

**TIMELINE ESTIMATES FOR TCEQ PERMIT APPLICATIONS
WITH CONTESTED CASE HEARINGS
(OTHER THAN FOR AIR POLLUTION PERMITS)**

June 2015

The following are estimates of the time required for a permitting process when there is a formal (i.e., a “contested case”) hearing. The estimates apply to applications filed with the Texas Commission on Environmental Quality (“TCEQ”) for new or amended permits for water pollution discharges; solid and hazardous waste storage, processing, and disposal; water rights certificates; and non-oil-and-gas injection wells. *The estimates do not apply to applications for air pollution permits.*

The estimates are intended to reflect times between events in standard cases. There are at least two cautions to remember. (1) Many cases are not “standard.” Some applications get revised several times after their initial filing. These can take a number of years and require work not contemplated, below. (2) The Texas Legislature passed in 2015 a new law, Senate Bill No. 709, that further restricted citizen participation rights in all TCEQ permitting actions. That law included a provision that, depending on how administrative law judges implement the provision, shortens the time available to parties between the “preliminary hearing” and the “proposal for decision” (both, described a bit, below). Senate Bill 709 applies, generally, to permit applications filed after September 1, 2015.

Unlike the comment “hearings” before a city council, county commissioner's court or the state legislature, the contested case hearing process involves a trial before an administrative law judge (“ALJ”) employed by the State Office of Administrative Hearings (“SOAH”) who take the evidence and make recommendations to the TCEQ Commissioners, who are the ultimate agency decisionmakers. The process often involves discovery (e.g., depositions) and other steps common to trials in court. Attorneys and expert witnesses are almost always employed by permit applicants and, often, by permit opponents.

Before the formal hearing process begins, there will typically have been a long period of review of the application by the TCEQ staff. Applicants know that TCEQ resources are very limited and, thus, applicants may try to get by with less than is required. The review usually results in negotiation process between the agency and the applicant. The TCEQ staff prods the applicant for more information or changes, and the applicant responds or tries to convince the staff that the information or change is not needed. Thus, the applicant can largely control the time required for the staff review.

Participation by concerned landowners, local governments and others at the staff review stage can assist TCEQ in taking a stronger position with permit applicants. The negotiation process, however, usually results in a recommendation in favor of the applicant. The staff has recommended denial of permits, although an applicant will usually withdraw the application before the staff has to make a formal recommendation for denial.

THE TIMELINE

Time (in days) Between Actions	Action
1	Application filed.
30 to 60	TCEQ determination of administrative completeness.

10 to 30	Initial public notice. A public meeting, which is less formal than is a public hearing, may be requested, although not always provided by the agency.
30	Deadline for comments on the application. (A public hearing request can and should be included.). If there is a public meeting, the comment deadline is usually extended to the day of that meeting, if the meeting is after the normal 30-day comment period.
60 to 500	TCEQ determination of technical completeness and, if the application is found to be complete, a draft permit is usually prepared.
10 to 30	Second public notice. The draft permit is usually issued now, too.
30	Deadline for comments on the draft permit. (A public meeting may be requested, again.)
45 to 150	<p>Unless there is a direct referral of the matter to SOAH, TCEQ will prepare a response to comments (RTC) after the comment deadline.</p> <p>(If the applicant does not oppose hearing requests or believes the request will be granted with most issues for trial approved, the applicant may refer the matter directly to SOAH for a hearing, reducing the time for the process by 1 to 4 months.)</p> <p>Also this deadline should be treated as a deadline for hearing requests. (Prior hearing requests will still be valid, but a new hearing request is usually important, because it allows the requestor a last chance to identify the issues to be referred to SOAH for the hearing.)</p>
30 to 90	If there were hearing requests and the application was not directly referred to SOAH, there will be a letter to requestors with notice of the date for the meeting of the three TCEQ Commissioners to grant or deny the hearing requests.
15 to 45	Deadline for applicant and others to file responses to hearing requests.
14	Deadline for requesters to file replies to responses for hearing requests.
9	Meeting of Commissioners to consider hearing requests and determine which issues to refer to SOAH for trial and the recommended time period for the hearing if a hearing request is granted. Senate Bill 709 (2015) set a presumptive 6-month time from preliminary hearing to a proposal for decision; the TCEQ Commissioner are allowed to set either a shorter or a longer time period.
30 to 60	If a hearing request is granted, new public notice (newspaper) of the preliminary hearing is required. At the hearing, parties are named and a schedule for the hearing is set.
30	<p>Preliminary hearing. Anyone who might be affected and who submitted comments on the permit application may attend and request to be named a party. Senate Bill 709 limits possible parties to people and groups that submitted comments on the <i>permit application</i>; it is not yet clear whether people or groups that submitted comments on the draft permit but not on the application may be named parties. Unless there is an agreement with the applicant that it will not oppose “party” status for a person or group, those who wish to be named as parties will need to be prepared to present evidence at the preliminary hearing to prove that they will be affected – that they have the legal "standing" to participate.</p> <p>There will usually be a schedule set for activities that precede the ultimate trial. The pre-hearing schedule usually includes:</p>

