

## **BILL ANALYSIS**

Senate Research Center

C.S.H.B. 2877  
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Natural Resources  
5/22/2003  
Committee Report (Substituted)

### **DIGEST AND PURPOSE**

C.S.H.B. 2877 provides that the Texas Commission on Environmental Quality, in considering a permit, only has to respond to written comments during the notice and comment process; clarifies the times that a request for reconsideration of the executive director's decision and a request for a contested case hearing are made; clarifies that the only person who can request a contested case is a person who has participated in the full process to that point and is an affected person; tightens the requirements for issues that are referred to a contested case in response to practices that seem to currently allow broad issues to be referred; clarifies the process in the air permitting statutes that currently allows an early request for hearing to stand as a request for contested case hearing; and limits who can be named parties to a hearing at the state office of hearing examiners. C.S.H.B. 2877 also establishes a 15-member study commission on water for environmental flows

### **RULEMAKING AUTHORITY**

Rulemaking authority is expressly granted to the Study Commission on Water for Environmental Flows in SECTION 8 (Section 11.0236, Water Code) of this bill.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Section 5.555(a), Water Code, to require the executive director, in accordance with procedures provided by the Texas Commission on Environmental Quality (TCEQ) rule, to file with the chief clerk of TCEQ a response to each relevant and material public comment on the preliminary decision filed in writing during the public comment period.

SECTION 2. Amends Section 5.556, Water Code, by amending Subsections (a), (c), and (d), and adding Subsections (g) and (h), as follows:

(a) Requires a request for reconsideration of the executive director's decision or for a contested case hearing to be filed with TCEQ after transmittal of the executive director's response to public comments and during the period provided by TCEQ rule. Requires a request for a contested case hearing to be filed with TCEQ after transmittal of the executive director's response to public comments during the period provided by TCEQ rule.

(c) Prohibits TCEQ from granting a request for a contested case hearing unless TCEQ determines that the request was filed by an affected person, as defined by Section 5.115, who submitted written comments during the public comment period or by a local government with authority under state law over the issues contemplated by the application upon a showing of good cause for not having submitted written comments during the comment period.

(d) Prohibits TCEQ from referring an issue to the state office of administrative hearings for a hearing, unless TCEQ determines certain facts.

(g) Provides that notwithstanding other law, public notice of a contested case hearing that TCEQ grants under this section is not required. Requires that notice of a hearing be provided to the applicant, the office of public interest counsel, the executive director, and

the person whose hearing requests have been granted.

(h) Provides that notwithstanding other law, an application to upgrade a permitted landfill facility to meet the requirements of 40 C.F.R. Part 258 submitted to TCEQ before April 30, 2003, is required to be considered by TCEQ as a modification as such is defined by TCEQ rules.

SECTION 3. Amends Section 7.0025, Water Code, as follows:

(a) Defines “relevant commission protocols.”

(b) Authorizes TCEQ to initiate an enforcement action on a matter under its jurisdiction under this code or the Health and Safety Code based on a combination of information TCEQ receives from a private individual and information developed by TCEQ if that combined information, in TCEQ’s judgment, is of sufficient value and credibility to warrant the initiation of an enforcement action.

(c) Requires the executive director or the executive director’s designated representative to consider certain criteria.

(d) Authorizes the TCEQ to adopt additional criteria for the executive director to use in evaluating the value and credibility of information received from a private individual and for use of that information in an enforcement action.

(e) Provides that TCEQ is not required to call a private individual who provides information on which TCEQ relies unless doing so is essential to the enforcement action.

(f) Prohibits TCEQ from using information provided by a private individual if the information was obtained by trespass or another illegal act.

(g) Provides that information provided by a private individual that is used in an enforcement action is subject to the rules of evidence.

