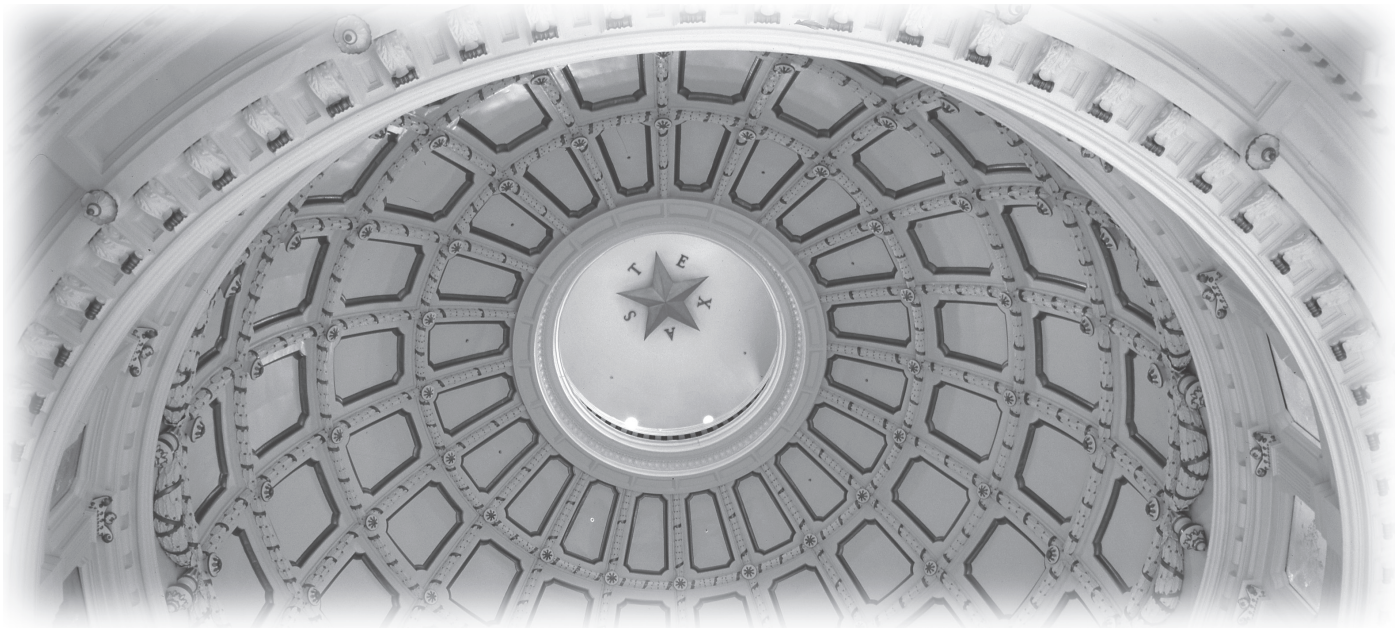

Interim Report

to the 84th Legislature

House Committee on Environmental Regulation

December 2014

HOUSE COMMITTEE ON ENVIRONMENTAL REGULATION
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2014

A REPORT TO THE
HOUSE OF REPRESENTATIVES
84TH TEXAS LEGISLATURE

PATRICIA HARLESS
CHAIR

COMMITTEE CLERK
JAMIE BURCHFIELD

Committee On
Environmental Regulation

December 23, 2014

Patricia Harless
Chair

P.O. Box 2910
Austin, Texas 78768-2910

The Honorable Joe Straus
Speaker, Texas House of Representatives
Members of the Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:

The Committee on Environmental Regulation of the Eighty-third Legislature hereby submits its interim report including recommendations and drafted legislation for consideration by the Eighty-fourth Legislature.

Respectfully submitted,

Patricia Harless

Marisa Márquez, Vice Chair

Ron Reynolds

Jason Isaac

Ed Thompson

Kyle Kacal

Chris Turner

Tryon Lewis

Jason Villalba

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Introduction

At the beginning of the 83rd Legislature, the Honorable Joe Straus, Speaker of the Texas House of Representatives, appointed nine members to the House Committee on Environmental Regulation (the Committee). The Committee membership included the following appointees: Patricia Harless, Chair; Marisa Márquez, Vice Chair; Jason Isaac, Kyle Kacal, Tryon Lewis, Ron Reynolds, Ed Thompson, Chris Turner, and Jason Villalba.

Pursuant to House Rule, Section 13 (83rd Legislature), the Committee shall have jurisdiction over all matters pertaining to:

1. air, land, and water pollution, including the environmental regulation of industrial development;
2. the regulation of waste disposal;
3. environmental matters that are regulated by the Department of State Health Services or the Texas Commission on Environmental Quality;
4. oversight of the Texas Commission on Environmental Quality as it relates to environmental regulation; and
5. the following state agency: the Texas Low-Level Radioactive Waste Disposal Commission.

During the interim, Speaker Joe Straus issued four interim charges to the Committee to study and report back with facts, findings, and recommendations. The House Committee held three public hearings on May 13, 2014, September 29, 2014 and September 30, 2014 to study the charges. The Committee also accepted written testimony and research from the public in the course of compiling this report. Appreciation is extended to those who testified before the Committee and those that submitted written materials during this time.

House Committee on Environmental Regulation
Interim Charges

1. Study the environmental permitting processes at the Texas Commission on Environmental Quality (TCEQ), specifically the contested-case hearing process at the State Office of Administrative Hearings (SOAH) and the timelines associated with the process. Study the economic impact that the state's permitting processes have on Texas manufacturing sectors and how neighboring states' and the federal permitting processes and timelines compare to those in Texas.

2. Study the rules, laws, and regulations pertaining to the disposal of high-level radioactive waste in Texas and determine the potential economic impact of permitting a facility in Texas. Make specific recommendations on the state and federal actions necessary to permit a high-level radioactive waste disposal or interim storage facility in Texas.

3. Conduct legislative oversight and monitoring of the agencies and programs under the committee's jurisdiction and the implementation of relevant legislation passed by the 83rd Legislature. In conducting this oversight, the committee should:
   a. consider any reforms to state agencies to make them more responsive to Texas taxpayers and citizens;
   b. identify issues regarding the agency or its governance that may be appropriate to investigate, improve, remedy, or eliminate;
   c. determine whether an agency is operating in a transparent and efficient manner; and
   d. identify opportunities to streamline programs and services while maintaining the mission of the agency and its programs.

