

BILL ANALYSIS

Senate Research Center

C.S.H.B. 801
By: Uher (Armbrister)
Natural Resources
5/12/1999
Committee Report (Substituted)

DIGEST

Currently, if an application to issue, amend, or renew a permit for which public notice and an opportunity for public hearing is required or allowed under Chapter 26 or 27, Water Code, or required or allowed under Chapter 361 or 382, Health and Safety Code, and the application is contested, Chapter 2001, Government Code, applies. This bill would establish that Subchapters D - H of Chapter 2001 do not apply to the aforementioned permit applications and establishes an alternative procedure for such proceedings.

PURPOSE

As proposed, C.S.H.B. 801 establishes procedures for public participation in certain environmental permitting procedures of the Texas Natural Resource Conservation Commission.

RULEMAKING AUTHORITY

Rulemaking authority is granted to the Texas Natural Resource Conservation Commission in SECTIONS 2, 5, 6, 9, 10, 12, 13, 15, 16, 19, and 20 (Section 5.551(b) and (c), Section 5.555(a), and Section 5.556(a), Section 26.0286(b)(2), Water Code, Section 361.066(c), Section 363.112(d), Section 364.012(f), Section 382.051(a), Section 382.05101, Section 382.05193(d), (g), and (i), Section 382.0519(b), (e), and (g), Section 382.05195(a) and (b), Section 382.0629(b), and Section 382.056(a) and (g), Health and Safety Code, and Section 2003.047(h), Government Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 5.115(a), Water Code, to delete a provision regarding a requirement to hold a hearing.

SECTION 2. Amends Chapter 5, Water Code, by adding Subchapter M, as follows:

SUBCHAPTER M. ENVIRONMENTAL PERMITTING PROCEDURES

Sec. 5.551. PERMITTING PROCEDURES; APPLICABILITY. Provides that this subchapter establishes procedures for providing public notice, an opportunity for public comment and hearing (public actions) regarding the Texas Natural Resource Conservation Commission (commission) actions relating to a permit issued under Chapter 26 or 27 of this code or Chapter 361, Health and Safety Code, and that this subchapter does not restrict or expand the types of commission actions for which public notice, an opportunity for public comment, and an opportunity for public hearing are provided under Chapter 26 or 27 or Chapter 361, Health and Safety Code. Provides that this subchapter does not create a new opportunity for a contested case hearing or limit the opportunity for a contested hearing for any commission action. Requires the commission, by rule, to provide for additional public actions to the extent necessary to satisfy a requirement for United States Environmental Protection Agency (EPA) authorization of a state permit program. Defines "permit."

Sec. 5.552. NOTICE OF INTENT TO OBTAIN PERMIT. Requires the executive director of the commission (executive director) to determine when an application is administratively complete. Requires an applicant to publish notice of intent to obtain a permit (notice) in a newspaper and requires the chief clerk of the commission (clerk) to mail the notice of intent to obtain a permit to certain governmental offices, not later than 30 days after the executive director determines an application to be administratively complete. Requires the commission, by rule, to establish the form and content of the notice. Requires the notice to include certain information regarding the

proposed activity. Requires an applicant to comply with any applicable public notice requirements under Chapters 26 and 27 of this code, Chapter 361, Health and Safety Code, and rules adopted under those chapters. Requires the applicant to make a copy of the application available for public review and copy. Authorizes the applicant to hold a public meeting to inform the public about the application and obtain public input.

Sec. 5.553. PRELIMINARY DECISION; NOTICE AND PUBLIC COMMENT. Requires the executive director to conduct a technical review of and issue a preliminary decision on the application. Requires the applicant to publish notice of the preliminary decision in a newspaper. Requires the commission, by rule, to establish the form and content of the notice, the manner of publication, and the duration of the public comment period. Requires the notice to include certain information regarding the preliminary decision. Requires the applicant to make a copy of the preliminary decision available for public review and copy. Makes conforming changes.

Sec. 5.554. PUBLIC MEETING. Authorizes the executive director to hold public meetings and requires the executive director to hold such meetings at the request of the member of the legislature who represents the general area in which the facility is located or proposed to be located or if the executive director determines that there is substantial public interest in the proposed activity.

Sec. 5.555. RESPONSE TO PUBLIC COMMENTS. Requires the executive director to file with the clerk a response to each relevant and material public comment on the preliminary decision filed during the public comment period. Requires the clerk to transmit to certain persons involved with the proposed activity, the executive director's decision, response to public comments and instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing.

