



# Requesting a Contested Case Hearing for Wastewater, Waste, or Air Permits

The purpose of this document is to provide guidance on the factors the Commission considers when determining whether to grant a request for a contested case hearing.<sup>1</sup>

## Overview of Public Participation in Permitting

Texas Commission on Environmental Quality (TCEQ) welcomes public participation in its environmental permitting process and provides opportunities to participate by submitting comments, requesting a public meeting, requesting reconsideration of staff permit recommendations, or—for certain authorizations—requesting a contested case hearing.

TCEQ requires applicants to provide public notice of their applications to alert the public to opportunities to participate in the permitting process. The first public notice for permit applications is called the Notice of Receipt of Application and Intent to Obtain Permit (NORI) and is issued after the permit application is deemed administratively complete. An application is administratively complete when the executive director's staff determines an applicant has submitted the information necessary to identify the applicant, the type of facility, and activities that are the subject of the application.

A second notice is provided once the executive director's staff determines that the application is technically complete and issues a draft permit. The second notice is called the Notice of Application and Preliminary Decision (NAPD).<sup>2</sup> An application is technically complete when the executive director has preliminarily determined that an application satisfies all state and federal regulatory requirements. The applicant must publish both the NORI and NAPD in a newspaper of general circulation in the municipality or county where the facility is proposed to be located. The notices

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<sup>1</sup> This document offers information on seeking a contested case hearing for authorizations issued under Texas Water Code Chapters 26, 27, and 32 and Texas Health and Safety Code Chapters 361 and 382. It does not include information on seeking a contested case hearing for water use or district applications. This document offers a general overview of how to request a contested case hearing. It is not a substitute for reviewing and complying with the statutes and rules governing requesting a hearing request. Relevant statutes and rules related to requesting a contested case hearing may be found in Texas Water Code Chapter 5, Texas Health and Safety Code Chapters 361 and 382, and Title 30 Texas Administrative Code, Chapters 39, 50, and 55.

<sup>2</sup> Certain types of applications, like concrete batch plant standard permits, have a consolidated notice. A consolidated notice combines the two notices, and only the one consolidated notice is published.

provide information on how and when the public may submit a comment or request for contested case hearing.<sup>3</sup>

If comments are received from the public on an application, the executive director prepares a response to all timely, relevant, and material or significant public comments, which is called a response to public comment (RTC). The commission's chief clerk mails the RTC to the applicant, any person who timely submitted comments during the public comment period, and any person who requested to be on the mailing list for a particular permitting action. The mailing of the RTC often triggers an additional 30-day period during which an individual can submit a request for a contested case hearing. Requests for a contested case hearing must meet certain requirements, as discussed in more detail below, and the commission's consideration of hearing requests is governed by factors in statutes and TCEQ rules.

The commission considers all timely filed hearing requests for a contested case hearing at a public agenda meeting. At these meetings, the commission decides whether to grant or deny the requests. Those who submit a timely request for a contested case hearing will receive a letter informing them of the time and location of the meeting at which the commission will consider their request. That letter will also include information about opportunities for filing additional information for the commission to consider.

The commissioners' decision to grant or deny a hearing request at an agenda meeting is based on the information the requester submits. Therefore, it is very important that requesters fully explain—in their written comments, hearing requests, and other filings—the reasons why their hearing request should be granted. If the commission grants a request for a contested case hearing, the case is referred to the State Office of Administrative Hearings (SOAH) with a list of issues to be considered at the SOAH hearing.

## **What Is a Contested Case Hearing?**

A contested case hearing is a legal proceeding like a civil trial in court. By requesting a contested case hearing, an individual is asking to participate in a contested case hearing by introducing evidence against the permit application. SOAH—an independent state agency that conducts hearings for many state agencies, including TCEQ—conducts the hearing.

At the SOAH hearing, an administrative law judge will consider sworn witness testimony and other evidence. Because contested case hearings are legal proceedings, parties may wish to hire an attorney to ensure that their interests are fully represented. However, representation by an attorney is not required. At the conclusion of the SOAH hearing, the administrative law judge issues a proposal for decision (PFD) and proposed order. The PFD and proposed order are then submitted to TCEQ commissioners for formal consideration at a public agenda meeting. At the public agenda meeting, TCEQ commissioners may then approve, deny, or modify the

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<sup>3</sup> The public comment period for most applications ends 30 days after the publication of the NAPD or consolidated NORI/NAPD. The comment period may be extended if a public meeting is held or if the executive director determines that additional time should be granted. Permits for hazardous waste facilities have a 45-day public comment period after the last publication of the NAPD.

executive director's draft permit or may ask SOAH to hold an additional hearing to gather more evidence.

## When Is a Contested Case Hearing Available?

Contested case hearings are only available for some authorizations. Some of the most commonly contested authorizations for which a contested case hearing is available include new domestic wastewater discharge permits, concrete batch plant emissions permits, and new municipal solid waste landfill permits. [Title 30 of the Texas Administrative Code, Section 55.201\(i\)](#), lists authorizations for which contested case hearings are not available.

