id.*

325 Tex. State Office of Admin. Hearings, *In the Matter of the Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket



dent demonstrating the frequency and degree to which the proposed wastewater treatment plant site flooded.<sup>326</sup>

Having considered this evidence and the arguments of the parties, on November 27, 2006, the ALJ issued a PFD recommending denial of the permit due to the proposed location of treatment plant units within wetlands.<sup>327</sup> Ultimately, the Commission considered the application on August 22, 2007.<sup>328</sup> At that meeting, the Commission adopted the ALJ's recommendation that Far Hills' permit be denied given that Far Hills was proposing to locate treatment plant units within wetlands in direct violation of TCEQ's rules.<sup>329</sup>

## 2. FAR HILLS APPLICATION ROUND 2: AN INACCURATE APPLICATION LEADS TO INSUFFICIENT NOTICE

Soon after the issuance of the ALJ's PFD, Far Hills submitted a second application for an alternate wastewater treatment plant at a different location.<sup>330</sup> But, the public notice for this second application was more limited. Although TCEQ rules require that initial notice of such applications be published in the newspaper of largest circulation in the County,<sup>331</sup> Far Hills published notice of this second application in the *Montgomery County News*, even though it presumably knew that the *Conroe Courier* was the newspaper of largest circulation in Montgomery County.<sup>332</sup> The Executive Director questioned the initial affidavit of publication for this notice, noting that Far Hills had not used the form provided for this purpose.<sup>333</sup> In response, Far Hills submitted a modified affidavit stating that the *Montgomery County News* was "a newspaper of largest circulation" in Montgomery County.<sup>334</sup> Given its smaller circulation, presumably fewer members of the public received notice of this second application.

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No. 582-06-0658, Supplemental Direct Testimony and Exhibits of Dr. John Jacob, submitted on behalf of Capps Concerned Citizens (June 9, 2006).

326 Tex. State Office of Admin. Hearings, *In the Matter of the Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, Supplemental Direct Testimony and Exhibits of Ms. Patsy Clemons, submitted on behalf of Capps Concerned Citizens (June 9, 2006).

327 Tex. State Office of Admin. Hearings, *Proposal for Decision re: Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, 2006 WL 4486602, \*9, \*11 (Nov. 27, 2006).

328 Tex. Comm'n on Env'tl. Quality, *Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, TCEQ Docket No. 2005-1899-MWD, Order Denying Application (Sept. 7, 2007).

329 *Id.*

330 Tex. State Office of Admin. Hearings, *Proposal For Decision in the Matter of Petition to Revoke TCEQ Water Quality Permit No. WQ001455002 Issued to Far Hills Utility District*, SOAH Docket No. 582-09-5727, 2010 WL 2619349, \*1 (June 21, 2010).

331 30 TEX. ADMIN. CODE § 39.405(f)(1) (2014).

332 Tex. State Office of Admin. Hearings, *Proposal For Decision in the Matter of Petition to Revoke TCEQ Water Quality Permit No. WQ001455002 Issued to Far Hills Utility District*, SOAH Docket No. 582-09-5727, 2010 WL 2619349, \*4, \*7 (June 21, 2010).

333 *Id.* at \*4.

334 *Id.* at \*4 (emphasis added).

This second application also contained a map of the facility indicating that it would be placed on a five acre piece of property owned by Far Hills with an intervening property between the facility and that owned by nearby property owners Suzanne O'Neal and Judy Spencer.<sup>335</sup> Consequently, Ms. O'Neal and Ms. Spencer did not receive mailed notice of the application.<sup>336</sup> However, Ms. Spencer and Ms. O'Neal in fact owned property adjacent to the tract upon which the facility was to be located.<sup>337</sup>

After notice of the Executive Director's decision to issue the second permit application was published in the *Montgomery County News*, TCEQ received no comments whatsoever regarding the application.<sup>338</sup> Therefore, a permit based on this second application was issued as an uncontested matter in November of 2007, fairly shortly after Far Hills' first application was denied.<sup>339</sup>

In September of 2008, Ms. Suzanne O'Neal first learned of this application when Far Hills began constructing the authorized facility.<sup>340</sup> In the spring of 2009, Ms. O'Neal filed a petition to revoke this second permit in consideration of the misrepresentations made by Far Hills in its application.<sup>341</sup>

