

BILL ANALYSIS

C.S.H.B. 3742
By: Phelan
Natural Resources
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Interested parties contend that the hearing process for a water rights permit application should be more consistent with the process that is provided in other Texas Commission on Environmental Quality program areas. C.S.H.B. 3742 seeks to reform the procedure for contested case hearings regarding water rights permit applications.

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. 3742 amends the Water Code to replace the type of hearing held by the Texas Commission on Environmental Quality (TCEQ) in connection with a water rights permit application from a public hearing to a contested case hearing and to make related changes. The bill replaces the requirement that notice of an application be given to the persons who in the judgment of TCEQ may be affected by an application with a requirement that notice be given as provided by TCEQ rule to a person who in the judgment of TCEQ should receive notice and makes changes relating to the provision of such notice. The bill includes an applicant among the persons whose request triggers the requirement for TCEQ to hold a hearing on an application and removes the requirement that TCEQ specify in the notice of an application the time and location

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where TCEQ will consider the application. The bill requires TCEQ, in the notice, to describe the process by which TCEQ will consider the application; to provide notice that by a certain deadline an applicable person may request a contested case hearing, submit comments on the application, or submit disputed issues of fact or mixed questions of fact and law that are relevant and material to the decision on the application; and to describe the process for such requests and submissions. The bill, for purposes of TCEQ conditional authority to act on an application without holding a contested case hearing, adds as an alternative to the condition that a contested case hearing has not been requested in writing by an applicable person within the applicable period the condition that no disputed issue of fact or mixed question of fact and law that is relevant and material to the decision on the application has been submitted by the applicant or an affected person within such period.

C.S.H.B. 3742 defines "affected person," "person affected," and "person who may be affected" for the purpose of an administrative hearing held by or for TCEQ involving a contested case under water rights provisions as a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing and specifies that an interest common to members of the general public does not qualify as a personal justiciable interest. The bill requires TCEQ to determine whether a person is an affected person at a public meeting of TCEQ unless an application is referred to the State Office of Administrative Hearings (SOAH) on the applicant's request as provided by the bill. The bill requires TCEQ to make a determination that a person is an affected person regarding the application if the person is the applicant or if the person has timely submitted one or more disputed issues of fact or mixed questions of fact and law that are relevant and material to the decision on the application and have the potential to affect the justiciable interest asserted by the person, and the person owns or leases a permit, certified filing, certificate of adjudication, or other recognized water right in the same basin as the basin affected by the application, has an administratively complete application pending before TCEQ for a new or amended water right in the same basin as the basin affected by the application, has an application pending before TCEQ for a change of ownership of a water right in the same basin as the basin affected by the application, or is otherwise an affected person. The bill specifies entities that are not affected persons based on a lack of a timely request or submission, and requires TCEQ, for other persons, to make a determination regarding whether a person is an affected person by making certain specified considerations.

C.S.H.B. 3742 requires TCEQ to refer an applicant's application to SOAH for a contested case hearing if the applicant requests that the application be so referred. The bill requires TCEQ, if TCEQ determines at a public meeting of TCEQ that a contested case hearing has been requested by an affected person, to either hold a contested case hearing on the application before TCEQ at a time and place designated by TCEQ or refer the application to SOAH. The bill limits to an affected person the type of person who may appear at a contested case hearing in person or by

attorney or who may enter the person's appearance in writing. The bill applies the Administrative Procedure Act to a contested case hearing. The bill prohibits TCEQ from referring an issue regarding an application for a contested case hearing requested by an affected person unless TCEQ determines that the issue is a disputed issue of fact or mixed question of fact and law, is relevant and material to a decision on the application, and was raised by an affected person whose hearing request was granted by TCEQ. The bill requires TCEQ, if TCEQ grants an affected person's request for a contested case hearing, to determine the number and scope of issues to be referred for a hearing and, consistent with the nature and number of issues to be considered at the hearing, to specify the maximum expected duration of the proceeding, beginning with the holding of the preliminary hearing and concluding with the issuance of the proposal for decision, which may not exceed a period of 270 days, unless TCEQ determines that the nature and number of issues to be considered at the hearing require that the period be extended. The bill authorizes the administrative law judge who conducts the contested case hearing or TCEQ, if TCEQ conducts the hearing, to extend the proceeding beyond the period specified by TCEQ if the parties to the hearing agree to an extension or if the administrative law judge or TCEQ, if TCEQ conducts the hearing, determines that failure to extend the proceeding would deprive a party of due process or another constitutional right and specifies for such purpose that a political subdivision has the same constitutional rights as an individual. The bill prohibits the administrative law judge who conducts a contested case hearing as a result of TCEQ referral of an application for such a hearing to SOAH on the applicant's request from granting party status to a person who is not an affected person or to a person whose hearing request was denied by TCEQ and requires the judge to determine the number and scope of issues to be considered at the hearing in accordance with specified limitations. The bill exempts the office of public interest counsel and the executive director of TCEQ from the prohibition against the judge granting party status to a person who is not an affected person. The bill establishes that in the event of a conflict between provisions relating to a contested case hearing on an application, as amended by the bill, and any other law the provisions prevail.