4. Review the Environmental Protection Agency's newly proposed Clean Power Plan to determine the potential impact the proposed federal rule would have on Texas. Specifically, the Committee should examine how the proposed emissions reductions would impact the reliability of the state's electricity generation, the potential impact on the price of retail electricity and its affordability, and the potential impact on the economic development of the state. Additionally, the Committee should review the state's renewable energy and energy efficiency standards to determine if they are capable of contributing to meeting any proposed emissions reductions and determine what changes, if any, to these policies could help facilitate meeting the proposed emissions reductions.

Charge 1

Study the environmental permitting processes at the Texas Commission on Environmental Quality (TCEQ), specifically the contested-case hearing process at the State Office of Administrative Hearings (SOAH) and the timelines associated with the process. Study the economic impact that the state's permitting processes have on Texas manufacturing sectors and how neighboring states' and the federal permitting processes and timelines compare to those in Texas.

Background

Prior to 1995, contested case hearings were conducted by a hearings examiner employed by the agency overseeing the proposed permit. A preliminary hearing was held by a hearings examiner for each application in order to determine whether the requester was an affected person. In 1995 the Legislature adopted several changes to the contested case process including creating the Natural Resource Conservation Division within the State Office of Administrative Hearings (SOAH) to conduct contested case hearings. The Legislature also adopted specific requirements in order for a hearing request to be valid, giving the Texas Commission on Environmental Quality (TCEQ) the authority to deny requests that did not meet the statutory standards without having to refer the application to SOAH. The applicant also gained the ability to request that its application be directly referred to SOAH if the applicant chose not to challenge the validity of any hearing requests, saving time and resources.

The next major change to the contested hearing case process was in 1999 when the Legislature revised the public participation process by creating a public notice and submission of public comment period prior to the publishing of the draft permit. This would allow the Commission and the applicant to address the public's concerns earlier and reduce the number of contested case hearings. Other changes in 1999 were to focus the scope of contested case hearings to relevant and material issues of fact that are disputed by the parties and to establish time limits for the actual hearing process.[1]

During the 83rd Legislature, HB 2082 by Ritter and SB 952 by Fraser were filed. This legislation sought to make several changes to contested case hearing process, administered by SOAH, for permits issued by the TCEQ. SB 952 was passed out of the Senate Committee on Natural Resources, but failed to be placed on a calendar for floor debate in the Senate. HB 2082 did not receive a hearing in the House Committee on Environmental Regulation, but the Committee was charged to examine this issue during the Interim.

Current Contested Case Process

Not all permit applications at TCEQ are subject to contested case hearings. For those that are, the process begins when the TCEQ receives the permit application. The next step is administrative review of the application. Once administrative review is completed, technical review of the permit begins. During the technical review process, the first public notice of the permit application is posted, which allows for a 30 day comment period, after which the technical review process is complete. Next is the second public notice with draft permit, which is another 30 day period for comment. At any time before the end of the second public notice period a public meeting can be requested.

If no comments or contested case hearing requests are received, the Executive Director issues the permit. If comments are received but not a request for a contested case hearing, the Commission files responses to comments before issuing the permit. When contested case hearing requests are received, the Commission must first consider whether to grant the contested case hearing request. If the request is denied, the permit is issued. When the Commission grants a contested case hearing, it is referred to SOAH.
Contested cases at SOAH are presided over by Administrative Law Judges (ALJ), with the

procedure being similar to a court trial by a judge with evidence, witnesses, motions, and legal arguments. In reviewing environmental permitting contested cases, the ALJ considers whether the application complies with state environmental laws and whether the application complies with federal environmental laws adopted by the state.[2]

Before the contested case hearing at SOAH, the involved parties are required to file in writing most of their evidence. At the hearing, the parties offer evidence, call witnesses, and question witnesses called by others. After the hearing, the parties file written arguments about applicable law and evidence. During the course of the hearing process, the parties may resolve their issues by agreeing to a settlement.

For each referred case, the ALJ prepares a Proposal for Decision (PFD). This includes an analysis of legal disputes and admitted evidence, proposals of fact findings and legal conclusions when the applicability or meaning of law is disputed. The ALJ does not decide whether a permit is issued, but makes a recommendation to the TCEQ who then decides whether or not to issue the permit.

When an applicant asks for a direct referral to SOAH for a contested case hearing, there is not a deadline for decision set by TCEQ. The schedule is developed by the ALJ with the involved parties generally in agreement on the timeline. When TCEQ grants the hearing request and refers to SOAH, the commission can also refer specific issues and sets the deadline for the PFD. The ALJ issues the PFD within 60 days after the case record is closed.

Once the ALJ has submitted the PFD to TCEQ, the permit application is placed on the Commision's Agenda for final decision. At the Agenda meeting, the Commissioners can either issue the permit as is, or with changes; remand the permit to the TCEQ Executive Director or SOAH, or deny the permit application.

From 2007 to 2013, an average of approximately 1,560 environmental permit applications was filed each year that were subject to a contested case hearing. From those applications, approximately 110 (7%) received hearing requests. An average of 26 applications (2.3%) was referred to SOAH for a contested case hearing. There has been an average of six direct referrals of permit applications to SOAH each year since 2007.[3]

Year	Permit Applications	Hearing Requests	Referred to SOAH
2007	1,726	169	35
2008	1,829	158	35
2009	1,614	142	37
2010	1,333	72	33
2011	1,305	96	15
2012	1,643	78	15
2013	1,474	65	10

Timeline for Contested Case Hearings

Generally, when TCEQ refers a permit application to SOAH for a contested case hearing, the Commission sets a hearing duration of six to nine months. This timeline may be lengthened depending on the complexity of the application. If an applicant requests a direct referral to SOAH, the timeline can be reduced by approximately 90 days. However, this is not always the case as when an application is sent to SOAH on a direct referral, TCEQ does not have the authority to narrow the issues for consideration or set a hearing duration.[4]

General Timeline for Contested Case Hearings	
Commission Agenda on Hearing Requests	45 days
Referral to SOAH	15 days
Notice and SOAH Preliminary Hearing Date	60 days
SOAH Evidentiary Hearing and PFD	180-270 days
Commission Agenda on PFD	45 days
Motion for Rehearing and Final Order	45-90 days
Total	390-525 days

Proponents for Current Contested Case Hearing Process

On May 13, 2014, the Environmental Regulation Committee met in a public hearing to hear testimony on the contested case hearing charge. Several groups and individuals testified in favor of keeping the current system. These witnesses have been involved with a number of contested case hearings over the years, either as individuals or with the groups they represent. Many felt that the current system works and is an integral component in protecting the private property rights of Texas citizens.