The Commission granted Ms. O'Neal's request for a hearing on her petition to revoke.<sup>342</sup> After a contested case hearing on the matter, the Executive Director joined with Ms. O'Neal and the TCEQ Office of Public Interest Counsel (OPIC) in asking that the permit be revoked as a result of the false information related to notice that was provided by Far Hills during the application process.<sup>343</sup> In his PFD, the ALJ found it difficult to believe that Far Hills thought the *Montgomery County News* was the paper of largest circulation in the county, particularly given that Far Hills had claimed that the *The Courier* was the paper of largest circulation in the County in its prior application.<sup>344</sup> With regard to Far Hills' misrepresentations that led to the exclusion of Ms. O'Neal from the mailing list, the ALJ found that this mistake may have been merely a "serious blunder" on the part of Far Hills and its consultants.<sup>345</sup> Whether the representations were purposeful or not, the ALJ recommended that Far Hills' permit be revoked due to the "significant misleading statement in the application regarding ownership and configuration of the property and notice to the public."<sup>346</sup>

### 3. THE TEMPORARY ORDER: FALSE INFORMATION FROM APPLICANT ONLY DISCOVERED THROUGH CROSS-EXAMINATION

During the pendency of the proceedings on the petition to revoke, Far Hills submitted an application for a temporary order to allow it to continue to discharge wastewater

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335 *Id.* at \*3.

336 *Id.* at \*3.

337 *Id.* at \*3.

338 *Id.* at \*1.

339 *Id.* at \*1.

340 *Id.* at \*5.

341 *Id.* at \*2.

342 *Id.* at \*2.

343 *Id.* at \*6.

344 *Id.* at \*7.

345 *Id.* at \*8.

346 *Id.* at \*10.

even if its permit was revoked.<sup>347</sup> In light of this application, the Commission issued an interim order remanding the petition to revoke to SOAH for consideration of whether suspension would be appropriate rather than revocation and for consideration of Far Hills' application for a temporary order.<sup>348</sup>

This hearing revealed that Far Hills' most recent permit application had contained significant substantive flaws in addition to the false information related to notice that had already been uncovered. On the first day of the hearing on the merits on remand, cross-examination of Far Hills' engineer revealed that the discharge was at the head of the canal.<sup>349</sup> During the earlier permitting process, the Executive Director had worked under an assumption that the discharge would be at a different location into the main body of Lake Conroe.<sup>350</sup> In light of the information brought to light in the hearing, the Executive Director withdrew his endorsement of the current permit and the temporary order staff had approved, and instead recommended that any temporary order issued include more stringent effluent limitations to meet the requirements of TCEQ's rules, and that any new permit contain more stringent effluent limitations.<sup>351</sup> After a briefing on the matter, Ms. O'Neal and Ms. Spencer withdrew their petition to revoke and protest of the temporary order, and withdrew as parties to the matter.<sup>352</sup> However, OPIC and the Executive Director made clear that the hearing still presented contested issues given the information that had been revealed in the hearing.<sup>353</sup> Ultimately, Far Hills, OPIC, and the Executive Director submitted an agreed recommendation requiring submission of a major amendment within thirty days that would establish more stringent effluent limitations for the permit going forward, allow Far Hills to continue operating while its major amendment was pending, and dismiss the Petition to Revoke and Far Hills' request for a temporary order.<sup>354</sup> At a September 21, 2011 meeting of the TCEQ, the Commission decided to adopt this recommendation and issued an order accordingly.<sup>355</sup> Far Hills received its amended permit less than a year later.<sup>356</sup>

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347 *Id.* at \*2.

348 Tex. State Office of Admin. Hearings, *Supplemental Proposal For Decision in the Matter of Petition to Revoke TCEQ Water Quality Permit No. WQ0014555002*, SOAH Docket No. 582-09-5727, 2011 WL 3223773, \*1 (July 21, 2011).

349 Tex. State Office of Admin. Hearings, *Petition to Revoke TCEQ Water Quality Permit No. WQ0014555002 Issued to Far Hills Utility District*, SOAH Docket Nos. 582-11-0471, 582-09-5727, Hearing on the Merits Transcript Vol. 1, at 73 (Nov. 15, 2010).

