

- SUBJECT:** Adjusting Department of Agriculture's regulatory programs and penalties
- COMMITTEE:** Agriculture and Livestock — favorable, without amendment
- VOTE:** 7 ayes — T. King, Anderson, M. González, Kacal, Kleinschmidt, Springer, White
0 nays
- WITNESSES:** For — (*Registered, but did not testify:* Doug DuBois, Jr., Texas Food & Fuel Association; Debra Hastings, Texas Oil & Gas Association; Gary Walker)
Against — None
On — Stephen Pahl and Catherine Wright-Steele, Texas Department of Agriculture
- DIGEST:** HB 1494 would make many changes to the Texas Department of Agriculture's (TDA) regulatory authority and penalties, including:
- eliminating the requirement for the TDA to provide a hearing when the person charged with a violation did not request one;
 - allowing the TDA to issue a cease-and-desist order immediately upon discovery of illegal activity, while providing an opportunity to appeal;
 - allowing license periods to be set in rule;
 - adjusting the licensing of service companies and service technicians and eliminating certain requirements;
 - allowing the TDA to establish the notice requirements for Commodity Board Elections by rule;
 - removing the requirement for public hearing before establishing an emergency quarantine; and
 - allow the TDA to dispose, sell or transfer livestock export pens.

Hearings for administrative penalties. HB 1494 would require a defendant to ask for a hearing within 20 days of receiving notice of violation. If the person did not ask for a hearing a default judgment would be imposed.

A defendant ordered to pay a penalty would be required to pay within 30 days of receiving the notice of violation.

Cease-and-desist order. The bill would allow the TDA to order the immediate stop of illegal activity by an unlicensed person engaging in an activity that required a license. The cease-and-desist order would take effect immediately and allow the subject of the order an opportunity to appeal.

A violation of an order would be grounds for imposing administrative and civil penalties with a civil penalty of \$50 to \$2,000 for each violation. Each day a violation occurred or continued could be considered a separate violation.

If a person violated or threatened to violate the cease-and-desist order, the TDA could bring civil action in district court for injunctive relief to restrain the person from continuing the violation and/or civil penalty.

HB 1494 would make violating a cease-and-desist order a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000) or, if the person had prior convictions, a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000).

Term and renewal of licenses and registrations. HB 1494 would allow the TDA to evaluate and propose adjustments to certain license and registration periods and the frequency of fees using the rulemaking process. It also would allow the TDA to send renewal notices by e-mail or mail, according to the records provided by the licensee.

Regulation of weights and measures. HB 1494 would define a "commercial weighing and measuring device" as a weighing and measuring device used in a commercial transaction. It would remove provisions providing that a barrel consisted of 31-1/2 gallons and that a hogshead consisted of two barrels. It would also establish that, for purposes of the retail sale of motor fuel only, a liquid gallon contained 231 cubic inches without adjustment based on the temperature of the liquid.

HB 1494 also would adjust the regulation of weights and measures, including requiring that a commercial weighing or measuring device be registered and periodically tested for correctness, allowing the TDA to

accept use of test standards of weights and measures by a National Institute of Standards and Technology certified laboratory, and providing licensing requirements for service technicians and service companies. Various penalties would be adjusted.

HB 1494 would change the civil penalty for a violation of weights and measures standards from a cap of \$500 to a range of \$250 to \$10,000. The TDA and the attorney general could recover reasonable expenses incurred in obtaining related injunctive relief and civil penalties.

The bill would make certain offenses a violation of provisions relating to weights and measures rather than a class C misdemeanor (maximum fine of \$500), including offenses relating to standard net weight or count set by rule; sale of commodities by proper measure; sale of milk or cream in a nonstandard container; sale of cheese, meat, or meat food product by nonstandard weight; misrepresentation of price or quantity; false representation of commodity quantity; and sale of a commodity in violation of certain provisions.

The bill would increase the penalty from a class C misdemeanor (maximum fine of \$500) to a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000) for offenses relating to the sale of commodities by net weight, standard fill and quantity labeling for commodities in package form, use of an incorrect weighing or measuring device, and testing of a package by the TDA. If previously convicted, the penalty would be a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000). The offense relating to the use of an incorrect weighing or measuring device would apply only if it were done knowingly.

Stop-sale orders. The TDA could issue and enforce a written or printed order to stop the sale of a commodity or service if there was reason to believe that the commodity was being sold or kept, offered, or exposed for sale in violation of weights and measures standards or through the use of a weighing or measuring device that was in violation.