C.S.H.B. 3742 excludes an application for a water right or an amendment to a water right from the applications for a permit or license under the Water Code for which TCEQ, at the time such an application is filed with the executive director of TCEQ and is administratively complete, is required to give notice to any person who may be affected by the granting of the permit or license. The bill instead requires TCEQ, at the time an application for a water right or an amendment to a water right is filed with the executive director and is technically complete, to give notice as required by law. The bill exempts a hearing on an application for a water right or an amendment to a water right from certain statutory provisions relating to TCEQ general powers and duties with regard to a person affected in a TCEQ hearing.

C.S.H.B. 3742 requires TCEQ to adopt rules to implement the bill and applies the bill's changes only to an application for a new or amended water right received by TCEQ on or after the

effective date of such rules.

C.S.H.B. 3742 repeals Section 11.132(f), Water Code.

EFFECTIVE DATE

On passage, or, if the bill does not receive the necessary vote, September 1, 2017.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 3742 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 5.115, Water Code, is amended by adding Subsection (h) to read as follows:

HOUSE COMMITTEE SUBSTITUTE

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

(b) At the time an application for a permit or license under this code, other than an application for a water right or an amendment to a water right under Chapter 11, is filed with the executive director and is administratively complete, the commission shall give notice of the application to any person who may be affected by the granting of the permit or license. At the time an application for a water right or an amendment to a water right under Chapter 11 is filed with the executive director and is technically complete, the commission shall give notice as required by law. A state agency that receives notice under this subsection may submit comments to the commission in response to the notice but may not contest the issuance of a permit or license by the commission. For the purposes of this subsection, "state agency" does not include a river authority.

(h) This section does not apply to a hearing on an application for a water rights permit or an amendment to a water rights permit under Chapter 11.

SECTION 2. Section 11.1273(d), Water Code, is amended.

SECTION 3. Sections 11.132(a), (c), and (d), Water Code, are amended to read as follows:

(a) Notice shall be given to the persons who in the judgment of the commission may be affected by an application, including those persons listed in Subdivision (2), Subsection (d), of this section. The commission, on the motion of a commissioner or on the request of the executive director, the applicant, or any affected person, shall hold a contested case ~~[public]~~ hearing on the application.

- (c) In the notice, the commission shall:
- (1) state the name and address of the applicant;
 - (2) state the date the application was filed;
 - (3) state the purpose and extent of the proposed appropriation of water;
 - (4) identify the source of supply and the place where the water is to be stored or taken or diverted from the source of supply;
 - (5) describe the process by which the commission will consider the application ~~[specify the time and location where the commission will consider the application];~~ ~~[and]~~
 - (6) provide notice that, not later than the 30th day after the date of the notice, a person described by Subsection (a) may:

(h) Subsections (a) and (a-1) do not apply to a hearing on an application for a water right or an amendment to a water right under Chapter 11.

SECTION 2. Same as introduced version.

SECTION 3. Sections 11.132(a), (c), and (d), Water Code, are amended to read as follows:

(a) Notice shall be given as provided by commission rule to a person ~~[to the persons]~~ who in the judgment of the commission should receive notice ~~[may be affected by an application, including those persons listed in Subdivision (2), Subsection (d), of this section]~~. The commission, on the motion of a commissioner or on the request of the executive director, the applicant, or any affected person, shall hold a contested case ~~[public]~~ hearing on the application.

- (c) In the notice, the commission shall:
- (1) state the name and address of the applicant;
 - (2) state the date the application was filed;
 - (3) state the purpose and extent of the proposed appropriation of water;
 - (4) identify the source of supply and the place where the water is to be stored or taken or diverted from the source of supply;
 - (5) describe the process by which the commission will consider the application ~~[specify the time and location where the commission will consider the application];~~ ~~[and]~~
 - (6) provide notice that, not later than the 30th day after the date of the notice, a person described by Subsection (a) may:

(A) request a contested case hearing; or
(B) submit:

(i) comments on the application; or
(ii) disputed issues of fact or mixed questions of fact and law that are relevant and material to the decision on the application;

(7) describe the process for the submissions and requests described by Subdivision (6); and

(8) give any additional information the commission considers necessary.