350 *Id.* at 178.

351 Tex. State Office of Admin. Hearings, *Petition to Revoke TCEQ Water Quality Permit No. WQ0014555002 Issued to Far Hills Utility District*, SOAH Docket Nos. 582-11-0471, 582-09-5727, Hearing on the Merits Transcript Vol. 2, at 472–473, 476–477 (Dec. 10, 2010).

352 Tex. State Office of Admin. Hearings, *Petition to Revoke TCEQ Water Quality Permit No. WQ0014555002 Issued to Far Hills Utility District for a Temporary Order Submitted by Far Hills Utility District*, SOAH Docket Nos. 582-09-5727, 582-11-0471, TCEQ Docket No. 2009-0290-MWD, 2011 WL 3223773, at \*2 (July 21, 2011).

353 *Id.* at \*2.

354 *Id.* at \*3.

355 Tex. Comm'n on Env'tl. Quality, *Petition to Revoke TCEQ Water Quality Permit No. WQ0014555002 Issued to Far Hills Utility District and Application for Temporary Order submitted by Far Hills Utility District*, TCEQ Docket Nos. 2009-0290-MWD, Final Order (Sept. 29, 2011).

#### 4. THE FAR HILLS CASE DEMONSTRATES HOW CONTESTED CASE PROCESS ENABLES BETTER AGENCY DECISIONMAKING

As an initial matter, the progress of the Far Hills case demonstrates the manner in which the contested case hearing process serves to remedy factual errors in an application. Even when citizens point out factual errors in an application during the permitting process, the Executive Director frequently disregards such critiques. The contested case hearing process allows citizens to present their case to an impartial fact-finder. It also allows the affected public to use tools such as cross-examination and discovery that often reveal that an applicant has selectively shared facts with the Executive Director.

Notably, corrections of fact made through the contested case hearing process do not necessarily reflect that an applicant intentionally deceived the TCEQ, or that the Executive Director's staff failed in its duty to review an application. A professional seal indicates diligence, but not infallibility. Consistent with the ALJ's initial evaluation of the petition to revoke, Far Hills' submission of false information related the location of wetlands on the Zboyan property, the configuration of the facility property adjacent to the O'Neal property, the circulation of the *Montgomery County News*, and the location of the discharge point for the temporary order application all could have reflected a lack of diligence by the applicant rather than any intent to deceive the agency. Further, the Executive Director's staff lacks the resources to double check every factual representation made by an applicant, nor should the staff be expected to do so. The integrity of the permitting process relies heavily on an assumption that applicants will honestly and accurately provide the relevant facts to the Executive Director's staff. Unfortunately, as the Far Hills case demonstrates, this is not always the case, and the contested case hearing process serves both as a check to detect inaccuracies in an application and as an incentive for applicants to provide accurate information in an application to avoid later problems when the public calls attention to such errors.

Additionally, the Far Hills case demonstrates the benefit that the contested case hearing process provides in allowing citizens to provide expert analysis that meaningfully supplements the analysis performed by the Executive Director's staff. As discussed above, the water quality division of the TCEQ lacks expertise to meaningfully evaluate the location of wetlands on a site and may not receive information adequate to independently perform such an evaluation. The comment process does not allow the public adequate time to fully evaluate many of the complex technical issues associated with permit applications, but given adequate time, the contested case hearing process provides an opportunity for a meaningful analysis of the issues. In the case of Far Hills, the protestants were able to present an analysis of the wetlands issue by an individual with expertise that far exceeded that of the Executive Director, and which the ALJ found to be more credible than the expert presented by the applicant.<sup>357</sup>

The Far Hills case further demonstrates the role of the contested case hearing process in facilitating meaningful oversight of the Executive Director's staff by the Commissioners. In performing its own technical review of the application, the Executive

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356 Tex. Comm'n on Env'tl. Quality, *Permit to Discharge Waste, TPDES Permit No. WQ0014555002*, issued June 28, 2012.

357 Tex. State Office of Admin Hearings, *Proposal for Decision re: Application of Far Hills Utility District for Water Quality Permit No. WQ001455-001 in Montgomery County*, SOAH Docket No. 582-06-0658, 2006 WL 4486602, \*8 (Nov. 27, 2006).