Testing of commercial weighing and measuring devices for correctness. Unless exempt by rule, a commercial weighing or measuring device would be inspected and tested for correctness by the TDA at least once every four years or more often as required by the TDA.

The bill would authorize, rather than require, the TDA to collect a fee for each test of a weighing or measuring device. The bill would repeal a provision allowing the TDA to collect prescribed fees for TDA inspection only once annually unless requested to perform additional tests by the owner of a weight or measure.

The penalty for knowingly selling an incorrect weighing or measuring device, or disposing of a condemned weighing or measuring device would be a class C misdemeanor (maximum fine of \$500). If previously convicted, the penalty would increase to a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000).

The penalty for refusing to allow a test of a weighing or measuring device or for hindering TDA personnel would be a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000) or a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000) if previously convicted. Neglecting to allow a test of a weighing or measuring device would no longer be an offense.

HB 1494 would remove the class C misdemeanor offense (maximum fine of \$500) for failure or refusal to comply with tolerances and specifications for commercial weighing or measuring devices.

Registering a commercial weighing or measuring device. Unless exempt by rule, a commercial weighing or measuring device would have to be registered with the TDA before use. The bill would provide application requirements and specifies that registration would be valid for one year unless a different period was established by TDA rule. Removal of a registration tag would be a class C misdemeanor (maximum fine of \$500) or a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000) if previously convicted.

If the TDA had reason to believe that an unregistered weighing and measuring device was being used for a commercial transaction, the TDA could inspect the device and the records to determine whether the device was in compliance.

Certified laboratory test standards of weights and measures. HB 1494 would allow the TDA to accept use of test standards of weights and measures by a National Institute of Standards and Technology-certified laboratory. The TDA could adopt rules to regulate the frequency and place

of inspection and correction of the standards used by an individual or business licensed by the TDA to perform certain device maintenance activities. The TDA could inspect any standard used by an individual or business licensed by the TDA to perform such activities if the TDA had reason to believe a standard was no longer compliant.

Licensing of service technicians and service companies. The bill would specify actions that constituted device maintenance activities and the powers and duties of the TDA regarding compliance verification and would provide exemptions from the licensing requirements.

Unless exempt, a service technician could not perform device maintenance activities unless licensed by the TDA. A service company could not hire a person that did not hold a service company license. An individual, acting as sole proprietor could not perform or offer to perform device maintenance activities unless they held a service technician license and a service company license. It would be a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000) to violate these license requirements or to cause another person to violate the requirements. The penalty would increase to a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000) if previously convicted.

HB 1494 would provide application requirements, service technician license requirements, and service company license requirements. While a service company performed device maintenance activities, it would be required to maintain a current effective operations liability insurance policy in an amount set by the TDA and based on the type of licensed activities to be performed.

The bill sets out provisions relating to the term of a license, license renewal, and authorized practices by a license holder. The bill would grant rulemaking authority to the TDA regarding the licensing of service technicians and service companies and would require the TDA to adopt rules by December 1, 2013. The TDA would be required to begin accepting applications for and issuing service technician licenses and service company licenses by January 1, 2014.

Repealers. HB 1494 would repeal provisions relating to a service person registration requirement and, effective March 1, 2014, provisions governing the inspection and testing of liquefied petroleum gas meters, inspection and testing of ranch scales, and licensed inspectors of weighing

and measuring devices.

Notice of commodity producers board elections. The TDA would be allowed to prescribe the manner for providing notice for Commodity Board Elections by rule rather than requiring notice to be published in regional newspapers.

Plant pest quarantines. HB 1494 would repeal Agriculture Code, sec. 71.006, requiring a public hearing to determine if a pest or disease was a menace to a valuable plant or plant product before quarantining an area.

Disposition of livestock export facilities. HB 1494 would allow the TDA to dispose of its livestock export facilities.

Effective date. This bill would take effect September 1, 2013.

SUPPORTERS
SAY:

Last session the Texas Department of Agriculture (TDA) regulatory programs were shifted to full cost recovery models. The agency implemented a variety of changes to maintain services with minimal or no fee increases. HB 1494 would make additional adjustments to maximize efficiencies and modernize outdated statutes, including eliminating obsolete licensing categories to reduce confusion for licensees.

