

**LEGISLATIVE UPDATE:**  
**Senator Hughes and Representative Paddie File Legislation to Improve Railroad  
Commission Hearing Process Governing Surface Mining Permits**

*By Michael J. Nasi, Jackson Walker L.L.P.*

On February 25<sup>th</sup>, Senator Bryan Hughes filed SB 1088 and, soon thereafter, Representative Chris Paddie filed an identical House version – HB 2498. These bills seek to reform the Railroad Commission (RRC) hearing process governing surface coal mining and reclamation permits issued by the RRC's Surface Mining and Reclamation Division (SMRD). Both Senator Hughes and Representative Paddie are past winners of TMRA's "Legislator of the Year" award and both have significant familiarity with the surface coal mining and the Railroad Commission due to operations located in their legislative districts, as well as the roles they play on key Senate and House energy committees. TMRA applauds their leadership in filing these bills and intends to work hard this session to support passage of this important set of reforms. What follows is a brief discussion of the background that led to the filing of this legislation, followed by a short overview of the key provisions.

**Background**

Under the current permitting process at the RRC governing surface mining renewals, significant revisions, and bond release applications, public notice and an opportunity to comment is provided. With this notice comes the opportunity for a contested case hearing to be requested by any person claiming to be "affected". While the SMRD contested case hearings at the RRC have not been a constant nuisance for operators, there are several historic examples (and a few recent ones) that show how this hearing process exposes operators and the commission to expending significant time and resources participating in the hearing and these proceedings can delay final issuance of the requested authorization by several months – even years. Due to the 5-year permit term on surface mining and reclamation permits and the need to continually revise permits and pursue bond releases, surface mine operators are exposed to these expenditures and delays at least every 5 years and often more frequently.

**Overview of SB 1088 & HB 2498**

There are two aspects of the RRC hearing process that these bills seek to refine to ensure that would-be protestants cannot unduly delay and complicate the process without a legitimate basis for participating (1) the standard governing whether somebody is sufficiently "affected" to be granted a hearing and (2) the burden of proof that must be met by protestants.

*1. "Affected Person" Standard.*

In contrast to TCEQ provisions governing this issue, the RRC governing provisions and practice do not require much of protestants when evaluating whether they will be adequately "affected" by a proposed revision, renewal, or bond release. The proposed reforms would integrate TCEQ statutory and regulatory standards that have been affirmed by Texas courts and could significantly improve the RRC SMRD hearing process. This is because Texas courts have recognized that the

language in those provisions tracks constitutional standing requirements applicable to determining whether a would-be party has a “justiciable interest” and, as such, would provide the RRC with a more tried-and-true method of assessing whether parties should be granted a hearing in RRC SMRD cases.

## *2. Burden of Proof*

Despite the fact that months (and most of the time, years) of technical and legal review have been conducted on an application, protestants currently do not have to “prove” anything in RRC SMRD contested case hearings - all the burden rests with the applicant. Despite some language imposing a burden on protestants to establish why they don’t think an unchanged part of a permit renewal should be issued, the provisions governing and the practice of the RRC requires applicants to put on a full case and discharge a burden of proof on their entire application in each proceeding which triggers notice and an opportunity for hearing – which is every significant revision, every bond release no matter how small, and every 5-year renewal no matter whether any changes are contemplated not previously noticed in prior permit/renewal proceedings.

The proposed reforms seek to align RRC SMRD hearings to the same burden of proof provisions the Texas legislature directed TCEQ to implement in 2015 with the passage of SB 709. These reforms will significantly improve the RCT hearing process by shifting the burden of proof to protestants once the applicant and staff demonstrate that the technical review of the application is complete and issuance is recommended.

### **Section by Section Analysis**

Section 1 of both bills amends Chapter 2003 of the Texas Government Code by adding a new Section 2003.0465 to govern hearings conducted under Section 134.062 of the Texas Natural Resources Code (which is the section governing RRC SMRD hearings) which includes provisions that provide that:

- Each issue in a RRC surface mining hearing needs to have been raised by an affected person in a comment submitted by that affected person in response to a permit application in a timely manner;
- A preliminary decision issued by the RRC Surface Mining Division, and other sufficient supporting documentation in the administrative record of the permit application, establishes a rebuttable presumption that: (1) the requested permit issuance, renewal, revision or bond release meets all state and federal legal and technical requirements; and (2) the requested permit issuance, renewal, revision or bond release, if issued consistent with the application and the Railroad Commission Surface Mining Division’s final technical assessment, would be eligible for the required findings under Section 134.066, Natural Resources Code (which is the statute setting out the basis on which permits can be issued);
- A protesting party may rebut the aforementioned presumption by presenting evidence that: relates to a matter for which a hearing is conducted by the Railroad Commission

under Section 134.062-.066, Natural Resources Code and demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.

- The applicant and the executive director may present additional evidence to respond to a protesting party's attempt to rebut the presumption with its own rebuttal evidence to further support the requested authorization.

Section 2 of both bills amends Section 134.062, Natural Resources Code (Request for Public Hearing; Notice), to add subsections (c) and (d) to provide that:

- The term "affected person" means 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.
- In determining whether a person has a personal justiciable interest or whether an affected association is entitled to standing in contested case hearings,
  - the RRC is authorized to consider:
    - the merits of the underlying application, including whether the application meets the requirements for permit issuance;
    - the likely impact of regulated activity on the health, safety, and use of the property of the hearing requestor;
    - the administrative record, including the permit application and any supporting documentation;
    - the analysis and opinions of the commission's Surface Mining Division;
    - whether the interest claimed is one protected by the law under which the application will be considered;
    - whether a reasonable relationship exists between the interest claimed and the activity regulated;
    - The likely impact of the regulated activity on use of the impacted natural resource by the person;
    - for governmental entities, their statutory authority over or interest in the issues relevant to the application; and
    - any other expert reports, affidavits, opinions, or data submitted on or before any applicable deadline to the commission by the executive director, the applicant, or a hearing requestor.
  - the RRC is prohibited from finding that:
    - a group or association is an affected person unless the group or association identifies, by name and physical address in a timely request for a contested case hearing, a member of the group or association who would be an affected person in the person's own right; or
    - a hearing requestor is an affected person unless the hearing requestor timely submitted comments on the permit application.

## **Conclusion**

If SB 1088 or HB 2498 were to pass, the public will continue to be able to participate in a significant component of the RRC SMRD permitting process as they will continue to have the opportunity to review applications, submit comments on applications, attend and participate in public meetings, and request and attend trial-type contested case hearings. The only difference under the proposed reforms will be that members of the public will be expected to establish that they have a legitimate basis for protesting the permit application and, to be successful, will have to present evidence to support their opposition rather than relying upon unsubstantiated claims.

It is important to point out in closing that neither the federal government nor the vast majority of states provide this right to a contested case hearing like Texas does. It is telling that the federal government actually eliminated this process entirely for federal environmental permitting during the Clinton Administration because they found evidentiary hearings did not render environmental benefits and were inefficient, overly burdensome on the public and government, and not necessary to prevent erroneous decision-making. See 65 *Federal Register* 30886, 30900 (May 15, 2000).

**MICHAEL J. NASI**

Jackson Walker L.L.P.  
Partner, Environmental & Legislative Practice Group  
100 Congress Avenue, Ste. 1100  
Austin, Texas 78701  
(512) 236-2216 (direct)  
(512) 391-2194 (fax)  
(512) 736-9200 (cell)  
Email: [mnasi@jw.com](mailto:mnasi@jw.com)  
Web: [www.jw.com/mnasi](http://www.jw.com/mnasi)