

SUBJECT: Revising regulation of grain and other warehouse operators

COMMITTEE: Agriculture and Livestock — committee substitute recommended

VOTE: 9 ayes — Swinford, McReynolds, Christian, Hardcastle, Miller, Brown, Green, Hupp, Kolkhorst
0 nays

WITNESSES: For — Ben Boerner, Texas Grain and Feed Association
Against — None
On — Jon Garza and David Gipson, Texas Department of Agriculture

BACKGROUND: Agriculture Code, chapter 14, subchapter A governs regulation of the grain storage industry by the Texas Department of Agriculture (TDA). This statute was revised last in 1987. Subchapter C applies to other public warehouse operations.

DIGEST: CSHB 2586 would make substantive and technical changes to the statutes governing the public grain warehouse industry and would remove references to TDA regulation of nongrain warehouse storage.

The bill would allow TDA to halt operations and close the facilities of warehouse operators who violated licensing or other statutory requirements deemed necessary to protect depositors. In instances of grain shortages, TDA could require operators to buy, deliver, store to the credit of, or sell company-owned grain to affected depositors. Operators could appeal enforcement actions that were not administrative or related to rules or licensing. They would have to show by a preponderance of evidence that the action was unauthorized or an abuse of TDA's discretion.

The bill would establish administrative and civil penalties of up to \$10,000 per statutory violation. Each day a violation occurred could be considered a separate violation. The attorney general or the appropriate district or county attorney would have to file suit to collect civil penalties upon TDA's

request. TDA could pursue both administrative enforcement actions and criminal prosecution for statutory violations, but not both administrative and civil action for the same offense.

TDA could halt grain operations if a warehouse closed or had its license revoked, if grain was abandoned and the operator or depositor could not be located, or if an injunction was issued. TDA could seal unlicensed warehouses or those whose licenses it had suspended or revoked or that had expired. TDA also could:

- ! seize business records during a license suspension period;
- ! determine operators' obligations to depositors;
- ! require operators to deliver grain to depositors;
- ! enter warehouse facilities and examine business records, grain, and structures;
- ! require notification of the handling of hazardous commodities, existing inspection hazards, grain segregation, or contract provisions protecting depositors;
- ! order corrective action, including probation; and
- ! suspend licenses without hearings for one or more periods that cumulatively did not exceed 30 days per licensing period.

The bill would establish penalties for interfering with sealed warehouses, inspections, or investigations. It would establish legal defenses to criminal prosecution for unlawful delivery of grain if the delivery was authorized and recorded previously, made to a person lawfully entitled to the grain, necessary to prevent the grain's destruction, or made under a state or federal court order.

In addition to annual inspection fees, TDA could charge for inspections related to suspension, probation, complaints, determinations of shortages, and obtaining records unavailable at designated headquarters sites, and to monitor termination of arrangements for storing or disposition of grain.

A warehouse operator could combine multiple facilities located within a 60-mile diameter under one TDA license. All business records would have to be maintained at a designated headquarters site. Licensees would have to submit financial statements and proof of casualty insurance, show that their

warehouses were suitable for inspection, and meet net-worth requirements based on 25 cents per bushel of storage capacity.

CSHB 2586 would require a single surety instrument for each license, whether it covered individual or multisite operations. It would remove the \$500,000-per-license performance bond cap and would raise the minimum bond amount from \$15,000 to \$20,000. Bonding requirements would change from a graduated structure to a flat rate. The current rates (7 cents per bushel for the first million bushels of storage capacity, 5 cents per bushel for the second million bushels, and 3 cents per bushel for all capacity above two million) would be replaced by a 6-cent-per-bushel across-the-board rate. In lieu of bonds, operators could submit cash, certificates of deposit, or letters of credit, but not negotiable securities. All surety instruments would be collectible for claims up to two years after expiration. The bill would add requirements on canceling certificates of deposit and letters of credit.

Operators would have to prevent intermingling of grain that could not be segregated. They would be liable for grain while their facilities were sealed or their licenses were suspended, revoked, or probated, with certain exceptions. TDA could seek bond recovery on depositors' behalf for damage incurred while facilities were sealed or abandoned.

The bill would add a casualty insurance coverage requirement for damage from fluids, malicious mischief, vandalism, theft, intentional waste or destruction, smoke, and hail. TDA could require additional insurance coverage and could set requirements for canceling policies.

Combination operations under a single license would require a single record-keeping system, including unique sets of sequential receipts and scale weight tickets. Operators could use federally-approved electronic receipt systems.

CSHB 2586 would not apply to feedmills, feedlots, on-site grain storage by growers for their own use, rice warehousing, or warehouses licensed by the U.S. Department of Agriculture or any other federal agency, nor to self-storage facilities, unless they issued title documents for property stored there.

This bill would take effect September 1, 2001.

SUPPORTERS
SAY:

Changes in the grain warehouse industry, including consolidation and various court rulings, necessitate more enforcement power, higher standards of operation, and statutory clarification. CSHB 2586 would be a constructive compromise between TDA and the industry that would elevate all operators to a best-practices level.

TDA needs greater enforcement power to pursue, neutralize, and shut down unlicensed and unscrupulous operators who gain competitive advantage over licensed operators and who pose financial threats to grain depositors. Adding civil penalties and increasing administrative penalties would bring regulation of grain warehouses into line with TDA's other regulatory programs. The grain warehouse program is the only TDA program without civil penalties. Currently, TDA has only two penalty options: criminal prosecution limited to second-degree felonies punishable by two to 10 years in prison and maximum \$10,000 fines, or \$500 administrative fines. TDA needs higher administrative penalties and a middle-ground civil option more proportional to the financial harm that violators can cause depositors.

Granting TDA "stop-sale" authority would enhance its ability to inspect and investigate suspicious operations and close violators, especially out-of-state owners who abandon their sites and unlawfully sell or otherwise jeopardize depositors' grain. Despite the bill's mandatory language, the attorney general would retain discretion over filing suits to collect civil penalties.

Individual licensing requirements are outdated and need to be changed to reflect trends toward combination warehouse operations. Bonding rates need to be changed from a range to a flat rate to level the playing field among large and small operators while providing depositors equal protection, regardless of storage facility capacity. Currently, bonds typically are collectible any time a year after expiration, while other forms of surety are not. This provision would lessen the burden somewhat on bonds and would increase it for other forms of surety, making it easier to collect for losses due to warehouse failures.

Clarifying warehouse operators' responsibilities would eliminate ambiguities in regulatory practices and make enforcement fairer and more effective.

OPPONENTS
SAY:

CSHB 2586 would grant a state regulatory agency too much discretionary authority. Allowing TDA virtually to shut down a grain warehouse would be a quantum leap from some of its current enforcement tools, such as locking a miscalibrated gasoline pump. This bill would set up too many conditions under which regulatory abuse of discretion might cause operators irreparable financial loss.

This bill would limit prosecutorial discretion by requiring the attorney general or district or county attorneys to sue operators to collect civil penalties at TDA's request.

NOTES:

The bill as filed would not have exempted grain-purchase contracts or brokerage agreements from performance bond requirements. It would have specified conditions under which operators could recover cash or certificates of deposit during the two-year claim period. It would have required posting of fees and would shrink rates at all facilities operating under a single license. TDA could have defined grain by rule and could have classified grain as genetically modified. The filed version also would have repealed Subchapter C, pertaining to other public warehouse operations.