Director's staff had made no independent determination regarding the site suitability requirements contained in the agency's own rules and had wrongfully assumed that the only wetlands of relevance were those under federal jurisdiction. The Far Hills case allowed the Commissioners to clarify for the staff that the site suitability rules warranted consideration and allowed the Commission to reiterate its position that TCEQ would not allow the U.S. Court or the Corps of Engineers to dictate the scope of a Texas agency's jurisdiction under Texas law.<sup>358</sup>

Finally, the Far Hills case demonstrates how the contested case hearing process can improve the quality of authorizations ultimately issued. Based on information submitted by Far Hills with its second permit application, the Executive Director had developed inadequate effluent limitations.<sup>359</sup> The hearing process allowed the Executive Director to develop more appropriate effluent limits that complied with TCEQ's rules.<sup>360</sup> Notably, recent legislation calls into question the Executive Director's ability to take such corrective action. The TCEQ Sunset Bill passed in 2011 imposed on the Executive Director a duty to participate as a party in contested case permit hearings to "support the executive director's position *developed in the underlying proceeding*."<sup>361</sup> Where the contested case hearing process reveals information that the Executive Director's staff believes calls into question its own recommendation, this statute potentially hampers the Executive Director's ability to modify or reverse its recommendation as new information warrants. In such a manner, this statutory duty that effectively prohibits the Executive Director from objectively considering information that comes to light in the hearing process undermines the ability of the agency to reach the most accurate decision.<sup>362</sup>

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358 See, e.g., Tex. Comm'n on Envtl. Quality, *Matter of the Application of Tan Terra Envtl. Svs. Inc., L.L.C. for a Permit to Operate a Type I Municipal Solid Waste Facility* (Permit No. MSW-2305), TCEQ Docket No. 2004-0743-MSW, Final Order, at 5 (Apr. 20, 2006) (denying permit in part due to presence of wetlands regardless of whether considered "jurisdictional" wetlands).

359 Tex. State Office of Admin. Hearings, *Petition to Revoke Tex. Comm'n on Envtl. Quality Water Quality Permit No. WQ0014555002 Issued to Far Hills Utility District*, SOAH Docket Nos. 582-11-0471, 582-09-5727, Hearing on the Merits Transcript Vol. 2, at 472-473, 476-477 (Dec. 10, 2010).

360 *Id.*

361 Tex. H.B. 2694, Act of June 17, 2011, 82nd R.S. ch. 1021, §10.02, sec. 5.228(c), 2011 Tex. Gen. Laws 2579, 2598 (emphasis added).

362 Furthermore, this statutory duty is contrary to TCEQ's representations to the Environmental Protection Agency as to how the Texas Pollution Discharge Elimination System Program will be implemented. TCEQ's rules for this program state that "evidence can be introduced in public hearings, or through the public comment process, concerning the determination of existing uses and criteria; the assessment of degradation under [the antidegradation policy]; the social and economic justification for lowering water quality; requirements and conditions necessary to preclude degradation; and any other issues that bear upon the implementation of the antidegradation policy." 30 TEX. ADMIN. CODE § 307.5(c)(2)(E) (2014). This opportunity seems meaningless if the Executive Director is precluded by Texas Water Code § 5.228(c) from changing his recommendation in light of such new information. In this manner, § 5.228(c) arguably constitutes a way in which Texas' current regulatory structure violates the conditions of its delegation of authority under the National Pollutant Discharge Elimination System Program.

## V. EVALUATION OF POTENTIAL CHANGES TO THE CONTESTED CASE HEARING PROCESS

Over the course of the last few legislative sessions, various interest groups and legislators have proposed revisions to the TCEQ permitting process. While the permitting process established by House Bill 801 is not perfect from any perspective, most of the changes discussed in recent sessions come with drawbacks that outweigh any benefits they may provide. This section considers a few of the changes that have been recently considered and rejected by the Legislature and explains why the Legislature should continue to reject attempts at such changes.