Sec 5.556. REQUEST FOR RECONSIDERATION OR CONTESTED CASE HEARING. Authorizes a person to file a request, during the period provided by commission rule, for the commission to reconsider the executive director's decision or hold a contested case hearing. Requires the commission to act on a request during a period provided by commission rule. Prohibits the commission from granting a request for a contested case hearing unless it is determined that the request was filed by a person affected as defined by Section 5.115. Prohibits the commission from referring an issue to the State Office of Administrative Hearings (SOAH) unless the commission makes certain determinations. Requires the commission to limit the number and scope of the issues to be referred to SOAH and specify the maximum expected duration of the hearing, if the commission grants a request for a contested case hearing. Provides that this section does not preclude the commission from holding a hearing if it determines that the public interest warrants doing so.

SECTION 3. Amends Section 11.138(a), Water Code, to authorize the commission, by rule, to authorize the beneficial use, without a permit, of not more than 25 acre-feet of water, for a term not to exceed one year, if the diversion of water will not affect existing water right holders and the user of the water registers the use with the commission in the manner required by the commission.

SECTION 4. Amends Section 11.142(a), Water Code, to provide that normal storage may involve the temporary storage of greater than 200 acre-feet if the owner of the structure maintains records which can demonstrate that throughout a 12 month period an average of not more than 200 acre-feet of water is impounded in such a structure.

SECTION 5. Amends Chapter 26B, Water Code, by adding Section 26.0286, as follows:

Sec. 26.086. PROCEDURES APPLICABLE TO PERMITS FOR CERTAIN CONCENTRATED ANIMAL FEEDING OPERATIONS. Defines "sole-source surface drinking water supply." Requires the commission to process an application for authorization to construct and operate a concentrated animal feeding operation (feeding operation) as a specific permit under Section 26.028 subject to the procedures provided by Chapter 5M, if the feeding operation is located or proposed to be located in the watershed of a sole-source surface drinking water supply and sufficiently close, as determined by commission rule, to potentially affect the public drinking water supply.

SECTION 6. Amends Section 361.066, Health and Safety Code, to require an applicant to submit any portion of an application that the commission determines is necessary to make the application administratively complete not later than the deadline set by the commission under Subsection (c). Requires the commission, by rule, to establish a deadline for the submission of additional information or material after the applicant receives notice from the commission that the information or material is needed to make the application administratively complete. Deletes text regarding a deadline of the 270th day after the applicant receives notice.

SECTION 7. Amends Section 361.088, Health and Safety Code, by amending Subsection (c) and adding Subsections (e) and (f), to require the commission to provide an opportunity for public hearing before a permit is issued, except as provided by Subsection (e). Authorizes the commission, without providing an opportunity for a contest case hearing, to act on an application to renew certain permits regarding the storage and processing of hazardous waste under specified conditions. Requires the commission to provide an opportunity to request a contested case hearing if the commission determines an issue of an applicant's ability to comply with a material term of a permit is raised, notwithstanding Subsection (e).

SECTION 8. Amends Section 361.152, Health and Safety Code, to prohibit the powers specified by Section 364.011, rather than Sections 364.011 and 364.012, from being exercised.

SECTION 9. Amends Section 363.112, Health and Safety Code, by amending Subsections (a) and (c), and adding Subsections (d) and (e), to require a city or municipality to designate an area for the disposal of municipal or industrial waste, in order to prohibit the processing or disposal of municipal or industrial solid waste in certain areas of a municipality or county. Prohibits the governing body of a municipality or county from prohibiting the processing or disposal of municipal or industrial solid waste in an area of that municipality for which certain conditions apply. Prohibits the commission from granting an application for a permit to process or dispose of municipal or industrial solid waste in an area in which the processing or disposal of municipal or industrial solid waste is prohibited by an ordinance or order authorized by Subsection (a), unless the governing body of the municipality or county violated Subsection (c) in passing the ordinance or order. Requires the commission, by rule, to establish procedures for determining whether an application is for the processing or disposal of municipal or industrial solid waste in an area for which that processing or disposal is prohibited by an ordinance or order. Prohibits the powers specified by this section from being exercised by the governing body of a municipality or county with respect to areas to which Section 361.090 applies. Deletes the provision that this section does not apply to a municipality or county that has adopted solid waste management plans approved by the commission under Section 363.063.