Cyrus Reed, Conservation Director for the Lone Star Chapter of the Sierra Club, testified that the current process works because very few permits receive requests for contested case hearings, even fewer actually go through a full contested case hearing because many reach an agreement, and only a handful of permits are ever denied by TCEQ because of a contested case hearing and ALJ decision. He contends that most contested case hearings simply result in better permits.

Reed also testified that the changes made to the contested case hearing process by HB 801 (74th Legislature) and HB 2694 (82nd Legislature) strengthened the process. Changes mentioned by Reed included making the Executive director of TCEQ a party in the contested case hearing and specifying that other state agencies may not be parties to contested cases. Time limits were imposed on certain permits where expediency is necessary, such as radioactive waste licenses and MACT air permits. Another significant change was that affected parties must have an economic or health interest that is greater than the general public.

In his testimony, Reed gave examples of various outcomes of contested case hearings that the Sierra Club has been a party to. For one permit application, the Sierra Club was able to reach an agreement to voluntary change the site plan for a grit trap operator in South Texas so that it would not impact a local school and neighboring homes. Reed also contended that sometimes even when the Sierra Club loses in the contested case hearing, the process leads to the agency improving permit limits such as the case with permit renewal application for ASARCO. In the case of a permit for a radioactive waste site in West Texas, the Sierra Club prevailed.

While supportive of the current process, Reed did suggest some changes that could be made. These included standardizing the process for the statutes involving radioactive, water, and air permits so there is more consistency; giving clearer direction on standing decisions, as well as adopting or referring to federal standing requirements. Reed also suggested there could be ways to create a more efficient process for permit renewals so that the time for these decisions is condensed.

The Committee also heard similar testimony from Public Citizen. Tom "Smitty" Smith testified that the contested case hearing process is necessary because many of the cases are for first-of-their-kind permits which need closer examination. Smith testified that from 2003 to 2010, there were 22 new coal plants that filed for permits and Public Citizen worked with community groups in 21 cases. In these cases, emissions were reduced between 20-80 percent and sometimes mercury and CO2 offsets of 100%. Smith believes that because of the contested case hearing process, these permits were made better because residents were able to offer expertise that TCEQ did not have.

During his testimony, Smith pointed out that there were a number of complaints about the contested case hearing process prior to the passage of HB 801 in 1999. HB 801 created a preliminary step of a community meeting which allowed TCEQ and the permit holder to address questions from the public, which has resulted in there being far fewer contested case hearing requests. He cautioned that Texas should be wary of shifting to a process that mirrors that of the Environmental Protection Agency for issuing permits, as Smith feels it is not strong enough to protect private property rights. Imposing time limits on hearings could also be a disservice to the public, as these permits can be very complex in nature and require additional time to be fully examined.

Bob Allen, Director of Harris County's Pollution Control Services Department offered testimony about Harris County's involvement in the contested case hearing process over the last five years. Allen testified that Harris County generally utilizes the contested case hearing process in two circumstances. The first circumstance is when a facility with a very egregious compliance history files for a permit renewal. The second circumstance is when a facility with a potential odor or dust issue files for a permit.

In the last five years, records of the Harris County Pollution Control Services (PCS) indicate that five contested hearing requests were requested in Harris County. One by PCS, one by the city of Houston, two by adjacent landowners, and one was a direct referral to contested case by the applicant. Out of these five hearing requests, only one actually proceeded to a contested case hearing and ultimately resulted in the issuance of the permit. In the other four cases, two applications were withdrawn, one permit is pending, and one permit was issued with negotiated permit provisions.

Rock Owens, Practice Group Manager for the Environmental and Infrastructure Division of the Harris County Attorney's office advocated for the current contested case hearing process because he feels it is very fair. In written testimony provided by Harris County, they claim that the current process gives local governments leverage to negotiate with applicants who have had compliance issues during the renewal process, rather than having to resort to filing a civil law

suit. Civil law suits take time and can result in penalties for the facility, where contested case hearings allow for improvements to be made without being assessed a penalty.

Harris County argues that facilities who have the potential to be of a high nuisance, whether through smell or dust, or located in an unsuitable location, need more protective permit provisions. The contested case hearing process provides a forum for these concerns to be addressed prior to the permit being issued. When a permit is issued to a facility with a high nuisance potential, there are often citizen nuisance complaints which when confirmed, lead to violation notices and possible civil enforcement actions with penalties assessed.

Another reason why Harris County supports the current system is that they feel the notice and comment process for permit applications provides few protections because TCEQ is limited to addressing technical issues with the permit. Complaints about potential nuisance conditions are often not addressed by TCEQ. If the contested case hearing is removed from the permitting process, there will also be a loss of any incentive for the applicant to negotiate with concerned parties to address issues with the facility prior to the issuance of the permit.

Laura Blackburn, with the League of Women Voters advocated for keeping the current system in place in her testimony because when the Legislature moved the hearings to SOAH, the scope of affected persons was reduced, which dramatically reduced the number of contested permit applications. Referencing a study done by the Texas Center for Public Studies, Blackburn noted that less than 3% of all permit applications are contested. She noted that often, those who are directly affected by the facilities applying for permits have low income and low education and would not have the funds to pursue legal action on their own. The contested case hearing process helps protect these people by giving them a more cost-efficient forum to be heard.

Eric Allmon, an attorney who has represented several clients in contested case hearings at TCEQ testified that hearings serve an important purpose to the application process. Through the contested case hearing, facts can be corrected and addressed which is not as easily done during the notice and comment period. He also pointed out that averages for the length of time a permit application can take at TCEQ can be misleading because the quality and accuracy of the application can affect the length of time the permit is under technical review.