## When Can You Request a Contested Case Hearing?

The commission can only grant requests for a contested case hearing that are submitted by the deadline. Each notice or mailing will contain specific information about the deadline for submitting public comments, requests for a public meeting, and hearing requests.

It is important to review the notice or mailing carefully and take note of any deadlines. For most applications, timely comments can be filed as soon as the NORI is published and up to 30 days after the NAPD is published. And, for most applications, the deadline to file hearing requests is 30 days after the mailing of the executive director's RTC.

However, for certain air applications, a requester must preserve the right to a contested case hearing much earlier in the process. For those certain air applications, if a hearing request is not received within 30 days of NORI publication, there is no further hearing request opportunity after the NAPD is published.

## Who Can Obtain a Contested Case Hearing?

The commission can only grant contested case hearings for requests filed by an "affected person."<sup>4</sup> An affected person means:

- the requester is personally affected by the permit decision, and
- their concern is something that the commission is allowed to address in the permit.

**Must be personally affected.** TCEQ may only grant a person's hearing request if the person has a legal right, duty, privilege, power, or economic interest that is affected by the permit. A person who is concerned about the permitted activity but will not be affected by it any differently than others is not eligible for a hearing.

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<sup>4</sup> The Texas Water Code (which grants TCEQ's authority) defines "affected person" as "a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest." Texas Water Code, Section 5.115(a); *but see* Texas Water Code, Section 27.018(a) (relating to hearings on injection well permit applications).

**Must be within TCEQ’s jurisdiction to consider.** TCEQ may only issue permits for specific activities that the Legislature has authorized the agency to regulate under the applicable permitting program. While individuals may be personally affected by and have valid concerns about potential impacts from the proposed facility and its activities, if those concerns are outside of the scope of the permit, then those individuals are not entitled to a hearing.

For example, for an air permit, a person who lives next door to the proposed facility, who is concerned only about property value, truck traffic to and from the facility, or groundwater pumping at the facility, would not be granted a hearing. This is because concerns about property value, off-site traffic, and groundwater availability are not within the commission’s authority to address for air permitting matters.

Explaining one’s concerns with the activity proposed in the draft permit and how those concerns personally impact the requester—including how close to or how frequently one will be near the permitted activity—helps the commission determine whether a hearing requester is affected differently than a member of the general public and whether the hearing requester has a concern that can ultimately be addressed through the permit.

## **What Information Must Be Included in a Request for a Contested Case Hearing?**

Requests for a contested case hearing must be in writing and include, at minimum, the following information:

- Information concerning the person who files the request:
  - **Name**
  - **Address (physical and, if different, mailing address)**
    - A mailing address must be provided so that the requester can receive additional information on the draft permit from the agency.
    - If the requester’s mailing address is a post office box, the hearing request must also include the physical street address or actual location of the property where the requester claims the applicant’s activities may affect them so the commission can understand the requester’s location relative to the proposed facility.
    - The requester should explain if they own, lease, rent, or have another interest in property near the activity. The interest claimed must be unique to the requester and not shared with the public at large. In addition, if the requester is claiming an interest based on the location of recreational interests or their employment, the requester should include the location where the recreation or work occurs, and explain how frequently they are at the location, how much time they spend at the location when they are there, and how long they have been recreating or working at the location.
  - **Daytime telephone number**
- **The hearing request must explain how the requester is an affected person.** The requester must identify a “personal justiciable interest” affected by the application. A “personal justiciable interest” is a clear explanation of how the requester believes they are impacted by the proposed facility or regulated activity that is the subject of the permit application. The request should include a specific

written statement explaining the requester's location relative to, including distance from, the proposed facility or regulated activity. The request should also explain how and why the requester believes they will be adversely affected by the proposed facility or activity differently than members of the general public.