### **A. ELIMINATION OF CONTESTED CASE HEARING PROCESS**

Broadly speaking, on numerous occasions, industry representatives have suggested replacing the contested case hearing process with an opportunity for notice and comment where the TCEQ is still required to provide a response to comments.<sup>363</sup> As a practical matter, the Legislature's refusal to adopt such legislation despite repeated efforts since the 1980s suggests little appetite for this one-sided approach. Even in the 83rd Regular Session, held in 2013, the Committee Substitute for Senate Bill 957 only made it out of committee with the addition of a process labeled as a "contested case," although that process bore no resemblance to a true evidentiary hearing.<sup>364</sup>

As discussed above, the contested case hearing process has a demonstrated track record of correcting factual errors and legal deficiencies remaining after the public comment process. The full development of this information and analysis cannot occur in the span of the comment process, and the Executive Director's evaluation of this information may be limited. In many cases, an applicant has had years to develop its analysis of an application, and the public can hardly be expected to provide an equally thorough analysis in thirty days.

Importantly, additional permit conditions resulting from the hearing process typically reflect terms determined necessary for a permit to meet the minimum requirements of TCEQ's rules.<sup>365</sup> Requirements that merely require an applicant to comply with the law should not be characterized as overly burdensome. While the contents of most settlement agreements resulting in the withdrawal of protests are usually confidential, as a general matter, the primary thrust of the vast majority of such agreements is to implement regulatory requirements that reflect the law or the prior actions of the applicant.

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363 See, e.g., Tex. Ass'n of Business, *Our Priorities are Your Priorities: TAB Board Approves New State Agenda*, TEX. BUSINESS REPORT, Oct. 2012, at 1, 3 ("TAB supports replacing [TCEQ] contested case hearings with a notice and comment process like most states and even EPA now use."); House Comm. on Env'tl. Regulation, Bill Analysis, Tex. H.B. 2491, 74th Leg., R.S. (1995) (noting that representatives of Texas Chemical Council, Texas Ass'n of Business, and Chambers of Commerce testified in support of H.B. 2491 to eliminate contested case hearing process and replace it with notice and comment process).

364 Tex. S.B. 957, § 1, 83rd Leg., R.S. (2013).

365 See, e.g., Tex. Comm'n on Env. Quality, *Application of Republic Waste Svcs. of Texas, LTD., for Type V Permit No. MSW-2356*, Docket No. 2009-2058-MSW (Final order granting permit) (Final Order refusing to include any recommended permit conditions determined unnecessary for applicant to meet its burden of proof).

Before the Legislature, representatives of the regulated community often attack these agreements as reflecting a flaw in the process. But, more often than not, protestants are willing to reach an agreed-upon resolution of the disputed issues that reflects a solution-oriented approach to the process that should be encouraged, not denigrated.

As reflected in the discussion above, the hearing process also provides a range of protections that are deeply rooted in Texans' attitudes towards government. In allowing a separation of the agency's adjudicatory functions under circumstances where factual disputes exist, the hearing process provides an important check on the power of the TCEQ. Further, while the hearing process does not involve the adjudication of property rights, it can serve a vital function in providing adequate protection against damage to the property of nearby landowners. It can help balance the rights of neighbors to use their lands where they get to decide how to strike that balance. The notice and comment process does not provide such an opportunity. This breadth of protected interests explains why, during the regular session of the 83rd Legislative Session, a bill filed to eliminate the contested case hearing process for sludge applications was killed on the house floor by a Republican member of the Tea Party caucus.<sup>366</sup>

## B. IMPOSITION OF STATUTORILY-MANDATED TIME LIMITS

Some have also proposed the allowance of contested case hearings, but with mandatory time limitations from referral to the issuance of a PFD.<sup>367</sup> Notably, under the current process, the Commission may already provide SOAH with a recommended duration for each matter referred,<sup>368</sup> and SOAH makes every effort to meet these deadlines absent the agreement of the parties or extenuating circumstances.

The imposition of mandatory time limits would undermine the ability of the public to participate in the process by necessarily limiting discovery and analysis. It would unnecessarily tie the hands of the judges who need to assure a fair process for all parties in each unique controversy. In fact, it is often the applicant that seeks additional time to revise an application or develop responsive evidence.