SECTION 4. Amends Subchapter C, Chapter 361, Health and Safety Code, by adding Section 361.1145, as follows:

Sec. 361.1145. PROHIBITION OF PERMIT FOR CERTAIN SOLIDIFIED, COMMERCIAL INDUSTRIAL SOLID WASTE FACILITIES. Prohibits TCEQ from issuing a permit for the storage, processing, or disposal of solidified, commercial, industrial solid waste in a solution-mined salt dome cavern or a sulphur mine located within one mile of a drinking water well, school, place of worship, or public park.

SECTION 5. Amends Section 382.056, Health and Safety Code, by amending Subsections (b), (g), (h), (i), (l), (m), and (n), and adding Subsections (s) and (t), as follows:

(b) Requires the notice to include certain information.

(g) Requires the applicant to publish notice of the preliminary decision in a newspaper, and requires TCEQ to seek public comment on the preliminary decision in accordance with the procedures provided by Subsections (i)-(n), if, in response to the notice published under Subsection (a) for a permit or permit amendment under Section 382.0518 or a permit renewal review under Section 382.055, a person files a request during the period provided by TCEQ rule that TCEQ initiate the public participation process, rather than holding a public hearing, and the request is not withdrawn before the date the preliminary decision is issued. Prohibits, however, TCEQ from seeking further public comment or holding a public hearing in response to a request for initiation of the public participation process, rather than hearing on an amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. Deletes text regarding a hearing

under the procedures provided by Subsections (i)-(n).

(h) Makes conforming changes.

(i) Requires TCEQ by rule to establish the form and content of the notice of preliminary decision under Subsection (g), the manner of publication, and the duration of the public comment period. Requires the notice to include certain information.

(l) Makes a conforming change.

(m) Makes conforming changes.

(n) Requires TCEQ, except as provided by Section 382.0561, to consider a request that TCEQ reconsider the executive director's decision or hold a contested case hearing, rather than a public hearing, in accordance with the procedures provided by Sections 5.556 and 5.557, Water Code.

(s) Requires TCEQ, if a request to initiate the public participation process is not filed during the period prescribed by TCEQ rule for a permit or permit amendment under Section 382.0518 or for a permit renewal review under Section 382.055, to conduct a public hearing held in response to a later public notice required solely by federal program requirements in accordance with Section 382.0561 and not under Chapter 2001, Government Code.

(t) Requires TCEQ to extend the public comment period automatically until the close of the public meetings held under Subsection (k). Prohibits TCEQ from extending the period during which requests for initiation of the public participation process or requests for reconsideration may be filed.

SECTION 6. Amends Section 382.0564, Health and Safety Code, as follows:

(a) Subsection created from existing text.

(b) Requires TCEQ to mail notice of intent to obtain a permit, permit amendment, or other authorization for a rock-crushing facility associated with blasting operations to an affected municipality.

(c) Authorizes an affected municipality entitled to notice under subsection (b) to submit comments to the TCEQ within 30 days of receiving a notice of intent under Subsection (b).

(d) Prohibits TCEQ from issuing a permit, permit amendment, or other authorization for a rock-crushing facility associated with blasting operations if TCEQ receives from an affected municipality a resolution in opposition to issuance of the permit, permit amendment, or other authorization during the 30 day comment period.

(e) Requires TCEQ to prohibit a currently permitted rock-crushing facility from being associated with blasting operations if blasting operations have not taken place on the tract for 10 or more years before April 10, 2003; and TCEQ receives from an affected municipality a resolution in opposition to the currently permitted rock-crushing facility.

(f) Defines "affected municipality."

SECTION 7. Amends Section 2003.047, Government Code, by adding Subsections (p) and (q), as follows:

(p) Authorizes the administrative law judge, in designating parties to a hearing on a permit application, to name as parties only the executive director, the office of public interest counsel, the permit applicant, and other persons whose hearing requests have

been granted by TCEQ and whose issues have been referred by TCEQ for a contested case hearing. Authorizes the executive director to participate in a contested case hearing only to the extent described in Section 5.228, Water Code.