SECTION 10. Amends Section 364.012, Health and Safety Code, to prohibit the commissioners court of the county from prohibiting the processing or disposal of municipal or industrial solid waste in an area of that county for which certain conditions apply. Prohibits the commission from granting an application for a permit to process or dispose of municipal or industrial solid waste in an area in which the processing or disposal of municipal or industrial solid waste is prohibited by an ordinance, unless the county violated Subsection (e) in passing the ordinance. Authorizes the commission, by rule, to specify the procedures for determining whether an application is for the processing or disposal of municipal or industrial solid waste in an area for which that processing or disposal is prohibited by an ordinance. Prohibits the powers specified by this section from being exercised by a county with respect to areas to which Section 361.090 applies. Deletes text regarding a requirement which does not apply if the county has adopted solid waste disposal guidelines approved by the commission. Makes conforming changes.

SECTION 11. Amends Subdivision (9) Section 382.003, Health and Safety Code, to redefine "modification of existing facility."

SECTION 12. Amends Sections 382.051(a) and (b), Health and Safety Code, to authorize the commission to issue a permit to operate an existing facility pursuant to a voluntary emissions reduction permit. Authorizes the commission to issue a standard permit for similar facilities, rather than numerous facilities subject to Section 382.0518, Health and Safety Code. Authorizes the commission, by rule, to issue a permit for types of facilities that will not significantly contribute air contaminants to the atmosphere, and a multiple plant permit for existing facilities at multiple locations subject to Section 382.0518 or 382.0519, Health and Safety Code. Makes conforming changes.

SECTION 13. Amends Chapter 382C, Health and Safety Code, by adding Section 382.05101, as follows:

Sec. 382.05101. DE MINIMIS AIR CONTAMINANTS. Authorizes the commission to develop, by rule, the criteria to establish a de minimis level of air contaminants for facilities or groups of facilities below which no permit under Section 382.0518 or 382.0519, standard permit under Section 382.05194 or permit by rule under Section 382.05195 will be required.

SECTION 14. Amends Sections 382.0511(a) and (c), Health and Safety Code, to authorize the commission to consolidate standard permits and permits by rule, into a single permit. Authorizes the commission to authorize changes in a federal source to proceed before the owner or operator obtains a federal source operating permit or revisions to a federal operating permit if the changes are de minimis under Section 382.05101 or the operator has obtained a preconstruction permit or permit amendment required by Section 382.0518, or is operating under a standard permit under Section 382.05194, a permit by rule under Section 382.05195, or an exemption allowed under Section 382.057, Health and Safety Code. Deletes text regarding a certain date of issuance of a permit and rulemaking.

SECTION 15. Amends Chapter 382C, Health and Safety Code, by adding Sections 382.0519, 382.05191-382.05195, as follows:

Sec. 382.0519. VOLUNTARY EMISSION REDUCTION PERMIT. Authorizes the owner or operator of an existing, unpermitted facility not subject to the requirement to obtain a permit under Section 382.0518(g) to apply for a permit to operate that facility under this section. Requires the commission to grant within a reasonable time a permit under this section if, from the information available to the commission, including information presented at any public hearing or through written comment, the commission finds that the facility will use an air pollution control method at least as beneficial as that described in Section 382.003(9)(E)(ii), considering the age and remaining useful life of the facility. Prohibits the commission from granting the permit under this section, if the commission finds that the emissions from the facility will contravene the standards under Subsection (b), or the intent of this chapter, including protection of the public's health and physical property. Requires the person planning the modification to comply with Section 382.0518, before work is begun on the modification of a facility previously permitted under this section. Authorizes the deferral of required reductions, under certain conditions. Requires deferral to be based on a certain prioritization necessary to meet local, regional, and statewide air quality needs.

Sec. 382.05191. VOLUNTARY EMISSION REDUCTION PERMIT: NOTICE AND HEARING. Requires an applicant for a permit under Section 382.0519 to publish notice of intent to obtain the permit in accordance with Section 382.056. Authorizes the commission to authorize an applicant for a permit for a facility which constitutes or is part of a small business stationary source as defined in Section 382.0365(g)(2) to provide notice using an alternative means if the commission finds that the proposed method will result in equal or better communication with the public, considering the effectiveness of the notice in reaching potentially affected persons, cost, and consistency with federal requirements. Authorizes the commission to afford an opportunity for a public hearing and the submission of public comment and send notice of a decision on an applicant for a permit under Section 382.0519 in the same manner as provided by Section 382.0561 and 382.0562. Provides that a person affected by a decision of the commission to issue or deny a voluntary emission reduction may move for rehearing and is entitled to judicial review under Section 382.032.

Sec. 382.05192. VOLUNTARY EMISSION REDUCTION PERMITS: REVIEW AND RENEWAL. Requires review and renewal of permits issued under Section 382.0519 to be conducted in accordance with Section 382.055.