TCEQ permitting cases often involve complex technical issues, and the permit application at issue at the contested case hearing may differ substantially from the application as available during the public comment period, limiting the utility of prior work. Furthermore, discovery regarding such issues can often be complex, resulting in legitimate disputes over the scope of discovery. The imposition of mandatory time limits would limit a judge's ability to resolve such disputes. In many cases, it would enable one party to gain advantage by unjustifiably resisting discovery in a manner that SOAH can currently address through adjustments to the procedural schedule.

The imposition of mandatory time limits could also allow applicants to gain an advantage by making changes to applications late in the hearing process. Under the current process, SOAH has the leeway to adjust a procedural schedule in light of such changes.<sup>369</sup> As generally proposed, SOAH would have no such authority and may have to simply recommend denial of a permit in that circumstance. When that recommenda-

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366 2013 H.J. of Tex. 3001, 83rd Leg., R.S. (Point of Order of Rep. Geanie Morrison).

367 See, e.g., Tex. S.B. 957, 83rd Leg., R.S. (2013) (requiring issuance of proposal for decision within 120 days of preliminary hearing).

368 TEX. WATER CODE ANN. § 5.556(e)(2) (West 2014).

369 30 TEX. ADMIN. CODE § 80.4(c)(17) (2014).

tion went to the Commissioners, they might decide to remand the matter for the changes to the application, creating a more expensive and longer process than would normally occur.

Further, such strict time limitations often fail to account for the fact that much of the time from referral of an application to SOAH to the issuance of a PFD is dedicated to processes, such as the scheduling of the preliminary hearing around the judges' other hearings and providing adequate time for the judges to write a PFD. There is time built into the process that is not in the control of the parties.

In sum, the current process by which the Commission can recommend a hearing duration based upon its evaluation of case-specific factors such as the complexity of the case and the number of parties, combined with SOAH's ability to adjust the procedural schedule as appropriate to ensure a fair hearing for all parties, should not be replaced by a one-size fits all limitation on the duration of the hearing that removes the ability of TCEQ and SOAH to have flexibility to address the circumstances of each case.

### C. LIMITS ON WHO MAY BE A PARTY

Some have also suggested that parties to a SOAH hearing should be limited to persons who previously filed comments or submitted a hearing request. This approach lacks merit for several reasons.

First, the agency procedures preceding a contested case hearing can take a substantial amount of time, during which period new persons may have moved into the area or may determine that they will be affected because of changes in the application or terms in the permit. It would be unfair, and potentially a violation of due process, to hold a contested case hearing while denying these persons an opportunity to participate merely due to the timing of when they acquired their affected interest or the changes in the application or permit.

Also, even with the best of efforts by the TCEQ and an applicant, the process for notice of applications is far from perfect. For instance, the television stations who protested the Blue Ridge application that would have potentially impacted the operation of their Doppler radar systems received no notice of the application prior to the end of the public comment period. They were not close enough neighbors to receive mailed notice.

Likewise, the independent oil producer who participated in the hearing on an Application by Regional Land Management Services in Webb County to protect its mineral rights did not learn of the application until after the contested case hearing had commenced, nor did the independent oil producer who participated as a protestant in the Texcom injection well matter.<sup>370</sup> To deny individuals in similar situations the right to participate in a contested case hearing merely due to flawed or inadequate notice would almost surely constitute a denial of due process. Instead, Texas law should be amended to improve notice through means such as requiring signs and making full use of electronic means of notice.

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370 Tex. State Office of Admin. Hearings, *Application by Reg'l Land Mgmt. Svs., Ltd.*, SOAH Docket No. 582-04-0975, Proposal for Decision (Sept. 2, 2008), Motion to Intervene by Rossetta Res. (Mar. 5, 2007); Tex. State Office of Admin. Hearings, *Application of Texcom Gulf, Disposal, L.L.C. for Tex. Comm'n on Envtl. Quality Underground Injection Control Permit Nos. WDW410, WDW411, WDW412, WDW413*, SOAH Docket No. 582-07-2376, Amended Proposal for Decision after Remand, at 6 (Apr. 25, 2008).



