

Webinar Sponsored by the Hill Country Alliance, Feb. 1, 2023:
The Wastewater Permitting Process Through the TCEQ
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Introduction:

- Remember that the TCEQ participation process is OUR RIGHT. You don't need to be an expert to weigh in.
- Public participation is effective and can get the attention of the agency of the applicant.
- It IS possible to at least win real improvements (to the permit) by the public's participation in the permitting process.
- RULE OF THUMB – at any time during the process, never ever waive your right to any kind of hearing.

The focus of this webinar will focus on **Domestic wastewater permits** (such as housing developments or summer camps, etc), non-industrial, non on-site (septic tanks).

The three permit options under this category are:

- 1) **TPDES (Texas Pollutant Discharge Elimination System)**, a Discharge permit that authorizes the placement of effluent placed directly into a stream.
- 2) **TLAP, or Texas Land Application Permit**, that allows for discharge on committed land, a dedicated disposal field. Potential problems include cracks that allow effluents to leak into the aquifer, or being located too close a waterway.
- 3) **Add-On, a Reclaimed Water or 210 Reuse authorization**, meant to be a “tack-on” to another granted permit, usually TLAP.

The KEY PLAYERS:

- 1) The Applicant – usually a private or local government. An important participant in the process.
- 2) The Protestants(s) – usually landowners, non-profit groups or even could be other cities.
- 3) TCEQ
 - a. **Commissioners** (3) appointed by the Texas Governor.
 - b. **Chief Clerk**, who keeps the records and issues public notices – a GOOD SOURCE OR INFORMATION FOR THE PUBLIC.

- c. **Executive Director (ED)** – who oversees the Staff, and has the authority to issue uncontested permits.
- d. **The Office of Public Interest Council (OPIC)**, a sort of a state office of helpful lawyers but who can answer questions but cannot represent the public.
- e. **Administrative Law Judge from the State Office of Administrative Hearings (SOAH)** –lawyers who can be helpful to answer questions but who do not/cannot represent the public.

THE TWELVE BASIC STEPS THE PUBLIC ought to know about when contesting a TCEQ Permit

- 1) **The Applicant Submits the application**, that first the ED looks over and finds mistakes, then issues a “notice of deficiency” [* Protestants should look for those.]
Also related: Since November 2022 there has been in place a PIP -Public Involvement Plan, especially pertinent to low-income, and persons of color communities.
- 2) **First Notice – NORI – Notice Of Receipt** of the Application and Intent to obtain the Permit. Mailed to adjacent landowners and to those within 1 mile downstream. For TLAPs, it is within one mile from the facility as the crow flies. The applicant must also publish a bilingual public notice in a publication catering to the public.
A TCEQ **WQ (water quality) permit #** is assigned.
- 3) **Second Notice – NAPD – Notice of Application and Preliminary Decision**, and a “Draft Permit” (non-binding) may be issued by the TCEQ after a second look at the application. There may also have been more NORIs in between the First and Second Notice if the application had repeated administrative errors. The applicant must again publish a bilingual public notice in a geographically relevant publication.

IMPORTANT: NOW THE 30-DAY PUBLIC COMMENT PERIOD BEGINS

- 4) **Public Comment Period**
 - a. Public comments are very important in the process – responses to anything not liked in the Draft Permit. These comments can include POTENTIAL concerns and they can be questions to the applicant. Make sure the “right” people submit – those who are affected by the discharge.
 - b. Comments can be submitted electronically via the TCEQ website (<https://www14.tceq.texas.gov/epic/eComment>), snail-mailed in writing or hand-delivered, all by 5pm of the last day. Make sure to include the WQ (Water Quality Permit) # and it’s better (from a formal standpoint) if addressed to the TCEQ’s Chief Clerk (currently Laurie Gharis).

- c. Organizations can make comments and/or they can join with another organization to make a comment, and individuals can join with a community or organization to frame their comments. **ORGANIZATION COMMENTS SHOULD BE SUBMITTED SOONER THAN LATER in the 30-day period.**

5) **An OPTIONAL BONUS STEP: a PUBLIC MEETING**

Not required, only granted if the TCEQ's ED thinks it is necessary based on the number of and content of public comments; OR a state legislator asks for it (this latter strategy can be very important).

- a. The applicant, OPIC and ED will all attend.
- b. Consists of two main parts: 1) an informal Q&A, a "back and forth" conversation by attendees, but none of this goes into the public record. 2) the Formal part: pre-scheduled oral comments are executed by protestants (with no response to you), and this part becomes part of the public record.
- c. **If possible, choose the Public Meeting facility with care – the ED doesn't get out often and location can be influential.**

**** NOTE: the Public Comment Deadline is extended to the end of the Public Meeting if one is indeed granted.****

6) **Response to Comments (RTC)** – this occurs up to 60 days after the Public Comment period has ended. ***And it triggers a 30-day DEADLINE to request a Contested Case Hearing.**

- a. Preparation for a Contest Case Hearing, a few tips (but best to also hire a dedicated environmental lawyer).
- b. Put EVERYTHING in the preliminary document, note that you don't have to litigate everything you included, but very difficult to add anything later.
- c. **Property ownership near the site and direct impact must be demonstrated – this is much more important to the TCEQ than generalized fear for the environment.**

7) **Deadline to Request a Contested Case Hearing** – the Commissioners will consider granting a Contested Case Hearing. Same day as the Commissioners meet, you will find out if your request was granted.

8) The TCEQ Commissioners Considers Hearing Requests – Note that Public Hearings are not automatic – they are granted by the Commissioners based on public input.

9) Three days in advance of the **Preliminary Hearing** – the contested case is transferred to the **State Office of Administrative Hearings (SOAH)** –

- a. It is vitally important that all involved protestants show up to the Preliminary Hearing.

10) **Hearing on the Merits & Proposal for Decision (PFD)** - There will be a Bench Trial, or Hearing on the Merits – live testimony from expert witnesses, with closing arguments from both sides. The Judges will issue their recommendations (PFD) back to the TCEQ.

11) The TCEQ Commissioners consider the Judge's recommendations.

- a. At this point, the decision can still go either way, with the TCEQ listening to or ignoring the Judge's PFD, or somewhere in between.
- b. This decision will be very difficult to overturn in District Court.
- c. The TCEQ can take up to two years to issue their decision, but just remember that the Applicant is also having to wait with their plans on hold.

12) Mediation and Settlement

- a. This commonly happens either before the Preliminary Hearing or shortly thereafter. Concessions can be made by the applicant (and often are).
- b. Settlements CAN WIN IMPROVEMENTS.
- c. Nothing is off the table. In the past, Protestants have achieved:
 - i. Applicant gives up and withdraws.
 - ii. A direct discharge applicant switches to a TLAP.
 - iii. Applicant agrees to less discharge.
 - iv. Applicant agrees to enhanced treatment practices.
 - v. "Good neighbor provisions" are added.
 - vi. Applicant pays money directly to protestant(s).
 - vii. Applicant's plan can have a reduced impact: for example, developments can have less density, include buffer zones, etc.

MEANWHILE, A GOOD STRATEGY FOR PROTESTANTS that can work after an unfavorable decision:

Look for other permits to challenge that the applicant may need to complete their plans, such as groundwater well rights, surface water rights, road entrances, tax incentives, development permits, sand and gravel permits, federal endangered species protections, etc.

--Unofficial transcript by Linda Fawcett