(d) The commission may act on the application without holding a contested case [public] hearing if:

(1) not less than 30 days before the date of action on the application by the commission, the applicant has published the commission's notice of the application at least once in a newspaper regularly published or circulated within the section of the state where the source of water is located;

(2) not less than 30 days before the date of action on the application by the commission, the commission mails a copy of the notice by first-class mail, postage prepaid, to:

~~(A) each claimant or appropriator of water from the source of water supply, the record of whose claim or appropriation has been filed with the commission; and~~

~~(B) all navigation districts within the river basin concerned; and~~

~~(3) within 30 days after the date of the newspaper publication of the commission's~~

(A) request a contested case hearing; or
(B) submit:

(i) comments on the application; or
(ii) disputed issues of fact or mixed questions of fact and law that are relevant and material to the decision on the application;

(7) describe the process for the requests and submissions described by Subdivision (6); and

(8) give any additional information the commission considers necessary.

(d) The commission may act on the application without holding a contested case [public] hearing if:

(1) not less than 30 days before the date of action on the application by the commission, the applicant has published the commission's notice of the application at least once in a newspaper regularly published or circulated within the section of the state where the source of water is located, if published notice is required by commission rule;

(2) not less than 30 days before the date of action on the application by the commission, the commission mails a copy of the notice by first-class mail, postage prepaid, to all persons to whom notice is required to be mailed under commission rules adopted under Subsection (a)]:

~~[(A) each claimant or appropriator of water from the source of water supply, the record of whose claim or appropriation has been filed with the commission; and~~

~~[(B) all navigation districts within the river basin concerned]; and~~

~~(3) within the period specified in the [30 days after the date of the newspaper~~

notice:

(A) [;] a contested case [public] hearing has not been requested in writing by a commissioner, the executive director, the applicant, or an affected person; or

(B) no disputed issue of fact or mixed question of fact and law that is relevant and material to the decision on the application has been submitted by the applicant or an affected person [who objects to the application].

SECTION 4. Subchapter D, Chapter 11, Water Code, is amended by adding Section 11.1321 to read as follows:

Sec. 11.1321. AFFECTED PERSON. (a) In this section, "timely" means within the period described by Section 11.132.

(b) For the purpose of an administrative hearing held by or for the commission involving a contested case under this chapter, "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.

(c) Unless an application is referred to the State Office of Administrative Hearings under Section 11.133(a), the commission shall determine whether a person is an affected person at a public meeting of the commission.

(d) The commission shall make a determination that a person is an affected

~~publication of the commission's~~ notice:

(A) [;] a contested case [public] hearing has not been requested in writing by a commissioner, the executive director, the applicant, or an affected person; or

(B) no disputed issue of fact or mixed question of fact and law that is relevant and material to the decision on the application has been submitted by the applicant or an affected person [who objects to the application].

SECTION 4. Subchapter D, Chapter 11, Water Code, is amended by adding Section 11.1321 to read as follows:

Sec. 11.1321. AFFECTED PERSON. (a) In this section, "timely" means within the 30-day notice period described by Section 11.132.

(b) For the purpose of an administrative hearing held by or for the commission involving a contested case under this chapter, "affected person," "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.

(c) Unless an application is referred to the State Office of Administrative Hearings under Section 11.133(a), the commission shall determine whether a person is an affected person at a public meeting of the commission.

(d) The commission shall make a determination that a person is an affected

person regarding the application if the person:

(1) is the applicant;

(2) owns or leases a permit, certified filing, or certificate of adjudication of a senior or superior water right in the same basin as the basin affected by the application;

(3) has an application pending before the commission for a new or amended water right in the same basin as the basin affected by the application;

(4) has an application pending before the commission for a change of ownership of a water right in the same basin as the basin affected by the application; or

(5) has timely submitted one or more disputed issues of fact or mixed questions of fact and law that:

(A) are relevant and material to the decision on the application; and

(B) have the potential to affect the justiciable interest asserted by the person.

(e) The following are not affected persons:

(1) a group or association that does not:

(A) timely request a contested case hearing in writing; and

(B) identify by name and physical address or location a member of the group or association who would be an affected person in the person's own right;

(2) a hearing requestor, even if otherwise an

person regarding the application if the person:

(1) is the applicant; or

(2) has timely submitted one or more disputed issues of fact or mixed questions of fact and law that are relevant and material to the decision on the application and have the potential to affect the justiciable interest asserted by the person, and the person:

(A) owns or leases a permit, certified filing, certificate of adjudication, or other water right recognized under this chapter in the same basin as the basin affected by the application;

(B) has an administratively complete application pending before the commission for a new or amended water right in the same basin as the basin affected by the application;

(C) has an application pending before the commission for a change of ownership of a water right in the same basin as the basin affected by the application; or

(D) is otherwise an affected person under Subsection (b).