Furthermore, the imposition of limits on who may participate in a hearing to persons who have previously participated in the permitting process could potentially have implications for Texas' ability to administer certain federally-delegated programs. For example, in obtaining authority to administer the water quality permitting program established by the Clean Water Act, Texas represented that standing requirements to seek judicial review of agency decisions was equally as broad as that under federal law,<sup>371</sup> consistent with the minimum requirements of federal law.<sup>372</sup> EPA's approval of the Texas permitting program was premised on this understanding.<sup>373</sup> Given the Attorney General's current position that participation in a contested case hearing is a prerequisite to the judicial appeal of an agency decision,<sup>374</sup> any limitation on standing to participate in a contested case hearing that would impose a burden not found under federal law would place Texas at risk of violating the conditions of its delegated authority over this program, as well as other programs with similar requirements.

#### D. SHIFTING OF BURDEN OF PROOF

Both the Committee Substitute for Senate Bill 957, as passed out of committee during the 83rd Legislative Session, and House Bill 3037, as filed in the 82nd Legislative session, would have shifted the burden of proof during a contested case hearing to the protestants.<sup>375</sup> This type of change fundamentally alters the nature of the process and greatly increases the cost of the process for protestants, be they local governments, nearby landowners, or others. For example, under the current burden of proof, the Commission should deny an application that wholly fails to address an applicable requirement.<sup>376</sup> If this burden were shifted, then such an omission on the applicant's part would not necessarily warrant denial of an application. Rather, even in the absence of any evidence supporting the application, protesting parties would be required to hire experts to perform the analysis that the applicant should have performed itself when submitting the application. Particularly given that it is the applicant who seeks to alter the *status quo*, this allocation of the burden of proof would be inappropriate.

By the time an application reaches the contested case hearing process, both the applicant and the Executive Director have long been aware of the issues in dispute, and both have taken the position that the application affirmatively demonstrates compliance with all applicable regulatory requirements relevant to these issues. Under current law, an issue may not be considered in hearing unless it was raised during the comment

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371 Tex. Att'y Gen., Statement of Legal Authority for the Texas National Pollutant Discharge Elimination System Program (Dec. 12, 1997). See also Memorandum of Agreement Between the Tex. Natural Res. Conservation Comm'n and the U.S. Env'tl. Prot. Agency, Region 6 Concerning the National Pollutant Discharge Elimination System (Sept. 14, 1998).

372 40 C.F.R. § 123.30 (2013).

373 *State Program Requirements; Approval of Application to Administer the National Pollutant Discharge Elimination System (NPDES) Program; Texas*, 63 Fed. Reg. 51,170 (1998).

374 *Sierra Club & Pub. Citizen v. Tex. Comm'n on Env'tl. Quality and Sw. Elec. Power*, Cause No. D-1-GN-13-000678, (419th Dist. Ct., Travis County, Tex. Nov. 25, 2013), TCEQ's Brief in Support of its Plea to the Jurisdiction and, if Necessary, Brief on the Merits, at 6.

375 Tex. S.B. 957, 83rd Leg., R.S. (2013); Tex. H.B. 3037, 82nd Leg., R.S. (2011).

376 30 TEX. ADMIN. CODE § 80.17(a) (providing that moving party bears burden of proof by a preponderance of the evidence).

period.<sup>377</sup> If an applicant and TCEQ staff have been diligent in performing the analysis required to reach this conclusion, then an applicant should easily be able to meet its burden of proof. If an application cannot stand on its own, or if an applicant is unwilling to defend its application, then it is proper for the application to be denied.

#### E. PROHIBITION ON DISCOVERY SUBSEQUENT TO SUBMISSION OF PRE-FILED TESTIMONY

The adoption of an amendment on the TCEQ Sunset Bill in 2011 that limits the ability to conduct discovery subsequent to the submission of pre-filed testimony is among the most transparent efforts to undermine the effectiveness of the contested case hearing process in getting to the truth of an applicant's claims.<sup>378</sup> The logic used to justify this limitation demonstrates a fundamental misunderstanding of the contested case hearing process with regard to environmental permits under consideration in TCEQ proceedings.