- The hearing request should explain specifically how and why the requester believes that they will be affected by the activity proposed in the permit differently than the general public. In other words, the request should explain how the activity will affect the requester, the requester's family, the requester's business, or the requester's property. If the requester is concerned that their or their family's health and safety may be affected by the facility or regulated activity, the request should explain how. If the requester's or their family's use of or interests in property may be affected by the proposed facility or regulated activity, the request should explain how, including how the requester's use of the water, land, or air will be impacted if the permit is granted.
- To distinguish the requester's interests from the general public, the hearing request should explain how the requester will be personally impacted. For example, a person who lives next to a proposed wastewater treatment plant may request a hearing and be concerned about whether the permit will control odors from the plant. Because controlling odors at the plant is part of TCEQ's permitting process and because the requester lives close enough that an odor from the facility might reach them, this requester would likely be an affected person. On the other hand, a requester who lives many miles away and is concerned only for others who live near the plant and the odors that others may experience is expressing a general public concern and, without more, would not be an affected person entitled to a hearing. In other words, the concerns must be personal to the requester rather than to the public at large.
- **The hearing request must specifically request a contested case hearing.** If the request does not indicate that the requester is asking for a contested case hearing, it will be treated as a comment. Assuming it is timely received, it will be reviewed and responded to in the RTC, but it will not be reviewed by the commission for referral to SOAH for a contested case hearing.
- **The hearing request must contain more than just a statement requesting a hearing.** If a person requests a contested case hearing—without also including information explaining how they will be affected in a manner different than the general public and listing their concerns—their hearing request will not be granted.
- **The hearing request must list relevant and material concerns with the draft permit that the hearing requester would like to litigate at the contested case hearing.** These concerns must relate to the draft permit and be subjects that TCEQ is authorized to regulate. Issues over which TCEQ has no authority are not considered relevant or material, and the commission cannot grant a hearing request based on such concerns. Concerns must involve a question of fact—a concern that there has been a misinterpretation of the law should be brought to the Commission's attention through a request for reconsideration.
  - A hearing requester must raise their concerns in a timely filed public comment. If those concerns are not raised in a timely public comment, the

commission cannot refer the concerns to SOAH for a hearing, even if they are relevant to the permit application.

- **Any other information that must be included as specified in the public notice.**
- **Additional requirements for groups and associations.** Groups or associations are considered affected only if a member of the group could be personally affected in their own right, as described above. A group or association filing a request must:
  - Identify one person by name, address, and daytime telephone number who will be responsible for receiving all official communications and documents for the group;
  - Identify one or more members of the group who would be an affected person in their own right and provide those members' names and physical addresses;
  - Explain how those individuals are personally affected by the application; and
  - Identify one or more purposes of the group or association and explain how the interests that the group seeks to protect relate to those purposes.
    - A group or association hearing requester must raise their concerns in a timely filed public comment. If those concerns are not raised in a timely public comment, the commission cannot refer the concerns to SOAH for a hearing, even if they are relevant to the permit application.
- **Additional requirements for governmental entities.** A governmental entity requesting a contested case hearing must also provide their statutory authority over, or interest in, the issues relevant to the application. The governmental entity should also explain why the proposed facility or regulated activity is related to that authority or interest. Finally, like individuals or groups and associations, the governmental entity must list relevant and material concerns with the permit that it would like to litigate at the contested case hearing.
  - A governmental entity hearing requester must raise their concerns in a timely filed public comment. If those concerns are not raised in a timely public comment, the commission cannot refer the concerns to SOAH for a hearing, even if they are relevant to the permit application.

## **What Factors Do TCEQ Commissioners Consider When Evaluating Requests for a Contested Case Hearing?**

The commission will evaluate each timely request for a contested case hearing to determine whether each requester is an affected person based on factors in TCEQ statutes and rules.<sup>5</sup> When evaluating requests for a contested case hearing, the commission will consider the following factors:

- Whether the requester timely submitted comments on the application that were not withdrawn.
- Whether the requester submitted a timely contested case hearing request.
- Whether the contested case hearing request includes all required information, such as an address and name.

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<sup>5</sup> Specific factors the commission will consider are included in Title 30, Texas Administrative Code, Chapter 55. Title 30, Texas Administrative Code, Section 55.203, applies to air, water quality, and waste applications.

- Whether the hearing requester is an “affected person” and has raised one or more relevant and material issues.
- Whether the interest claimed is one protected by the law under which the application will be considered.
  - The commission can consider only concerns with the proposed facility or activity that are related to legal requirements for the proposed permit or the commission’s authority to regulate the permitted activity.
- Distance restrictions or other limitations imposed by law on the affected interest.
  - For some types of applications, statutory restrictions may limit who can be considered an affected person. For example, on applications for standard permits for concrete batch plants, only persons actually residing in a permanent residence within 440 yards of the proposed plant may be considered affected persons.<sup>6</sup>
- Whether a reasonable relationship exists between the interest claimed and the activity regulated.
- The likely impact of the regulated activity on the health and safety of the person and on the use of the person’s property.
- The likely impact of the regulated activity on use of the impacted natural resource by the requester.
- For governmental entities, their statutory authority over, or interest in, the issues relevant to the application.

## **Are There Other Issues the Commission May Consider in Evaluating a Request for a Contested Case Hearing?**

The commission may also consider the following:

- For certain authorizations, the merits of the underlying application, including whether the application meets the requirements for permit issuance;
- The likely impact of the regulated activity on the health, safety, and use of the property of the hearing requester;
- The administrative record, including the permit application and any supporting documentation;
- The analysis and opinions of the executive director; and
- Any other expert reports, affidavits, opinions, or data timely submitted to the commission by the executive director, the applicant, or a hearing requester.

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<sup>6</sup> Texas Health & Safety Code, Section 382.058(c).