Proponents for Changing the Contested Case Hearing Process

During the public hearing, the Committee also heard testimony from those who believe there are inadequacies in the current contested hearing process. Stephen Minick, representing the Texas Association of Business testified to some key issues he believes the Legislature should address. In the current process, there is an opportunity created for opponents of the proposed project to force applicants to agree to terms and conditions or other accommodations that go beyond the authority of TCEQ to impose under any regulatory or statutory provision. The hearing process for significant permit applications can also take several years to final approval. Another concern regarding the current process is that the burden of proof falls to the applicant to defend the draft permit written by TCEQ, instead of the protestor of the permit.

Minick contends that the unpredictable nature of the permit timelines and process can turn potential businesses away from building in Texas. Investors sometimes turn to neighboring states

where the permit process is viewed as easier and faster, which is a loss for the Texas economy. Minick suggests some changes that could be made to the contested case hearing process to remedy this would be to review where the burden of proof should rest between the applicant and the protestants and to establish reasonable time frames and schedules for all parties in the process. Minick also recommends possibly narrowing the scope of the issues that are determined to be subject to a hearing in order to focus more accurately on those facts that are legitimately in dispute and the qualification of those parties who are eligible to request a hearing.

Bob Thompson, a landowner who has participated in contested case hearings for permits at both TCEQ and the Railroad Commission advocated for changes to make the TCEQ process more similar to the Railroad Commission process. He recommends that the protestants of permit applications become involved at a much earlier stage in the application process. Another suggestion made by Thompson is for TCEQ staff to be able to perform their own analysis and examinations, much like the staff at the Railroad Commission who make site visits and write reports for the case file. He also believes the contested case hearing process would be strengthened if TCEQ staff is allowed to take advocacy positions and become a party to the SOAH proceeding.

Currently, only one Administrative Law Judge presides over the contested case hearing for TCEQ permit applications. For contested case hearings for Railroad Commission applications there are two judges presiding: one with legal expertise and one with technical expertise. Thompson contends that the process for TCEQ permits would be strengthened by also having a judge with technical expertise presiding over the hearing. In his opinion, any changes made to the contested case hearings for TCEQ permits, should strengthen the process and help protect landowners and their private property rights rather than making the process easier for industry.

David Wise, Vice President of Manufacturing for Shintech, the largest PVC manufacturer in the United States, advocated for the need of certainty in the permitting process. His company is currently looking to build a facility in either Texas or Louisiana. In his experience, the permitting process for facilities in Louisiana is faster and more predictable with permits taking six to ten months for final approval, roughly a year less than Texas. With his facility earning 35 million a day from production, 1.5 million in wages direct to employees in a month, the lengthy permitting process in Texas would cost his company an estimated 400 million in revenue. More certainty in the permitting process would give potential applicants the ability to better calculate costs and have a greater understanding of the risk involved with pursuing a permit in Texas.

Representing Balanced Energy for Texas, Derek Seal addressed the committee speaking on his experience with contested case hearings at TCEQ. At the time, Seal had been involved with ten contested cases, seven of which reach a settlement agreement and three that went all the way through the process. From the perspective of the applicant, Seal testified that the contested case hearing changes the way business is done in Texas.

Seal noted that in 2000, the Environmental Protection Agency eliminated evidentiary hearings on water quality permits, which were similar to contested case hearings, because the agency found them to be unduly burdensome without environmental benefits. An argument can be made that this is the case for contested case hearings because so few permit applications come back from SOAH with anything more than minor changes. Often, the contested case hearing process is used

to add provisions to permits that would not otherwise be required by TCEQ. Seal feels the comment period for the permit is helpful to address concerns regarding the permit.

Another issue Seal has with the contested case hearing process is that it can be very expensive for the applicant, especially when a case is direct referred to SOAH and the scope is not narrowed. He recommended that the committee consider shifting the burden of proof from the applicant to the protestor in order to reduce some of the expense. Seal testified that applicants will often prepare boxes of evidence to submit for the hearing without knowing specifically which issues will arise during the course of the contested case hearing. If the protestor had to provide some proof when raising concerns with a permit, it could narrow the scope of the hearing and shorten the timeline for the hearing process.

Conclusion

While the Committee heard from parties who are in support of the current contested case process and those who are advocating for changes, testimony showed that parties on both sides agree that some changes could be beneficial to the permit process. Specifically, the parties agreed that the timelines associated with the contested case hearings could be less time consuming. When considering any changes to the contested case hearing process, it is imperative that the Legislature find a balance that protects the rights of private property owners and meets environmental regulations while not unnecessarily hindering economic development by an over burdensome and unpredictable permitting process.

Charge 4

Review the Environmental Protection Agency's newly proposed Clean Power Plan to determine the potential impact the proposed federal rule would have on Texas. Specifically, the Committee should examine how the proposed emissions reductions would impact the reliability of the state's electricity generation, the potential impact on the price of retail electricity and its affordability, and the potential impact on the economic development of the state. Additionally, the Committee should review the state's renewable energy and energy efficiency standards to determine if they are capable of contributing to meeting any proposed emissions reductions and determine what changes, if any, to these policies could help facilitate meeting the proposed emissions reductions.

Background

On June 2, 2014, the Environmental Protection Agency (EPA) proposed the Clean Power Plan to cut carbon pollution from power plants. This is the first time the EPA has proposed regulations to reduce carbon pollution from existing power plants, which is the single largest source of carbon pollution in the United States. The rule is also the first time the agency has attempted to place a national limit on carbon pollution levels, though instead of creating a uniform national standard, the EPA has proposed individual standards that vary by state. According to the EPA, this plan will "protect public health, move the United States toward a cleaner environment and fight climate change while supplying Americans with reliable and affordable power."

The goals of the Clean Power Plan are to:

- Cut carbon emission from the power sector by 30 percent nationwide below 2005 levels, which is equal to the emissions from powering more than half the homes in the United States for one year;
- Cut particle pollution, nitrogen oxides, and sulfur dioxide by more than 25 percent as a co-benefit;
- Avoid up to 6,600 premature deaths, up to 150,000 asthma attacks in children, and up to 490,000 missed work or school days- providing up to $93 billion in climate and public health benefits; and
- Shrink electricity bills roughly 8 percent by increasing energy efficiency and reducing demand in the electricity system.[5]

The new rule was published in the National Register on June 18, 2014. Four public hearings were held in July in Atlanta, GA; Denver, CO; Washington, DC; and Pittsburgh, PA. Originally, the comments on the proposal were due by October 16 but the EPA extended the comment period until December 1, 2014. At this time, the EPA expects to finalize the rule in June 2015. State plans are due to the EPA by June 30, 2016, unless a state receives an extension until June 30, 2017. States who are submitting a multi-state plan may receive an extension until June 30, 2018.

