

Concerns Regarding HB 3114

The removal of SOAH from TCEQ hearings and addition of constraints on water rights permit hearings impedes the affected public's ability to protect private property rights.

Factual determinations in TCEQ hearings should be made by an impartial and independent decision-maker.

The primary purpose of a contested case hearing is to determine the facts, such as the depth to groundwater beneath a proposed landfill to protect nearby water wells, and those facts should be determined through an objective consideration of the evidence by someone without an interest in the outcome. In fact, an impartial fact-finder is an essential element of due process.

TCEQ, itself, cannot make an unbiased determination of the facts after a draft permit has been issued. At that point, the TCEQ Executive Director's staff has already negotiated the permit with the applicant, has often helped draft significant parts of the application, and the Executive Director supports the application. This prevents the agency from independently and impartially determining the facts regarding a permit, and is why in 1995 the Legislature required that the Texas Natural Resource Conservation Commission (now TCEQ) utilize the State Office of Administrative Hearings to conduct contested case hearings.

The State Office of Administrative Hearings provides institutional protections that foster independence and impartiality, while saving state money.

Overall, SOAH has done a good job of considering TCEQ permitting cases in a fair and impartial manner. Because SOAH judges are not directly or indirectly employed by the TCEQ, they have an important degree of independence. In 2010, when rendering a decision in a TCEQ matter, SOAH judges wrote that, "as our agency's core values reflect, our role is simply to call balls and strikes[.]" SOAH underwent Sunset review in 2015, and the final report from that review noted that the Legislature's ongoing investment in SOAH as an independent hearing tribunal has improved fairness, reduced bias, and contained costs. SOAH's sole focus on the conduct of hearings has allowed it to save the state money by allocating work efficiently among judges in a way that the TCEQ could not accomplish through contracting with individuals.

House Bill 3114 undermines the independence and impartiality of the hearing process.

House Bill 3114 requires that TCEQ stop using SOAH judges to conduct hearings, and, instead has the TCEQ directly contract with private attorneys to preside over permit hearings. This direct financial relationship certainly creates perceived bias, and likely will result in actual bias. An attorney that regularly represents industry, or an attorney that regularly represents environmental organizations, simply cannot be expected at the same time to serve as an impartial judge in TCEQ permit hearings.

House Bill 3114 also undermines surface water rights permitting process

Surface water rights hearings involve the direct adjudication of private property rights. Thus, such hearings have historically been afforded greater procedural protections for the affected public than environmental permits. House Bill 3114 improperly erases that distinction, and imposes significant new constraints on the hearing process for water rights, such as statutory limits on the duration of hearings, and a presumption that a water right application should be granted.