Those in favor of this discovery limitation argued that the submission of a party's direct pre-filed testimony should be considered perfectly analogous to the presentation of a direct case in a judicial trial.<sup>379</sup> Such logic ignores many of the critical differences between a judicial trial and a TCEQ contested case hearing. In a judicial trial, the case is generally submitted for decision by the judge or jury soon after the presentation of a party's direct case. In contrast, several months could pass after the submission of pre-filed testimony in an administrative proceeding and the closing of the evidentiary record. During this period, expert witnesses can—and often do—refine their opinions and positions. Ending discovery at the time of pre-filed testimony denies the parties an opportunity to determine such shifts. This particularly prejudices the proceedings against protestants, given TCEQ's ongoing tendency to allow the significant alteration of a permit application, or the permit itself, at any point in the proceeding.

Furthermore, in a judicial trial, expert reports are often required, disclosures are generally more detailed, and an opportunity exists to conduct discovery on an expert regarding the contents of the expert's report up until fairly shortly prior to the live trial. In judicial proceedings, protections exist against the presentation of new material at trial to ensure that these obligations are reasonably met, as the Texas Rules of Civil Procedure prohibit the presentation of material or information at trial that was not timely disclosed during discovery.<sup>380</sup> No such protection from unfair surprise has been provided to counterbalance the strict nature of the prohibition on discovery imposed in TCEQ proceedings. Even if a party provides new information pursuant to its duty to supplement discovery responses, the bar on the conduct of discovery after the submission of pre-filed testimony senselessly forbids the other parties from pursuing discovery with regard to these newly-disclosed facts.

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377 TEX. WATER CODE ANN. § 5.556(d) (West 2014).

378 Tex. H.B. 2694, Act of June 17, 2011, 82nd R.S. ch. 1021, §10.02, sec. 5.228(c), 2011 Tex. Gen. Laws 2579, 2598.

379 See, e.g., Audio recording, Apr. 2, 2011 Meeting of House Comm. on Envtl. Regulation, Testimony of Christina Wisdom on behalf of Texas Chemical Council in favor of Tex. H.B. 3037, 82nd Leg., R.S., at 9:30 mark in recording.

380 Tex. R. Civ. P. 193.6 (prohibiting presentation of material or information not previously disclosed in discovery, and allowing continuance to permit discovery on any new material that results in unfair surprise or unfair prejudice).

Even though an applicant enters a contested case hearing having claimed that materials already in existence demonstrate that it has met its burden of proof, it is far from unusual for applicants to present entirely new experts during the hearing process, along with new materials, and perhaps even revisions to the application or the permit at issue. In some cases, the opinions of these experts, and the full nature of the materials that an applicant intends to rely upon are not disclosed until the filing of pre-filed testimony. In essence, pre-filed testimony in TCEQ proceedings often serves the same function as do expert reports in judicial proceedings. In this manner, the prohibition on discovery after the submission of pre-filed testimony in TCEQ proceedings actually creates a crucial disconnect between the conduct of discovery in judicial proceedings versus the conduct of discovery in TCEQ proceedings. In judicial proceedings, protections exist to ensure that discovery is meaningfully available regarding all evidence to be presented at trial. In TCEQ proceedings, quite the opposite is true—the process is actually structured to reward an applicant that withholds information up to, until, or after, the filing of pre-filed testimony.

If a prohibition on discovery after the submission of pre-filed testimony truly made the contested case hearing process more efficient without unduly prejudicing the rights of the parties, then this prohibition would have been applied across the board to cases such as those heard by the PUC, the RRC, or even TCEQ matters involving utility issues. But, this is not the case.

## VI. CONCLUSION

The contested case hearing process serves a valuable role in protecting the rights of impacted persons as well as providing a check on the concentration of legislative, judicial, and executive functions within the TCEQ. The existing hearing process is not perfect from any particular stakeholder's perspective, but the process does represent a genuine effort to balance the interests of the various interests involved. TCEQ's decisions can be no better than the information upon which the decisions are based, and the hearing process enhances the quality of information available to the TCEQ by allowing the affected public an opportunity to correct factual errors or omissions in an application, as well as allowing the affected public an opportunity to provide meaningful expert analysis of issues to supplement that performed by the agency. Eliminating, or further constricting, the contested case hearing process would do away with a critical tool now used by persons whose health, property, and livelihoods stand to be impacted by permitting decisions, as well as by local governmental entities such as cities and counties. Taking this tool away would not only compromise protection of public health and the environment, but would also run contrary to the values of limited government, protection of private property rights, and local control that have long defined Texas.

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