EPA has given each state two options for their proposed goals. The proposed state goal calls for a greater reduction, but gives the state until 2030 to meet the final goal. The alternate state goal allows the state to achieve lower reductions, but requires that the goal be reached sooner with the final goal deadline being 2025. The interim goal is based on a ten year average of 2020-2029 for the proposed goals and a five year average of 2020-2024 for the alternate goals. Final goals are based on a rolling three-year average. The goals set forth for Texas are as follows:

Proposed State Goals

- Interim goal: 853 lbs CO_2/MWh, phased in from 2020-2029
- Final goal: 791 lbs CO_2/MWh, starting in 2030

Alternate State Goals

- Interim goal: 957 lbs CO_2/MWh, phased in from 2020-2024
- Final goal: 924 lbs CO_2/MWh, starting in 2025[6]

When creating the standards, the EPA reviewed existing emissions reductions methods in order to establish the Best System of Emissions Reduction (BSER). Four building blocks have been created to guide states in how best to achieve the new goals, though the EPA has given states the flexibility to achieve their goals using alternate approaches.

Block 1- Heat Rate Improvement: efficiency improvements on coal-fired units

- Proposed State Goals- 6% heat rate improvement
- Alternate State Goals- 4% heat rate improvement

Block 2- Re-dispatch to Existing Natural Gas Combined Cycle Plants (NGCC): shifting generation from coal-fired to higher CO_2 emitting units to NGCC

- Proposed State Goals- 70% capacity factor ceiling
- Alternate State Goals- 65% capacity factor ceiling

Block 3- Renewable Energy, Nuclear Under Construction, Nuclear At-Risk

- Proposed State Goals- State-specific; Texas' final target is 20% of generation by 2029, or approximately 86 million megawatt-hours (MWh).
- Alternate State Goals- State-specific; Texas' final target is 15% of generation by 2024, or approximately 65 million MWh.

Block 4- Increased Demand-Side Energy Efficiency: Incrementally increasing the rate of each state's energy efficiency improvement by a set rate per year, up to a maximum target rate, and adjusting state goals based on cumulative savings.

- Proposed State Goals- Incremental rate of 0.20% per year, 1.5% target rate; Texas' final cumulative savings target is 9.9% of retail sales by 2029.
- Alternate State Goals- Incremental rate of 0.15% per year, 1.0% target rate; Texas' final cumulative savings target is 4.4% of retail sales by 2024.[7]

It should be noted, block one falls within the fence line, while blocks two, three, and four fall outside the fence. Within the fence line refers to regulations that take place at a coal plant facility. Outside the fence refers to regulations that extend beyond what occurs at a coal plant facility. With this proposed rule, for the first time, the EPA is imposing regulations that extend beyond the fence.

EPA has provided states with multiple options for meeting state goals. States may demonstrate compliance by taking either an individual or a multi-state regional approach to meet their specific goals. States may also adopt rate-based standards or mass-based standards. Compliance can be demonstrated through site-specific emissions standards or a portfolio approach (a statewide cap or statewide lb/MWh level). States may also choose whether to incorporate renewable energy and energy efficiency into their state plans.

Speaker Straus charged the Committee to review the proposed Clean Power Plan, specifically the impact on electricity costs and reliability and to evaluate energy efficiency and renewable energy standards to determine if they are capable of contributing to help the state meet the proposed emissions reductions. The Committee held two comprehensive hearings in Austin on September 29 and 30, 2014 where representatives from agency, industry, and advocacy groups provided

testimony on the proposed rule and its potential effects on Texas. This report highlights several issues brought to the attention of the Committee from the testimony that should be considered as Texas determines the best course of action regarding EPA's proposed Clean Power Plan.

Credit for Achievements in Renewable Energy and Energy Efficiency

Texas can be proud of the work industry has done to diversify our energy portfolio. According to testimony provided by the Electric Reliability Council of Texas (ERCOT), in 2013, 40.5% of energy use was from Natural Gas, 9.9% was from Wind, 0.9% came from Hydro, Biomass, Solar, or other sources, while 37.2% came from Coal and 11.6% came from Nuclear. Roughly, 11% of energy used in Texas came from renewable energy, with most of that being wind. Under the new Clean Power Plan, Texas would need to increase our use of renewable energy to 20% in order to meet the emissions reductions standards set forth by EPA.

According to testimony provided by Donna Nelson, Chairman of the Public Utilities Commission, the EPA rule assumes that the Texas fleet of renewable energy, already the largest in the country, will grow an additional 153% in 8-14 years. California with the second largest fleet is required to grow just 37%. The renewable energy goal for Texas is based on Kansas's 20% capacity RPS. This expectation of growth in renewable energy is problematic because it seems to be founded on the logic that because Texas has already achieved higher levels of renewable energy usage, the state will be able to achieve even higher levels of renewable energy usage in the future.

Phillip Oldham, testifying on behalf of the Texas Association of Manufacturers, noted that in other regions, the renewable energy goal was based on an average of the states in the region. If the Kansas goal was averaged with the existing renewable energy goal in Texas, the average would have been approximately 12%, which is much lower and more achievable than the mandated 20%. Oldham also pointed out that the rule confuses renewable generating capacity with renewable energy production. The Kansas goal is based on installed generation capacity, while the EPA has set a standard based on the overall energy produced. If the EPA's standard was capacity-based, Texas would have already met this goal.

Texas does expect to achieve growth in the renewable energy sector in the coming years. According to the Texas Solar Power Association, price drops in the last four years have made solar power an economically attractive energy option across the state. Currently, there is over 650 MW of large-scale solar plants either online or under construction. Witnesses testified that the state will be able to move forward with utilizing more solar power in the future without having to offer any new mandates or subsidies. It is unclear how beneficial this growth will be to helping Texas achieve the goals set forth by EPA since solar power was less than 1% of the energy produced in Texas in 2013.