Sec. 382.05193. MULTIPLE PLANT PERMIT. Authorizes the commission to issue a multiple plant permit for multiple plant sites which are owned or operated by the same person or persons under common control if the commission finds certain actions have been taken. Prohibits a permit issued under this section from authorizing emissions from any of the facilities authorized under the permit that exceed that facility's highest historic annual rate, or permit authorized levels. Requires the commission to publish notice of a proposed multiple plant permit, and sets forth notification procedures. Authorizes the commission, by rule, to require additional notice. Sets forth required notification information. Sets forth provisions for public meetings for existing facilities. Requires the commission to issue a written response to public comments under certain conditions. Requires the commission to establish, by rule, procedures for multiple plant permit application approval. Sets forth circumstances wherein a permit is not subject to Chapter 2001,

Government Code. Authorizes the commission to adopt rules to administer and delegate administration of this section.

Sec. 382.05194. STANDARD PERMIT. Authorizes the commission to issue a standard permit for new or existing similar facilities if the commission finds that certain actions can be taken. Requires the commission to publish notice in certain publications in the state designated by the commission's rule. Authorizes the commission, by rule, to require additional notice to be given. Requires the notice to include an invitation for written comments by the public to the commission regarding the proposed standard permit and to be published not later than a certain date. Requires the commission to hold a public meeting to provide an additional opportunity for public comment. Requires the commission to give notice described in Subsection (b) not later than a certain date before the date of the meeting. Requires the commission to issue a written response to comments on the permit at the same time that the commission issues or denies the permit, if the commission receives public comment relating to issuance of a standard permit. Requires the commission to establish the procedures for application and approval for the use of a standard permit. Provides that the issuance, amendment, or revocation of a standard permit by the commission is not subject to Chapter 2001, Government Code. Authorizes the commission to adopt rules as necessary to implement and administer this section and to delegate to the executive director under Section 382.061 the authority to issue, amend, or revoke a standard permit.

Sec. 382.05195. PERMITS BY RULE. Authorizes the commission to adopt permits, by rule, for certain types of facilities if it is found on investigation that certain types of facilities will not make a significant contribution of air contaminants to the atmosphere. Prohibits the commission from adopting a permit, by rule, authorizing any facility defined as a "major source" under the federal Clean Air Act or regulations adopted under that Act. Provides that nothing in this subsection shall be construed to limit the commission's general power to control the state's air quality under Section 382.011(a). Requires the commission to adopt rules specifically defining the terms and conditions for a permit by rule under this section.

SECTION 16. Amends Section 382.056, Health and Safety Code, by amending Subsections (a), (b), (d), and (e) and adding Subsections (f) - (p), to require an applicant for a permit under Section 382.0518, rather than Section 382.054, or a permit renewal under Section 382.055 (state permit) to publish notice of intent to obtain the permit or permit review not later than the 30th day after the date the commission determines the application to be administratively complete. Requires, rather than authorizes, the commission to require an applicant for a federal operating permit under Section 382.054 to publish notice consistent with the requirements of Subsection (b), rather than of this section. Requires the commission, by rule, to prescribe the form and content of the notice. Authorizes the commission to require the publication of an additional notice. Requires the commission, by rule, to prescribe alternative procedures for publication of the notice in a newspaper if the applicant is a small business stationary source and will not have a significant effect on air quality. Requires the alternative procedures to be cost-effective. Requires the notice to include certain information. Requires the executive director to conduct a technical review of and issue a preliminary decision on the application. Requires the applicant to publish notice of the preliminary decision in a newspaper and requires the commission to seek public comment on the preliminary decision, if a person requests during the period determined by commission rule that the commission hold a public hearing and the request is not withdrawn prior to the issuance of the preliminary decision. Requires the commission to consider a request for public hearing under the procedures provided by Subsections (i) - (n). Prohibits the commission from seeking further public comment or hold public hearing under the procedures provided by Subsections (i) - (n) in response to a request for a public hearing on a modification that would result in an increase in allowable emissions. Requires the commission to consider a request for public comment made during the period provided by commission rule under the procedures provided by Section 382.0561 and not under the procedures provided by Subsections (i) - (n). Requires a notice published under Subsection (a) to include certain information. Requires the clerk to transmit to certain persons, including any person who timely filed a request for a public hearing in response to the notice published under Subsection (a), the executive director's decision, response to public comments and instructions for requesting that the commission reconsider the executive director's decision or hold a contested case. Requires the commission to consider a request that the commission reconsider the executive director's decision or hold a public hearing in accordance with the procedures provided by Section 5.556, Water Code, except as provided by Section 382.0561. Authorizes the commission to hold a hearing on a permit amendment if the commission, rather than board, determines that an applicant has a negative compliance history. Requires the commission, by rule, to provide for public actions to the extent necessary to satisfy a requirement to obtain or maintain delegation or approval of a federal program.