Hearings for administrative penalties. Currently, if a defendant ignores a TDA notice of violation and does not affirmatively challenge allegations, the TDA must hold a trial. This oftentimes results in a waste of agency resources because defendants do not show up to about 40 percent of these TDA hearings. A no-show results in a default judgment against the defendant. HB 1494 would allow the TDA to enter a default judgment if a defendant failed to request a hearing by a specified deadline. This would save the agency time and resources that could be redirected to address caseload backlog. This process would track the civil process for failure to answer a lawsuit and would be similar to the system already used by Texas Department of Licensing and Regulation, the state's primary occupational licensing agency.

Cease-and-desist order. HB 1494 would improve consumer protection by allowing the TDA to order the immediate cessation of illegal activity while providing the subject of the order an opportunity to appeal. Currently a cease-and-desist order does not take effect until after a hearing is held. The bill would amend the cease-and-desist order system to go

from a hearing-first to a hearing-second scheme so that the order took effect immediately but could be challenged after the fact.

This provision of the bill is neither unique nor unprecedented as it was modeled after a similar enhancement for violations in Chapter 76 of the Agriculture Code.

Term and renewal of licenses and registrations. Currently, some license periods are set in rule and others in statute. HB 1494 would streamline the TDA's license authority and increase efficiency and save money by allowing the TDA the flexibility to evaluate each license period and propose adjustments using the rulemaking process.

No license period changes are anticipated currently, but this authority would allow the TDA to be responsive if efficiency was identified and supported through the public rulemaking process. This would allow the TDA to redirect resources and improve customer service when necessary.

The TDA would also be allowed to send renewal notices by e-mail or mail, saving printing and postage for licensees who prefer to get notice by e-mail.

Regulation of weights and measures. HB 1494 would make many stakeholder-approved updates to the Weights and Measures Code that would improve consistency and clarity. The bill also would better align the administrative and criminal offenses, including increasing certain penalties.

Current penalties for violating weights and measures standards are not enough of a deterrent for those committing an illegal activity, such as knowingly selling or using an incorrect weighing and measuring device. The current penalty for many violations is a fine, which could be viewed by repeat offenders as just the cost of doing business, whereas jail time would be an actual punishment and more likely serve as a deterrent.

Notice of commodity producers board elections. Current statute calls for extensive and repeated publication in regional newspapers when providing notice of commodity producers' board elections. The costs significantly outweigh the effectiveness of newspaper publications when compared with more modern methods of notification. HB 1494 would allow the TDA to prescribe the manner for providing notice for

Commodity Board Elections by rule, rather than requiring notice to be published in regional newspapers. The Texas Department of Transportation has similar authority.

Plant pest quarantines. Currently, before an emergency quarantine may be established, the TDA holds a hearing to investigate the pest or disease and determine if the pest or disease is a menace to a valuable plant or plant product. This hearing is procedural at that point because the TDA would have already been working extensively with public and private partners on the issue. HB 1494 would streamline the process to establish an emergency quarantine by removing the requirement for an unnecessary hearing that could delay the response time.

Streamlining the process for the state to establish quarantine is important because if the state fails to establish the quarantine quickly enough, the U.S. Department of Agriculture is authorized to quarantine the entire state, placing excessive economic burden on agricultural commerce.

There is ample opportunity for transparency and public input throughout the process of establishing a quarantine, so removing the requirement to have a public hearing before establishing a quarantine would not compromise the opportunity for producers and industry to be involved and informed. The process by which the TDA publishes notice of a permanent quarantine in the Texas Register to allow for public comment would remain. Also, the TDA can hold public hearings as deemed necessary and is required to hold a public hearing if a group of 25 or more people request a hearing.

Disposition of livestock export facilities. While the TDA has the authority to build and maintain livestock export facilities, it lacks clear authority to dispose, sell or transfer pens, sheds, and other facilities upon expiration or termination of the ground leases or when the facility has reached the end of its useful life. HB 1494 would allow the TDA to dispose of these livestock export facilities.

OPPONENTS
SAY:

The current penalties imposed by the TDA are adequate. HB 1494 would increase penalties for many second offenses from a class C misdemeanor (maximum fine of \$500) to a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000). Enhancing those penalties would be a big leap, involving potential jail time, which may not be an appropriate use of government resources for these types of nonviolent offenses.

NOTES:

The identical Senate companion bill, SB 1433 by Hinojosa, was left pending in the Senate Committee on Agriculture, Rural Affairs and Homeland Security on April 22.