Wind energy production has also been increasing in recent years. The current wind capacity of 10,407 MW is the most of any state in the nation. Over the last two years, wind energy has represented half of the new electrical generation built in Texas, according to the Wind Coalition. In his testimony, Cyrus Reed of the Lone Star Chapter, Sierra Club said that based on current trends, he believes that Texas will achieve the 20% goal in renewable energy by 2022. Tom "Smitty" Smith of Public Citizen noted that the growth of renewable energy will also lead to the

growth of jobs for Texans in rural areas of the state where the state can develop more wind and solar energy. Citing a report issued by the Governor Perry's office[8], Smith stated that renewable energy now employs more Texans than coal, at 102,000 jobs compared to 23,000 so increasing our renewable energy portfolio to meet these new goals will also create more jobs. While job growth in this sector is beneficial for Texas, it should be noted that the jobs lost from having to shut down coal power plants are in opposite ends of the state from where the new jobs will be created.

With the proposed energy efficiency standards, the EPA is attempting to regulate the usage of end-use customers. The proposed reductions do not take into account what Texas has already done in energy efficiency, and rather expects the state to achieve incremental reductions based on mandates from other states. Texas has already implemented cost-effective energy efficiency measures due to existing mandates, so it will most likely cost industry and consumers more in order to achieve greater energy efficiency.

Cris Eugster, Executive Vice President and Chief Generation & Strategy Officer for CPS Energy in San Antonio spoke to the importance of the EPA giving credit to early action in renewable energy. CPS is the nation's largest municipally owned electric and natural gas utility and they have a very diverse energy portfolio. They project that in 2020, their fleet will comprise of 16% natural gas, coal 38%, nuclear 27%, and roughly 19% will be renewables and demand response. In his testimony, Eugster specifically pointed to the early action made by Texas in wind development as well as the small credit given to nuclear, which has a significant impact on carbon reduction. CPS intends to ask these questions, as well as others, in their comments to EPA on the proposed rule.

In his testimony, Warren Lasher, Director of System Planning for ERCOT noted that ERCOT has significant experience with integrating renewables into its electricity transmission. He brought up three factors that are necessary to integrate more renewable energy into the market. First, there is a need for more reliable forecasting. Second, there is also a need for acquiring additional ancillary services, which are short-term commitments from resources in order to support operational reliability. Finally, there is also a need for more back-up resources, either in generation or load resources in order to ensure you've got adequate resources across the whole year. Lasher believes that all of these can be achieved, but noted that it will take time, which the current proposed rule does not give.

Based on the data and testimony provided to the Committee, it appears that because Texas has already taken steps to diversify our energy portfolio, we are now expected to do more than most states. Several witnesses pointed out that Texas has already grasped at the "low hanging fruit" with regard to the use of renewable energy, meaning that expanding our reliance on these resources will cost the state more money and will be more difficult to achieve. Not only will it take money, but time will be needed to expand our infrastructure, which the proposed timeline for implementation does not account for.

Inequities in Goal Setting

As previously noted, rather than setting a nation-wide standard for emissions reductions, the EPA has set a separate goal for each state under the proposed Clean Power Plan. Also, the target

for emission rates is applied to an entire state, and not to any one source of pollution. The rates for each state vary substantially, and some states are even allowed to increase emissions of Green House Gases (GHG).

In his testimony to the Committee, Stephen Minick, Vice President for Governmental Affairs for the Texas Association of Business, highlighted some of the variances in the state goals. Washington has the highest emissions rate reduction at 83%, while Rhode Island may increase up to 37%. Regionally, Washington must reduce by 83%, Oregon by 42% and California by 7%. Looking at our region, Texas must reduce by 42%, Oklahoma by 41%, and Kansas and Nebraska may increase by 10%. South Dakota must reduce by 4% while North Dakota may increase by 1%. Virginia must reduce emissions by 35%; West Virginia must reduce by 0%. Tennessee must reduce emissions by 20% and Kentucky may increase by 3%. States have been given the option to propose multi-state plans, but with such differing goals by region, a state with a lower reduction goal, or with a goal that increases emissions would have little incentive to work with a state with a more strenuous reductions goal.

It appears that the rationale for varying the state goals is an acknowledgment that each state faces different challenges and opportunities for reducing GHGs, according to Minick. However, he points out that there is no provision in the Clean Air Act which authorizes the EPA to invent a plan for reducing emissions from existing sources without imposing requirements on existing sources and then creating standards for each state based on a theory of what the EPA believes the state is capable of accomplishing. In testimony provided by Sam Newell with the Brattle Group, he noted that in the EPA's 2030 Base Case, Texas accounts for 11.3% of national emissions but 19.0% of national CO_2 reductions in EPA's analysis of the rule. Some witnesses argued that this disproportionate impact is not allowed by the Clean Air Act.

Effects on Electricity Reliability

During the hearing, the Committee heard testimony from a number of electricity companies from around the state. Three panels representing investor-owned utilities, municipal-owned utilities, and electric cooperatives spoke to the effects this proposed rule will have on their ability to provide electricity to Texans.

Over the course of the hearing, it became apparent that while this rule will have significant consequences for all providers, East Texas will greatly suffer from the implementation of the Clean Power Plan. Debbie Robinson, President of East Texas Electric Cooperative (ETEC) spoke to the detrimental effects this rule will have for their company and its members. With an initial estimated cost of $2.9 billion, ETEC anticipates having to retire four coal plants which provide approximately 294 MWs of power.

Venita McCellon-Allen, President of Southwestern Electric Power Company (SWEPCO) also spoke to the impact this rule will have on their plants and service they provide in East Texas. They anticipate needing to retire three separate units located in East Texas by 2020 in order to comply with the rule. That would be a loss of almost 1,700 MWs, which is roughly 30% of SWEPCO's installed capacity and 100% of the base load coal generation in Southwest Power Pool's (SPP) East Texas pocket. McCellon-Allen also noted that East Texas customers cannot benefit from any remaining capacity or energy in ERCOT, or all of the available capacity and

energy in the SPP. The loss of local, base load generation at the East Texas plants will require significant investments in both new capacity and new transmission and the implementation timeline for the Clean Power Plan which does not give any recognition to the planning, approval, permitting and siting time that will be needed to approve and install new generation and transmission.

