SUBJECT: Establishing public hearing and other standards for groundwater districts

COMMITTEE: Natural Resources — committee substitute recommended

VOTE: 7 ayes — Puente, Bonnen, Campbell, Geren, Hardcastle, Hope, Laney

0 nays

2 absent — Callegari, Hilderbran

WITNESSES: For — Susan Butler, San Antonio Water System; Mary E. Kelly Environmental Defense; James Kowis, TWCA GW Subcommittee; Mike Mahoney, Evergreen Underground Water Conservation District; Dean Robbins, Texas Water Conservation Association

Against — None

BACKGROUND: Water Code, ch. 36, governs groundwater conservation districts, the state's preferred method of groundwater management. These districts have the authority to adopt and enforce rules to manage groundwater resources and to issue permits for water wells.

DIGEST: CSHB 1763 would make several changes to provisions governing notice, hearing, and permitting requirements of chapter 36 groundwater districts.

Rulemaking. At least 20 days before a rulemaking hearing, a groundwater district board or manager would have to:

- post notice at the district office;
- provide notice to the county clerk of each county in the district;
- publish notice in newspapers in counties in the district;
- provide notice by mail, fax, or e-mail to any person requesting notice; and
- make a copy of proposed rules available at a public place and on the district's Web site, if it has one.

Notice would include:

- the date, time, and location of the hearing;
- an explanation of the subject of the hearing; and
- a location or Web site where the proposed rules could be reviewed.

Failure to provide notice to someone requesting notice would not invalidate action taken at a rulemaking hearing.

The presiding officer would have to conduct the meeting so as to expeditiously obtain information and comment on the proposed rule. Comments could be submitted orally or in writing, and could be submitted for a specified period after the hearing was closed as allowed by the presiding officer. A person offering comment could be required to submit a form stating the person's personal information. A record of the hearing would be maintained in audio, video, or transcribed format. The district could use informal consultations and advisory committees to obtain the opinions of interested parties about rules being contemplated.

These requirements would not apply to the Edwards Aquifer Authority.

Emergency rulemaking. A board could adopt an emergency rule with no or abbreviated notice or hearing if an imminent peril to public welfare or federal requirements required such action. The district would have to provide a written statement of these reasons. An emergency rule could not be effective for longer than 90 days, unless notice of a hearing on the final rule was given in that time, in which case the rule would be effective for an additional 90 days. These requirements would not apply to the Edwards Aquifer Authority.

Permitting. The bill would specify that a permit was required for operation of a well. A change in the withdrawal or use of groundwater would have to be approved by a permit amendment. Maintenance would not require a permit amendment if it did not increase the well's production capabilities.

A district would have to determine each activity for which a permit or permit amendment was required and determine whether a public hearing was required for each activity. A public hearing for applications determined by the district board rather than administratively by the general manager would be held subject to state open meeting requirements. A

district would have 60 days after a final hearing to act upon an application, and an applicant could petition the district to act upon an amendment if no action had been taken 60 days after submittal.

A district general manager or board could schedule a hearing as necessary and could schedule more than one application for consideration at a hearing. Notice of the meeting would have to be provided to each applicable county clerk and at the district office. Notice also would have to be provided to the applicant, to any person who requested notice, and any other person so entitled. Failure to provide notice to a person who requested it would not invalidate action taken at the hearing. The district could require registration of a person participating in a hearing.

A hearing could be conducted by a quorum of the district board or an individual delegated the responsibility to preside over the hearing. The board president or a director selected by a quorum of the board could serve as presiding officer.

A district could allow any person to testify at an uncontested hearing and allow written testimony to be submitted. Supplemental testimony could be permitted up to 10 days after if the board had not acted on an application. The bill would direct a district to establish rules governing alternative dispute resolution for parties to a contested hearing and determine how costs of the dispute resolution procedure would be apportioned among the parties. A record of the hearing would have to be maintained in audio, video, or transcribed format, although minutes or a report could be substituted as the record for an uncontested hearing.

A presiding officer would have to submit a summary report to the board within 30 days after a hearing and provide a copy to the applicant and persons providing comment. Those receiving the report could submit exceptions to the report. For a hearing conducted by a quorum of the board, a report would be required at the presiding officer's discretion.

An applicant or party to a contested hearing could administratively appeal a decision within 20 days after the decision was made by requesting written findings or a rehearing. Findings would have to be submitted by the board within 35 days of this request. If the board granted a rehearing it would have to occur within 45 days after it was granted. Failure to act upon a rehearing request within 90 days would constitute a denial of the request. An applicant or party to a contested hearing could file suit to

appeal a decision in the county court of jurisdiction. A person could not file suit if a rehearing request was not filed on time.

Unless a board could not adequately evaluate one application until it had acted on another, the board would have to process applications from a single applicant under consolidated notice and hearing procedures if separate applications were required for permits.

The bill would provide for the adoption of rules by a district to implement the legislation.

A district could continue to contract with the State Office of Administrative Hearings (SOAH), and such a hearing would be governed by statutes relating to SOAH. Other than provisions governing requests for rehearing and finality of decisions, provisions governing permitting in the bill would not apply to the Edwards Aquifer Authority.

The bill would repeal a definition of applicant in current law.

The bill would take effect September 1, 2005, and would apply to completed applications and rulemaking hearings for which notice was given on or after the bill's effective date.

SUPPORTERS SAY:

CSHB 1763 would establish hearing procedures and notice requirements for groundwater districts. Although the Water Code requires hearings and notice for rulemaking or permit applications, it does not establish specific procedures for conducting hearings, such as how to admit evidence, request a rehearing, or post notice. As a result, districts around the state have adopted an array of hearing procedures. In one district, a dispute over a permit became bogged down in procedural bickering rather than addressing the merit of the application. As groundwater becomes increasingly scarce, permit applications are likely to become more controversial, and districts will need more sophisticated procedures to sort out disputes. CSHB 1763 would establish a uniform hearing procedure for permit applications, increasing the overall effectiveness of groundwater districts.

The bill would specify that districts could use alternative dispute resolution procedures. If authorized, a hearing’s presiding officer could send a matter to alternative dispute resolution and could assign costs to the parties. This would benefit smaller districts that could end up in court

every time they denied a permit and do not have the staff or financial resources to litigate every disputed permit.

OPPONENTS SAY:

Although the new hearing requirements could benefit some districts, not all districts need the same hearing procedures. A number of districts have not experienced any problems issuing permits under current law. In smaller districts, complying with the bill's hearing and notice requirements could be burdensome.

NOTES:

The committee substitute made numerous technical changes to the bill as introduced. Among other changes, it added a provision stating that failure to provide notice of a hearing to a person requesting notice would not invalidate actions taken at the hearing. The substitute also exempted the Edwards Aquifer Authority from several provisions of the legislation.

The companion bill, SB 344 by Duncan, was reported favorably, as substituted by the Senate Natural Resources Committee on May 3.