(e) The following are not affected persons:

(1) a group or association that does not:

(A) timely request a contested case hearing; and

(B) identify by name and physical address or location a member of the group or association who would be an affected person in the person's own right;

(2) a hearing requestor, even if otherwise an

affected person, who did not timely submit in writing a disputed issue of fact or mixed question of fact and law that is relevant and material to the decision on the application;

or

(3) a person, even if otherwise an affected person, who did not timely request a contested case hearing.

(f) For a person other than those described by Subsection (d) or (e), the commission shall make a determination regarding whether a person is an affected person by considering:

(1) the likely impact of approving the application on the health, safety, and use of the property of the hearing requestor, to the extent the impact relates to issues within the commission's jurisdiction;

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

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

(4) 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.

SECTION 5. Section 11.133, Water Code, is amended to read as follows:

Sec. 11.133. HEARING. (a) If an applicant requests a contested case hearing and that the hearing be referred to the State Office of Administrative Hearings, the commission shall refer the hearing to the

affected person, who did not timely submit in writing a disputed issue of fact or mixed question of fact and law that is relevant and material to the decision on the application;

or

(3) a person, even if otherwise an affected person, who did not timely request a contested case hearing.

(f) For a person other than those described by Subsection (d)(1), (d)(2)(A), (d)(2)(B), (d)(2)(C), or (e), the commission shall make a determination regarding whether a person is an affected person by considering:

(1) the likely impact of approving the application on the health, safety, and use of the property of the hearing requestor, to the extent the impact relates to issues within the commission's jurisdiction;

(2) the administrative record, including the permit application, public comments, hearing requests, related filings, and any supporting documentation;

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

(4) 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; and

(5) any other factors the commission considers relevant.

SECTION 5. Section 11.133, Water Code, is amended to read as follows:

Sec. 11.133. CONTESTED CASE HEARING ON APPLICATION. (a) If an applicant requests that the applicant's application be referred to the State Office of Administrative Hearings for a contested

State Office of Administrative Hearings.

(b) If the commission determines at a public meeting of the commission that a contested case hearing has been requested by an affected person, the commission shall either: (1) hold a contested case hearing on the application before the commission at a time and place designated by the commission; or (2) refer the application to the State Office of Administrative Hearings.

(c) [At the time and place stated in the notice, the commission shall hold a hearing on the application.] Any affected person may appear at the hearing in person or by attorney or may enter the person's [his] appearance in writing. Any affected person who appears may present objection to the issuance of the permit. The commission or the State Office of Administrative Hearings may receive evidence, orally or by affidavit, in support of or in opposition to the issuance of the permit, and it may hear arguments. Chapter 2001, Government Code, applies to a contested case hearing held under this section.

(d) If the commission grants a request for a

case hearing, the commission shall refer the application to the office.

(b) If the commission determines at a public meeting of the commission that a contested case hearing has been requested by an affected person, the commission shall either: (1) hold a contested case hearing on the application before the commission at a time and place designated by the commission; or (2) refer the application to the State Office of Administrative Hearings.

(c) [At the time and place stated in the notice, the commission shall hold a hearing on the application.] Any affected person may appear at the contested case hearing in person or by attorney or may enter the person's [his] appearance in writing. Any affected person who appears may present objection to the issuance of the permit. The commission or the State Office of Administrative Hearings may receive evidence, orally or by affidavit, in support of or in opposition to the issuance of the permit, and [it] may hear arguments. Chapter 2001, Government Code, applies to a contested case hearing held under this section.

(d) The commission may not refer an issue regarding an application for a contested case hearing under Subsection (b) unless the commission determines that the issue:

(1) is a disputed issue of fact or mixed question of fact and law;

(2) is relevant and material to a decision on the application; and

(3) was raised by an affected person whose hearing request was granted by the commission.

(e) If the commission grants a request for a

hearing, the commission shall:

(1) for a hearing other than a hearing referred to the State Office of Administrative Hearings under Subsection (a), determine the number and scope of issues to be considered in the contested case hearing; and

(2) consistent with the nature and number of issues to be considered at the hearing, specify the maximum duration of the hearing, beginning on the date of the preliminary hearing and concluding with the issuance of a proposal for decision, which may not exceed a period of 270 days, unless the commission determines that the nature and number of issues to be considered at the hearing requires that the period be extended.