Increasing reliance on wind energy to meet the new emissions standards could also pose problems for reliability. Golden Spread Electric Cooperative (GSEC) serves an area spanning 77 counties in Texas as well as portions of Oklahoma, Kansas, Colorado and New Mexico. Mark Schwirtz, President and General Manager testified that the significant wind energy development presents a challenge to the electric grid due to its intermittent nature. Because of this, fast start generation is needed to provide grid stability. According to Schwirtz, currently, when the wind stops blowing, GSEC's units are able to reach 70% capacity in 10 minutes and 100% capacity in 11 minutes from a cold start. The new rules could limit the use of fast start units. This could inhibit wind energy integration because of the need to maintain stability to the grid and possibly result in higher CO_2 emissions if combined cycle units are used in place of fast start units. Schwirtz pointed out that the EPA's actions to limit simple cycle operation could potentially encumber the renewable energy initiative.

On November 17, 2014 ERCOT released a report[9] detailing their analysis of the impacts of the Clean Power Plan. In their analysis, ERCOT stated that implementation of the plan in the ERCOT region, particularly to meet the Plan's interim goal, is likely to lead to reduced grid reliability for certain periods and an increase in localized grid challenges. Specifically, the report highlights three challenges ERCOT will face with the implementation of this rule:

- The anticipated retirement of up to half of the existing coal capacity in the ERCOT region will pose challenges to reliable operation of the grid in replacing the dispatchable generation capacity and reliability services provided by these resources.

- Integrating new wind and solar resources will increase the challenges of reliably operating all resources, and pose costs to procure additional regulating services, improve forecast accuracy, and address system inertia issues.

- Accelerated resource mix changes will require major improvements to ERCOT's transmission system, posing significant costs not considered in EPA's Regulatory Impact Analysis.

As Texas weather is famously known for how quickly it can change, and how extreme the temperatures can vary from hot to cold, the reliability of our electric grid is essential. As currently proposed, the Clean Power Plan will result in significant changes that will disrupt how many Texans receive their power. The current timelines for implementation will not provide enough time to replace retiring coal plants with more efficient coal plants or alternative energy sources, as new construction takes years for development, permitting, and completion.

Cost of Implementation

One of the biggest concerns of witnesses testifying before the Committee is the overall cost for Texas to comply with the proposed Clean Power Plan. While the goal of the Clean Power Plan is to shrink electricity bills by 8%,[10] many witnesses testified that implementing the plan as proposed will result in significant costs to electric companies and lead to higher electricity bills for Texans.

The competitive electricity market in Texas has driven generation to more natural gas and renewables already. Mac McFarland, CEO for Luminant noted in his testimony that with the Texas population and economy growing, the total electric generation has increased significantly since 2005, but carbon emissions have remained essentially flat. McFarland also pointed out that the EPA has made a faulty assumption that coal plants can cost-effectively improve efficiency. In order to be competitive, most utilities have already implemented as much cost-efficiency units that they can.

In his testimony, Phillip Oldham told the Committee that the proposed rules would change how decisions on electricity system dispatch are made. Decisions about which units should be used to service customers will have to be based on each unit's emissions rate, not its cost which will undermine the competitive electricity market and lead to an increase in consumer costs. He also testified that the EPA's assumptions in setting emission standards are inconsistent and work at cross-purposes. The EPA assumes that Texas can reduce the heat rate of its coal units by 6%. The rule would also require coal units to run less often. Running less often actually increases the overall heat rate and emissions rate for a unit, which will make it even more difficult to achieve the new standards.

SWEPCO President Venita McCellon-Allen noted that her company has a duty to reliably serve its customers and to comply with federal law. Compliance with current and known regulations requires the investment of hundreds of millions of dollars. This significant investment will lead to a resulting increase in customer rates, as the companies cannot absorb the cost burden to be in compliance with new regulations.

Bob Kahn, General Manager for Texas Municipal Power Agency testified that TMPA estimates the cost to meet the interim requirement would be over $80 million per year. Compliance is uneconomical and would make it difficult for TMPA to compete in the ERCOT competitive wholesale market, which could force their power plant to be shut down. Having to shut down units because of the current lack of compliance technology and prohibitive costs would be detrimental to the reliability of the ERCOT grid and to all rate payers in ERCOT.

Companies are also concerned about the combined impact of other EPA regulations on their ability to provide generation to their customers and the cost it will take to do business. David Hudson, President and CEO of Southwestern Public Service Company, an operating subsidiary of Xcel Energy, told the Committee that this impact is something that keeps him up at night. Specifically the Cross-State Pollution Rule, Mercury and Air Toxics Rule, and Regional Haze rules cause concern because combined they provide for a lot of uncertainty as to how to comply with the growing number of regulations while trying to produce an affordable product for their customers.

Several witnesses testified that the EPA has severely underestimated the cost of implementation of this rule. In his testimony, McFarland said that preliminary analysis of the rule being performed by NERA Economic Consulting indicates that average delivered electricity prices from 2020-2030 could jump by over 20 percent. This analysis indicates that residential rates could increase by approximately 3 cents per kilowatt-hour under the proposed rule which would translate to an increase in average household electric bills of over $30 a month. This is a significant increase for all Texans, but will be particularly hard for those who are most at-risk such as elderly customers on fixed incomes and low-income customers.

A report[11] by Energy Venture Analysis also found that the cost of implementation has been underestimated by the EPA. Their report estimates that annual power and gas costs for residential, commercial and industrial customers in America would be $284 billion higher in 2020 compared to 2012, which is a 60% increase. They estimate that average retail electricity prices will increase in the contiguous U.S. by 5.9% to 6.5% in 2020.

In their November report, ERCOT preliminary analysis of the proposed rule anticipates that energy costs for consumers may increase by up to 20% in 2020. This analysis does not account for the associated costs of transmission upgrades, natural gas supply infrastructure upgrades, procurement of additional ancillary services, energy efficiency investments, capital costs of new capacity, and other costs associated with the retirement or decreased operation of coal-fired capacity in ERCOT. ERCOT believes that consideration of these factors would result in even higher energy costs for consumers.

These anticipated higher costs for consumers also do not take into consideration the increased reliance on gas power and the potential fluctuations in the price of natural gas. In recent years, the low cost of natural gas has led to more use of this commodity for electricity. The implementation of the Clean Power Plan will require even more reliance on natural gas for electricity generation. Should the availability of natural gas diminish or the cost of delivering this product increase, Texans will face even higher electric bills.