Deletes text regarding a statement that a person may be affected by certain air contaminants. Deletes a provision requiring the commission to hold a public hearing. Makes conforming changes.

SECTION 17. Amends Section 382.057(a), Health and Safety Code, to delete text regarding facilities.

SECTION 18. Amends Section 382.058, Health and Safety Code, as follows:

Sec. 382.058. New heading: PROVISIONS RELATING TO COMMISSION PERMITS BY RULE OR STANDARD PERMITS OR EXEMPTION FOR CONSTRUCTION OF CERTAIN CONCRETE PLANTS. Prohibits a person from beginning construction on any concrete plant that performs wet batching, or central mixing under a standard permit under Section 382.05194 or a permit by rule, rather than an exemption, adopted by the commission under Section 382.05195, rather than Section 382.057, unless the person has complied with the notice and opportunity for hearing provisions under Section 382.056. Prohibits the commission from requiring that a person who qualifies for the exemption conduct air dispersion modeling before beginning construction of a concrete plant, and evidence regarding air dispersion modeling may not be submitted at a hearing under Section 382.056, if the commission considers air dispersion modeling information in the course of adopting an exemption under Section 382.057 for a concrete plant that performs wet batching, dry batching, or central mixing.

SECTION 19. Amends Section 382.062(b), Health and Safety Code, to authorize the commission to adopt rules relating to charging and collecting a fee for an exemption for a permit, a permit by rule, or for a voluntary emission reduction permit, for a multiple plant permit. Makes conforming changes.

SECTION 20. Amends Section 2003.047, Government Code, by amending Subsections (e) - (j) and adding Subsections (k) - (o), to require the commission to provide a list of disputed issues to an administrative law judge (judge) in referring a matter for hearing, rather than when the office receives jurisdiction of a proceeding. Requires the commission to specify the date by which the administrative law judge is expected to complete the proceeding and provide a proposal for decision. Authorizes the judge to extend the proceeding if the judge determines that failure to grant an extension would deprive a party of due process. Requires the judge to establish a docket control order designed to complete the proceeding by the date specified by the commission. Provides that the scope of the hearing is limited to the issues referred by the commission, except as otherwise provided by this subsection. Authorizes a judge to consider an issue that was not referred by the commission under certain circumstances. Sets forth limitations to the scope of permissible discovery. Requires the commission, by rule, to provide for subpoenas and commissions for depositions, and require that discovery be conducted in accordance with the Texas Rules of Civil Procedure, except that the commission by rule is required to determine the level of discovery under Rule 190, Texas Rules of Civil Procedure. Deletes a provision regarding areas that must be addressed. Makes conforming changes.

SECTION 21. Authorizes the commission to adopt as soon as practicable after the effective date of this Act, any rules necessary to implement the changes in law made by this Act.

SECTION 22. Requires the commission to prepare and distribute to the governor, lieutenant governor, the speaker of the house of representatives, the chairman of the Senate Committee on Natural Resources, and the chairman of the House Committee on Environmental Regulations a report on the number of companies that have obtained or applied for a permit under Section 382.0519, Health and Safety Code, as added by this Act, and the reductions in emissions anticipated to result from issuance of such permits not later than January 15, 2001.

SECTION 23. Prohibits the commission from initiating enforcement actions against a person who files an application for a certain permit on or before August 31, 2001. Limits the application of this section to exclude a facility modification that occurs after March 1, 1999.

SECTION 24. Provides that the changes in law made by SECTION 16 do not expand or restrict the types of actions of the commission for which public actions are provided under Chapter 382, Health and Safety Code.

SECTION 25. (a) Effective date: September 1, 1999.

(b) Makes application of this Act prospective.

(c) Provides that Sections 361.066(a) and (c), Health and Safety Code, apply only to an application pending before the commission as of the effective date of this Act.

(d) Provides that Sections 361.152, 363.112, and 364.012, Health and Safety Code, apply to an application pending before the commission as of the effective date of this Act.

(e) Provides that Sections 361.152, 363.112, and 364.012, Health and Safety Code, do not apply until January 1, 2000, to any application submitted after September 1, 1998, for a facility proposed to be located in a county in which the commissioners court has provided notice by September 1, 1999, in accordance with any applicable provisions in Chapter 551, Government Code, of intent to enact an ordinance pursuant to this Act.

SECTION 26. Emergency clause.