

BILL ANALYSIS

C.S.H.B. 1865
By: Morrison
Environmental Regulation
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Under the current environmental permitting process at the Texas Commission on Environmental Quality (TCEQ), certain air, water quality, and waste permit applicants are subject to a contested case hearing conducted by an administrative law judge at the State Office of Administrative Hearings (SOAH) before the applicant can obtain a final permit from TCEQ. Interested parties assert that the current process has become detrimental to the state's ability to competitively attract business due to the uncertainty and expense created by the complexity of the process and the possibility of a lengthy contested case hearing. C.S.H.B. 1865 seeks to address these concerns in a manner that preserves public participation in TCEQ permitting decisions and the contested case hearing process.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 1865 amends the Government Code to require each issue referred by the Texas Commission on Environmental Quality (TCEQ) to the State Office of Administrative Hearings (SOAH) regarding certain permit applications filed with TCEQ 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. The bill requires the list of such disputed issues submitted by TCEQ to SOAH relating to those permit applications to be detailed and complete and to contain either only factual questions or mixed questions of fact and law. The bill requires the administrative law judge to complete a proceeding regarding a referred matter and provide a proposal for decision to TCEQ not later than the earlier of the 180th day after the date of the preliminary hearing, or the date specified by TCEQ or the administrative law judge, if applicable.

C.S.H.B. 1865 establishes that, in a contested case hearing before an administrative law judge regarding those permit applications, the filing with SOAH of the application, the draft permit prepared by the executive director of TCEQ, the TCEQ executive director's preliminary decision, and other sufficient supporting documentation in the administrative record of the permit application is a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements and that a permit issued consistent with the draft permit would protect human health and safety, the environment, and physical property. The bill authorizes a party to rebut such a prima facie demonstration by presenting evidence that relates to a matter

referred for a hearing or an issue included in the list of disputed issues and that demonstrates that the draft permit violates a specific state or federal legal or technical requirement or that the draft permit, if issued, would not protect human health and safety, the environment, or physical property. The bill authorizes the applicant and the executive director of TCEQ to present additional evidence to support the draft permit if a party rebuts a prima facie demonstration.

C.S.H.B. 1865 amends the Water Code to authorize TCEQ to consider certain information in determining whether a person or an association is an affected person entitled to standing in a contested case hearing for certain air, waste, or water quality applications. The bill authorizes TCEQ, in making such a determination, to consider the merits of the underlying application; the likely impact of regulated activity on the health, safety, and use of the property of the hearing requestor; the administrative record; the analysis and opinions of the executive director of TCEQ; and any other expert reports, affidavits, opinions, or data submitted to TCEQ by the executive director, the applicant, or a hearing requestor on or before any applicable deadline. The bill prohibits TCEQ, in making that determination, 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 and from finding that a hearing requestor is an affected person unless the hearing requestor timely submitted comments on the permit application.

C.S.H.B. 1865 includes among actions the executive director of TCEQ is required to take as a participant in contested case permit hearings before TCEQ or SOAH the presentation of evidence supporting a draft permit in relation to which a party rebuts a prima facie demonstration.

C.S.H.B. 1865 requires TCEQ, not later than January 1, 2016, to adopt rules to implement the bill's provisions and requires TCEQ, for an application filed after the bill's effective date but before the adoption of the rules, to provide sufficient notice to the applicant and other participants in the permit proceeding that the changes in law made by the bill apply to the proceeding.

EFFECTIVE DATE

September 1, 2015.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 1865 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and formatted in a manner that indicates the substantial differences between the introduced and committee substitute versions of the bill.

INTRODUCED

SECTION 1. Section 2003.047, Government Code, is amended by adding Subsections (d-1) and (d-2) and amending Subsections (e) and (e-1) to read as follows:

No equivalent provision.

HOUSE COMMITTEE SUBSTITUTE

SECTION 1. Section 2003.047, Government Code, is amended by adding Subsections (e-1), (e-2), (i-1), (i-2), and (i-3) to read as follows:

(e-1) This subsection applies only to a matter referred under Section 5.556, Water Code. Each issue referred by the commission must have been raised by an affected person in a comment submitted by that affected person in response to a permit

No equivalent provision.

(d-1) The applicant's filing with the administrative law judge of the draft permit, the executive director's preliminary decision, and any other supporting documentation in the administrative record is a prima facie demonstration that:

- (1) the draft permit meets all state and federal statutory, regulatory and technical requirements; and
- (2) a permit issued in the same form of the draft permit would be protective of the public's health and physical property and the environment.

(d-2) After the applicant has made a prima facie demonstration pursuant to Subsection (d-1), each protesting party shall be given an opportunity to present evidence to

demonstrate that the draft permit does not meet the requirements of Subsection (d-1) based on the number and scope of issues that have been referred by the commission.

After the submission of evidence by the protesting parties, the applicant and the executive director may present evidence to support the draft permit.

application in a timely manner. The list of issues submitted under Subsection (e) must:

- (1) be detailed and complete; and
- (2) contain either:

- (A) only factual questions; or
- (B) mixed questions of fact and law.

