

OPPOSE HB 3234 – Changes to Water Rights Permitting – On House Floor 5/6

Background on the Water Rights Permitting Process:

Under Texas law surface water belongs to the people and is held in trust for them by the state. Those entities or individuals who want to use surface water must apply to the Texas Commission on Environmental Quality (TCEQ) for the right to use that water for anything other than livestock or domestic use. TCEQ must consider a number of factors before granting a water right, including the following, among other factors:

- Whether there is unallocated water available in the stream on a dependable basis to accommodate additional water use
- Whether the water rights application is for a “beneficial use”
- What the impacts of the water use would be on water quality, wildlife habitat, instream uses, downstream water rights, and – where appropriate – freshwater inflows to bays and estuaries, among other factors
- Whether the applicant has prepared and/or implemented a water conservation plan.

The administrative review and especially technical review of the water rights permit application takes considerable time, effort, and resources on behalf of TCEQ – especially in the case of complex water rights applications such as the multi-volume Brazos River Authority’s “systems operations” permit application.

The public is supposed to be notified when a permit application is determined by TCEQ to be “administratively complete” and then again after the technical review when and if TCEQ issues a draft permit. Persons “affected” by the proposed water rights permit – such as landowners whose land might be inundated by a proposed water reservoir associated with the permit – may request a contested case hearing on the permit. TCEQ may deny the requests for a contested case hearing and issue the permit.

If TCEQ grants the request for a contested case hearing, the matter is referred to the State Office of Administrative Hearings (SOAH) for a hearing, and other affected parties or parties whose requests were denied by TCEQ may seek to participate in the hearing, if the Administrative Law Judge (ALJ) admits them as parties. After the contested case hearing is concluded, the ALJ will make a proposal for decision by TCEQ. TCEQ makes the ultimate decision and may issue the permit, even when the ALJ recommends denial of the permit.

At whatever point TCEQ issues a water rights permit, that decision may be appealed to state court. Denial of a request for contested case hearing is also appealable to state court if the permit is issued. The courts have overturned TCEQ denial of party status and contested cases for different permits issued by the agency. But the courts give considerable discretion to the agency in decisions about the issuance of a permit. TCEQ rarely denies applications for water rights permits, but permits are often improved as a result of TCEQ and public scrutiny of the permit applications.

CSHB 3234 - This proposed legislation:

- sets deadlines for TCEQ's processing of water rights permit applications
- limits the issues that may be referred to SOAH for consideration in a contested case hearing on a draft permit,
- prohibits the ALJ from admitting as parties to the contested case hearing any persons or organizations who did not make a request to TCEQ for a contested case,
- prohibits parties in a contested case hearing from raising any issues they did not raise earlier, and
- sets limits on the length of time for conducting the contested case hearing.

What's Wrong with CSHB 3234 – This legislation:

- sets unrealistic deadlines for TCEQ's processing of water rights permit applications – especially complex multi-volume permit applications – requiring in essence that TCEQ complete its review and issue a draft permit within 300 days (with some flexibility for additional time if more information needs to be requested from and provided by the permit applicant)
- puts TCEQ and the public at a disadvantage in reviewing a permit application – while the applicant may have spent years preparing an application the agency and the public are expected to review it thoroughly within a few months
- makes it difficult to adequately review the impacts of a proposed water rights permit on water quality, wildlife habitat, instream uses, downstream water rights, freshwater inflows, and other concerns
- ignores any staffing and resource constraints at TCEQ in expediting permit applications
- unduly limits the issues that may be considered in a contested case hearing on a permit
- puts inappropriate limitations on an ALJ's authority to admit persons affected by the proposed permit as parties to a contested case hearing on the permit – if a landowner affected by the permit was not properly notified of the application or the draft permit, for example, the ALJ would not have the authority to admit that person as a party to the hearing because they had not earlier requested that TCEQ grant such a hearing
- unrealistically limits the time period for the contested case hearing process to nine months – naming of parties, setting a schedule for the process, researching the issues, deposing witnesses and doing other “discovery,” briefing the issues, conducting the physical hearing, replying to briefs, reviewing the evidence, and issuing a proposal for decision would all have to occur within nine months, leading to a rushed and unfair process that is again all to the advantage of the applicant and to the disadvantage of affected persons such as landowners contesting the permit
- is not the result of a stakeholder process involving diverse interests but reflects only the interests of attorneys for a few permit applicants who requested this legislation, and thus ignores the interests of potentially affected persons such as landowners and anglers, who might be harmed by the issuance of a water rights permit