

Bills Threaten Texans' Ability to Protect Property and Communities from Polluting Facilities

OPPOSE bills that undermine the ability of governments, businesses and property-owners from obtaining an impartial hearing on permits for large polluting facilities: SB 709 (Fraser) & HB 1865 (Morrison), HB 1113 (Clardy) & SB 941 (Creighton), and HB 1247 (Smith)



Texans currently have an opportunity for an impartial hearing if a large polluting facility is going to be built or expanded nearby. A variety of bills would unfairly tilt the process in favor of the polluter. Although very few in number, local governments, businesspeople and residents are able to obtain Contested Case Hearings (CCHs) if they could be affected by a new or expanding facility. These hearings provide such “affected persons” with the ability to seek information from the applicant, cross-examine the applicant’s experts, and present their case to a neutral Administrative Law Judge at the State Office of Administrative Hearings (SOAH).

Participation in these proceedings requires a significant commitment from the public, and the process already involves several requirements that make it difficult for the public. These bills would unfairly tilt these David-vs.-Goliath challenges against the affected public.

SB 709 and HB 1865 would do the following:

SB 709 and HB 1865 unjustifiably shift the burden of proof to the public

- Affected residents would bear the burden of proving that an application should be denied.
- The relevant applications are essentially a request for permission to pollute the environment. Where the pollution will not cause unreasonable impacts, such permission may be appropriate, but the applicant seeking to create this danger should be required to justify such risk.
- **Shifting the burden of proof imposes significant costs upon the public** to perform fact-finding and engage experts simply to protect themselves from injury.
- The polluting facility will economically benefit from the project, and the applicant has been able to develop an application on its own schedule. The affected public should not be required to do the same work in the short time a hearing allows.

SB 709 and HB 1865 create unjustified limits on public participation by residents and associations

- These bills would require that an affected resident must file comments on an issue himself or herself, even though the resident may not have received notice of the application during end of comment period, may not have had access to information on the issue, may not have received notice of the application during end of comment period, or may not have understood the complex permitting process.
- The bills would make it easier for the TCEQ to deny an impartial hearing by refusing to acknowledge that a person will be potentially impacted by a permit.
- They would impose procedural requirements, such as particular language in an organization’s purpose statement, that further enable TCEQ to deny a hearing based on minor technicalities.
- **These requirements inhibit the ability of local communities to participate in TCEQ decisions** to form groups to fight a polluting facility that may not have adopted a specific enough charter or bylaws during the relatively short period when the Executive Director is making a decision on the permit, or may not have even organized yet during the initial public comment period.

SB 709 and HB 1865 limit the length of hearings to 180 days

- **The Texas Commission on Environmental Quality already has authority to limit the length of any hearing on a case-by-case basis.** In a complex case, 180 days is simply not enough time to initiate and evaluate meaningful discovery, formulate of pre-filed testimony, conduct a live hearing, present all arguments and allow an impartial judge to analyze complex legal and factual issues.
- Factors that lead to extensions often include circumstances beyond control of affected residents such as significant changes to an application, requests by a polluting facility to delay the hearing to change the application or, surprise presentation of new evidence by a polluting facility.

HB 1113 (Clardy) and SB 941 (Creighton) would do the following:

- Make it easier for the TCEQ to refuse to acknowledge that persons are potentially impacted by a permit.
- Limit judicial review of the TCEQ's decision on denying "affected person" status

HB 1247 (Smith) would do the following:

- Transfers burden of proof to the affected person, and place even higher burden of proof on affected parties than SB 709 & HB1865
- Affected persons would have to prove show that the polluting facility (1) would violate a specific state, federal or technical requirement; or, (2) intentionally withheld or misrepresented information.