(e) An issue included in the scope of issues determined under Subsection (d)(1) must be an issue the commission determines:

(1) involves a disputed question of fact or a mixed question of fact and law;

(2) is relevant and material to the decision on the application; and

(3) was raised by an affected person during the notice period described by Section 11.132.

SECTION 6. Subchapter D, Chapter 11, Water Code, is amended by adding Section 11.1335 to read as follows:

Sec. 11.1335. HEARINGS CONDUCTED BY THE STATE OFFICE OF ADMINISTRATIVE HEARINGS.

(a) The presiding administrative law judge of a contested case hearing referred under Section 11.133(b)(2):

contested case hearing under Subsection (b), the commission shall:

(1) determine the number and scope of issues to be referred for a hearing; and

(2) consistent with the nature and number of issues to be considered at the hearing, specify the maximum expected duration of the proceeding, beginning with the holding of the preliminary hearing and concluding with the issuance of the proposal for decision, which may not exceed a period of 270 days, unless the commission determines that the nature and number of issues to be considered at the hearing require that the period be extended.

(1) may not grant party status to a person who is not an affected person as determined by the commission under Section 11.1321; and

(2) shall limit the scope of the hearing to the disputed issues of fact or mixed questions of fact and law identified by the commission under Section 11.133(d)(1).

(b) The presiding administrative law judge of a contested case hearing referred under Section 11.133(a):

(1) may not grant party status to a person who is not an affected person; and

(2) shall limit the scope of the hearing to:

(A) disputed issues of fact or mixed questions of fact and law that:

(i) are relevant and material to the decision on the application; and

(ii) were raised by a party to the hearing within the period described by Section 11.132;

(B) issues that the parties have agreed to include in the hearing, with the approval of the presiding judge; and

(C) issues that the presiding judge determines are necessary to prevent the deprivation of due process or another constitutional right to a party.

(c) The administrative law judge who hears the case shall issue a proposal for decision on or before the deadline determined by the commission under Section 11.133(d)(2) unless the judge determines that failure to extend the deadline would unduly deprive a party to the hearing of due process or

(h) If the commission refers an application for a contested case hearing under Subsection (a), the administrative law judge who conducts the hearing:

(1) may not grant party status to:

(A) a person who is not an affected person under Section 11.1321; or

(B) a person whose hearing request was denied by the commission; and

(2) shall determine the number and scope of issues to be considered at the hearing in accordance with the limitations contained in Subsection (d).

(f) The administrative law judge who conducts the contested case hearing or the commission, if the commission conducts the hearing, may extend the proceeding beyond the period specified by the commission under Subsection (e)(2) if:

(1) the parties to the hearing agree to an

another constitutional right.

(d) For the purposes of Subsections (b) and (c), a political subdivision has the same rights as an individual.

SECTION 7. Sections 11.143(d) and (g), Water Code, are amended.

SECTION 8. Section 11.174, Water Code, is amended.

SECTION 9. Section 11.132(f), Water Code, is repealed.

SECTION 10. (a) As soon as practicable after the effective date of this Act, the Texas Commission on Environmental Quality shall adopt rules to implement the changes in law made by this Act.

(b) The changes in law made by this Act apply only to an application received by the Texas Commission on Environmental Quality on or after the effective date of the rules adopted under Subsection (a) of this section. An application received before the effective date of the rules adopted under Subsection (a) of this section is governed by the law in effect on the date the application

extension; or

(2) the administrative law judge or the commission, if the commission conducts the hearing, determines that failure to extend the proceeding would deprive a party of due process or another constitutional right.

(g) For the purposes of Subsection (f)(2), a political subdivision has the same constitutional rights as an individual.

(i) Subsection (h)(1) does not apply to the office of public interest counsel or the executive director.

(j) In the event of a conflict between this section and any other law, this section prevails.

SECTION 6. Substantially the same as introduced version.

SECTION 7. Same as introduced version.

SECTION 8. Same as introduced version.

SECTION 9. (a) As soon as practicable after the effective date of this Act, the Texas Commission on Environmental Quality shall adopt rules to implement the changes in law made by this Act.

(b) The changes in law made by this Act apply only to an application for a new or amended water right received by the Texas Commission on Environmental Quality on or after the effective date of the rules adopted under Subsection (a) of this section. An application received before the effective date of the rules adopted under Subsection (a) of this section is governed by the law in

was received, and the former law is continued in effect for that purpose.

SECTION 11. This Act takes effect September 1, 2017.

effect on the date the application was received, and the former law is continued in effect for that purpose.

SECTION 10. 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, 2017.