

**TIME ESTIMATES FOR TCEQ APPLICATIONS FOR AIR POLLUTION PERMITS
INVOLVING
CONTESTED CASE HEARINGS**

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 that allow increased emissions of air contaminants.

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 commissioners’ 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”). Witnesses testify under oath and are subject to cross examination by opposing parties. 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 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 applicants. The negotiation process, however, usually results in a recommendation for issuance of a permit. 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.

Time (in days)	Action
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Between Actions	
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. For small facilities, i.e., facilities not subject to major NSR permitting (“New Source Review” permitting, a federally-required process), it is also the deadline to request a contested hearing. For small facilities, only those who request a hearing will be given mailed notice of the draft permit; see below.
60 to 500	TCEQ determination of technical completeness and, if so, draft permit is usually prepared. Something like 90 days is common for this step.
10 to 30	Notice of Draft Permit to those who commented or requested a hearing during the earlier comment period. Newspaper notice of draft permit for any large facility application and for a small facility application on which timely comments or hearing requests were filed.
30	Deadline for comments on draft permit. Deadline to request a contested hearing. (A public meeting can be requested, but, again, is not required.)
45 to 150	TCEQ will prepare a response to comments (“RTC”) after the comment deadline.
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 3 TCEQ Commissioners to decide whether to grant or deny the hearing requests.
15 to 45	Deadline for Applicant and others to file responses to hearing requests.
14	Deadline for requestors to file replies to responses for hearing requests.
9	Meeting of Commissioners to consider hearing requests and, if some are granted, to determine which issues to refer to SOAH for trial and the recommended time period for the hearing.
30 to 60	If a hearing request is granted, new public notice (newspaper) of the preliminary hearing is required. At the preliminary hearing, parties are named and a schedule for the hearing set. 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	<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 permit application; 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. 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 of witnesses. In question and answer form. When the witness is presented at the trial, the witness does not then repeat the testimony; instead, the written testimony is accepted into the record and cross-examination of the witness by others begins.</p>
	<p>One or more preliminary hearings to resolve issues.</p>
90 to 300	<p>The hearing on the merits (i.e., the trial) is held by an Administrative Law Judge (ALJ), possibly two, from SOAH. Sometimes the hearing or part of the hearing will be held in the local area, but the hearing more typically is held wholly in Austin. The hearing may last a few days or a few weeks. The low end of the range of times shown here is much more common than is the high end.</p>
5 to 10	<p>After the hearing is over, the court reporter prepares the transcript of the hearing. (Note, each party can be required to pay a percentage of the costs of the full transcript, although the ALJs usually assess the largest share to the applicant. Transcripts can often be in the range of \$1,000 to \$10,000, possibly more, with all opponents shares often totally 20% of the costs.)</p>
10 to 20	<p>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, parties will also file proposed findings of fact and conclusions of law.</p>
5 to 15	<p>Responses to final written arguments of others.</p>

30 to 60	Recommendation of the Administrative Law Judge to the TCEQ Commissioners. (A “Proposal for Decision” or “PFD” with a proposed order including 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. All parties may file.
10	Deadline to respond to exceptions of others. All parties may file.
10 to 90	Meeting of the Commissioners to consider the PFD and exceptions. The Commission usually votes that day on a decision.
10 to 60	Written order of the Commission mailed to all parties.
20	Deadline to file motion for rehearing to ask the Commission to reconsider, a prerequisite to appealing the agency’s decision. Any parties may file.
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, since if the court reversed TCEQ's decision, there will be no permit, at least for some period of time. Thus, often an applicant will not proceed until there is a final court decision.

Note, also, that a decision by a court to reverse TCEQ's decision, 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.