(e-2) For a matter referred under Section 5.556 or 5.557, Water Code, the administrative law judge must complete the proceeding and provide a proposal for decision to the commission not later than the earlier of:

- (1) the 180th day after the date of the preliminary hearing; or
- (2) the date specified by the commission or the administrative law judge, if applicable, under Subsection (e).

(i-1) In a contested case regarding a permit application referred under Section 5.556 or 5.557, Water Code, the filing with the office of the application, the draft permit prepared by the executive director of the commission, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that:

- (1) the draft permit meets all state and federal legal and technical requirements; and
- (2) a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.

(i-2) A party may rebut a demonstration under Subsection (i-1) by presenting evidence that:

- (1) relates to a matter referred under Section 5.557, Water Code, or an issue included in a list submitted under Subsection (e) in connection with a matter referred under Section 5.556, Water Code; and
- (2) demonstrates that:

- (A) the draft permit violates a specific state or federal legal or technical requirement; or
- (B) the draft permit, if issued, would not protect human health and safety, the environment, or physical property.

(i-3) If in accordance with Subsection (i-2) a party rebuts a presumption established under Subsection (i-1), the applicant and the executive director may present additional evidence to support the draft permit.

(e) In referring a matter for hearing pursuant to Water Code Section 5.556, the commission shall provide to the administrative law judge a discrete list of disputed factual issues and [~~—The commission~~] shall specify the date by which the] administrative law judge must [~~is expected to~~] complete the proceeding and provide a proposal for decision to the commission, which may not exceed 180 days after the preliminary hearing.

(e-1) In matters referred to a hearing pursuant to Water Code 5.556 or 5.557, the administrative law judge:

(1) may extend the proceeding only if the administrative law judge determines that failure to grant an extension would deprive a party of due process or another constitutional right; [~~—The administrative law judge~~

(2) subject to Subsection (e-1) (1), shall establish a docket control order designed to complete the proceeding and provide a proposal for decision no later than 180 days after the preliminary hearing or by the date specified by the commission, whichever is earlier.

SECTION 2. Section 5.556, Water Code, is amended by adding Subsection (c-1) to read as follows:

(c-1) In determining under Subsection (c) whether a person seeking a contested case hearing is an affected person, the commission:

No equivalent provision.

No equivalent provision.

SECTION 2. Section 5.115, Water Code, is amended by amending Subsection (a) and adding Subsection (a-1) to read as follows:

(a) For the purpose of an administrative hearing held by or for the commission involving a contested case, "affected person," or "person affected," or "person who may be affected" 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.

(a-1) The commission shall adopt rules specifying factors which must be considered in determining whether a person is an affected person in any contested case arising under the air, waste, or water programs within the commission's jurisdiction and whether an affected association is entitled to standing in contested case hearings.

For a matter referred under Section 5.556, the commission:

(1) may weigh and resolve matters relating to the merits of the underlying application, including whether the application meets the requirements for issuance and

the likely impact of the regulated activity on the health, safety, and use of the property of the hearing requester;

(2) may evaluate the administrative record, including the permit application and any supporting documentation,

the analysis and opinions of the executive director, and

any other expert reports, affidavits, opinions, or data submitted to the commission by the executive director, the applicant or a hearing requester within the applicable deadlines to submit hearing requests and briefing to the commission;

(3) may not find 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 who would be an affected person in the person's own right; and

(4) may not find that a hearing requester is an affected person unless the hearing requester timely submitted comments, and may only refer an issue pursuant to Subsection (d) if requested by the affected person who raised the issue in a timely submitted comment.

No equivalent provision.

(1) may consider:

(A) the merits of the underlying application, including whether the application meets the requirements for permit issuance;

(B) the likely impact of regulated activity on the health, safety, and use of the property of the hearing requester;

(C) the administrative record, including the permit application and any supporting documentation;

(D) the analysis and opinions of the executive director; and

(E) 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 requester; and

(2) may not find that:

(A) 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

(B) a hearing requester is an affected person unless the hearing requester timely submitted comments on the permit application.

SECTION 3. Section 5.228(c), Water Code, is amended to read as follows:

(c) The executive director shall participate as a party in contested case permit hearings before the commission or the State Office of Administrative Hearings to:

(1) provide information to complete the administrative record; ~~and~~

(2) support the executive director's position developed in the underlying proceeding; and

(3) present evidence supporting a draft permit under Section 2003.047(i-3), Government Code.

SECTION 3. The changes in law made by this Act apply only to an application for a permit that is filed with the Texas Commission on Environmental Quality on or after the effective date of this Act. An application for a permit filed before the effective date of this Act is governed by the law in effect on the date of filing, and that law is continued in effect for that purpose.

SECTION 4. (a) The changes in law made by this Act apply only to a permit application that is filed with the Texas Commission on Environmental Quality on or after the effective date of this Act. A permit application filed before the effective date of this Act is governed by the law in effect when the permit application was filed, and the former law is continued in effect for that purpose.

(b) Not later than January 1, 2016, the Texas Commission on Environmental Quality shall adopt rules to implement the changes in law made by this Act. For an application filed after the effective date of this Act but before the adoption of rules to implement the changes in law made by this Act, the commission shall provide sufficient notice to the applicant and other participants in the permit proceeding that the changes in law made by this Act apply to the proceeding.

SECTION 4. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2015.

SECTION 5. This Act takes effect September 1, 2015.