	<p>Discovery Can include oral depositions of witnesses, of parties and others; exchange of written questions and answers, production of documents requested by parties.</p> <p>Submission of prefiled written testimony for each witness. In question and answer form. When the witness is presented, the witness does not then repeat the testimony, instead the written testimony is accepted into the record cross-examination by others begins.</p> <p>One or more preliminary hearings to resolve issues.</p>
90 to 300	The hearing on the merits (i.e., the trial) is held by a SOAH ALJ or, sometimes, two ALJs. Occasionally, the hearing or part of the hearing will be held in the local area, but the hearing may be and generally are held exclusively in Austin. The hearing may last a few days or a few weeks. Historically, the time period from preliminary hearing to trial has been 120 to 180 days.
5 to 10	After the hearing is over, the court reporter prepares the transcript of the hearing. (Each party can be required to pay a percentage of the costs of the full transcript, although the ALJs usually assess the largest share of costs to the applicant. Transcripts can often be in the range of \$1,000 to \$10,000, possibly more, with all opponents' shares often totaling 20% of the costs.)
15 to 30	Filing of written final arguments, with references to the pages of the transcript and trial exhibits for all facts. Legal briefing is also often included with the factual arguments. Often a party, to help the ALJ rule for that party, will also file proposed findings of fact and conclusions of law.
5 to 15	Parties file responses to final written arguments of others.
30 to 60	Recommendation of the ALJ(s) to the TCEQ Commissioners. (This is the "Proposal for Decision." It will include a proposed order including with findings of fact and conclusions of law.) The Commissioners are the ones who actually make the agency's decision. So, note that the trial only results in a recommendation to the Commission.
20	Deadline to file exceptions to the PFD.
10	Deadline to respond to exceptions of others.
10 to 90	Commissioners' meeting to consider the proposal for decision and exceptions and replies, if any. The Commission usually votes that day on a decision.
10 to 60	Written order of the Commission is mailed to all parties
20	Deadline to file motion for rehearing to ask the Commission to reconsider the decision. This is a mandatory step , if one is to be able to appeal the agency's decision.
45 to 90	Commission grants or denies motion for rehearing.
30	If the motion is denied, deadline to file appeal to court.

An appeal to court does not automatically stay the permit decision. If a permit is issued, the applicant can proceed. Many applicants do not, however, since, if the court reversed TCEQ's decision, there would be no permit, at least for some period of time.

Note, also, that a decision by a court to reverse TCEQ's decision only requires TCEQ to reconsider its decision, if the applicant wants to continue to pursue the application. A court decision favorable to permit opponents does not clearly void the permit. This is a murky area of the law, but, conceivably, the permit applicant could choose to proceed, even though the decision to grant its permit has been reversed.