Implementation Authority

The broad nature of the rule leaves questions of who in Texas has jurisdiction in creating a state plan and who will have the authority to implement the rule once it is finally adopted. Generally, the TCEQ is the primary agency responsible for implementing rules adopted by the EPA and for preparing and submitting the State Implementation Plan. The PUC has authority over electricity utilities which play the biggest role in implementing the Clean Power Plan. However, the PUC's authority over municipally owned utilities and electric cooperatives is limited with the deregulation of the market. It is likely that in order for the state to implement a plan to satisfy the EPA, legislation will be required to either grant sole jurisdiction to one agency specifically for the administration of the Clean Power Plan or to set specific guidelines to the two agencies in order for them to collaborate to administer the rule.

Implementation authority will also be an issue for ERCOT which oversees 85% of the electricity consumed in Texas. ERCOT is the only transmission organization located solely within one state. Currently, dispatch in the ERCOT market is based on economics with ERCOT receiving

bids every five minutes and decisions on dispatch based on the lowest cost.[12] The Clean Power Plan proposal is fundamentally inconsistent with competitive electricity markets because ERCOT, and other competitive transmission organizations, would have to make dispatch decisions based on environmental factors rather than cost. Chairman Nelson testified that this shift in decision making would have impacts on the electricity market that are impossible to quantify at this time.

Another issue brought to the attention of the committee is how compliance could be problematic for some utilities because the EPA has given varying goals to each state. Several witnesses testifying for their respective companies brought up concerns for compliance because not only do they have utilities in different states, but some of their utilities are distributed through different electric markets. These companies have really no way to prepare for the implementation of this rule with each state having a different goal and also being given flexibility of how they achieve their goal.

Conclusion

After two days of testimony from representatives of agency, industry, and advocacy groups, there is still much unknown about the proposed Clean Power Plan, its impact on the electricity market, and how best to comply with the rule. The EPA has reported that more than 1.4 million comments were received during the comment period, which closed on December 1, 2014. It is unknown what effect these comments will have on the proposed rule and whether the final publish date will also be pushed back due to the high volume of comments and the amount of time it will take to review. The Legislature should continue to monitor the progress of the proposed rule and also continue an ongoing dialogue with agency, industry, and advocacy groups so that the state may choose the best course of action if/when the Clean Power Plan rule is finalized.

Letter from Representative Lewis

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December 22, 2014

The Honorable Patricia Harless, Chair
Texas House Committee on Environmental Regulation
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Chairwoman Harless,

The proposed regulations of the Environmental Protection Agency (EPA), which constitute the Clean Power Plan, were published in June of 2014. Because the comment period did not close until shortly before our Committee Report was due, and the final rules will not be determined until after the 84th Session of the Texas Legislature is concluded, the Committee Report makes no substantive recommendation for legislative action. The Report also makes no conclusion with regard to the two subjects of Charge 4: (1) Determine the impact of the Clean Power Plan on electricity cost and reliability; and (2) Evaluate the ability of energy efficiency of renewable energy to meet proposed emission reductions.

While I cannot argue with the decision of the Committee Report to refrain from comment on a Plan which is still formative and not final, I feel that enough is known about the regulatory intent of the EPA to warrant an answer to the Speaker's Charge:

(1) We know that the EPA not only intends to cap carbon emissions, but that it means to do so in imposing individual caps on each state.

(2) We know that the EPA intends that the limit on Texas would require the reduction of carbon emissions from the present level, despite the expected growth of the Texas economy and population, and the additional power needs to supply industrial, commercial, and residential growth.

(3) We know that these new standards will be devastating to the Texas Coal industry and power facilities which utilize coal.

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(4) We know that the federal government, through the EPA rules, expects to impose the burden of implementation of these standards on the State Government of Texas. At present, no state agency has been granted regulatory responsibility which would include the full ambit of those needed to comply with Clean Power Plan.

From the testimony before the Committee, I believe that we can conclude that the implementation of the Clean Power Plan will have the following economic impacts on Texans.

(1) Electricity rates to consumers will increase by at least 20% which could contribute an additional $30 a month in an average residential bill.
(2) A number of Texas Coal-powered generation plants and the coal extraction facilities which supply them will be closed. ERCOT anticipates it will lose up to half of existing coal capacity in its region. This will place a particular economic burden on East Texas.
(3) The important ability of Texas' power generation industry to adjust between coal and natural gas generation, depending on supply and cost factors of the marketplace will be adversely impacted.
(4) Under present technology, alternative energy sources, which largely depend on the vagaries of weather, do not constitute a reliable source of power to contribute to meeting proposed emissions reductions.

No state agency has regulatory responsibility over the whole subject matter which will be covered by implementation of the Clean Power Plan. As noted in the Committee Report, the Texas Commission on Environmental Quality (TCEQ) is the primary agency responsible for implementing rules adopted by the EPA, while the Public Utility Commission (PUC) has authority over electric utilities. It would seem prudent for the Committee to recommend that legislation be adopted in the 84th Session, which would establish a Task Force, chaired by the Chairs of the TCEQ and PUC and include representation by Members of The Texas House and Senate. The Task Force should examine the impact of the Clean Power Plan on Texas and make recommendations, no later than January 1, 2016 as to whether the state should submit a state plan under the Clean Power Plan and, if so, which plan option should be chosen.

Sincerely,

Tryon D. Lewis

ENDNOTES

[1] Testimony provided by Robert Martinez, Director of the Environmental Law Division, TCEQ.
[2] Testimony provided by Bill Newchurch, Administrative Law Judge, Natural Resources Team Leader, SOAH.
[3] Testimony provided by Robert Martinez, TCEQ.
[4] Testimony provided by Robert Martinez, TCEQ.
[5] News Release from the Environmental Protection Agency on June 2, 2014.
[6] Testimony provided by the TCEQ.
[7] Testimony provided by the TCEQ.
[8] http://texaswideopenforbusiness.com, Office of the Governor, page 1.
[9] ERCOT Analysis of the Impacts of the Clean Power Plan.
[10] News Release from the Environmental Protection Agency on June 2, 2014.
[11] Clean Power Plan Impact Analysis, Energy Ventures Analysis, November 2014.
[12] Testimony provided by Warren Lasher, Director of System Planning for ERCOT.