(q) Authorizes an administrative law judge to make a summary disposition of the issues referred by TCEQ as provided by TCEQ rules.

SECTION 8. Amends Subchapter B, Chapter 11, Water Code, by adding Section 11.0235, 11.0236, and 11.0237, as follows:

Sec. 11.0235. POLICY REGARDING WATERS OF THE STATE. (a) Provides that the waters of the state are held in trust for the public, and the right to use state water may be appropriated only as expressly authorized by law.

(b) Provides that maintaining the biological soundness of the state's rivers, lakes, bays, and estuaries is of great importance to the public's economic health and general well-being.

(c) Provides that the legislature has expressly required TCEQ while balancing all other interests to consider and provide for the freshwater inflows necessary to maintain the viability of the state's bay and estuary systems in TCEQ's regular granting of permits for the use of state waters.

(d) Provides that the legislature has not expressly authorized granting water rights exclusively for instream flows dedicated to environmental needs or inflows to the state's bay and estuary systems; or other similar beneficial uses.

(e) Provides that the fact that greater pressures and demands are being placed on the water resources of the state makes it of paramount importance to reexamine the process for ensuring that these important priorities are effectively addressed in clear delegations of authority to TCEQ.

Sec. 11.0236. STUDY COMMISSION ON WATER FOR ENVIRONMENTAL FLOWS. (a) Provides that in recognition of the importance that the ecological soundness of our riverine, bay and estuary systems and riparian lands has on the economy, health, and well-being of the state there is created the Study Commission on Water for Environmental Flows.

(b) Provides that the Study Commission on Water for Environmental Flows (study commission) is composed of 15 certain members.

(c) Sets forth the composition of the members appointed under Subsection (b)(2).

(d) Sets forth the composition of the members appointed under Subsection (b)(3).

(e) Provides that each appointed member of the study commission serves at the will of the person who appointed the member.

(f) Provides that the appointed senator with the most seniority and the appointed house member with the most seniority serve together as co-presiding officers of the study commission.

(g) Provides that a member of the study commission is not entitled to receive compensation for service on the study commission but is entitled to reimbursement of the travel expenses incurred by the member while conducting the business of the study commission, as provided by the General Appropriations Act.

(h) Authorizes the study commission to accept gifts and grants from any source to

be used to carry out a function of the study commission.

(i) Requires TCEQ to provide staff support for the study commission.

(j) Requires the study commission to conduct public hearings and study public policy implications for balancing the demands on the water resources of the state resulting from a growing population with the requirements of the riverine, bay, and estuary systems including granting permits for instream flows dedicated to environmental needs or bay and estuary inflows, use of the Texas Water Trends, and any other issues the study commission determines have importance and relevance to the protection of environmental flows. Requires the study commission, in evaluating the options for providing adequate environmental flows, to take notice of the strong public policy imperative that exists in this state recognizing that environmental flows are important to the biological health of our parks, game preserves, and bay and estuary systems and are high priorities in the permitting process. Requires the study commission to specifically address ways that the ecological soundness of these systems will be ensured in the water allocation process.

(k) Requires the study commission to perform certain tasks.

(l) Requires the study commission, not later than December 1, 2004, to issue a report summarizing certain items.

(m) Requires the study commission to promptly deliver copies of the report the governor, lieutenant governor, and speaker of the house of representatives.

(n) Requires the study commission to adopt rules to administer this section.

(o) Provides that the study commission is abolished and that this section expires September 1, 2005.

Sec. 11.0237. WATER RIGHTS FOR INSTREAM FLOWS DEDICATED TO ENVIRONMENTAL NEEDS OR BAY AND ESTUARY INFLOWS. (a) Prohibits TCEQ from issuing a new permit for instream flows dedicated to environmental needs or bay and estuary inflows. Provides that this section does not prohibit TCEQ from issuing an amendment to an existing permit or certificate of adjudication to change the use to or add a use for instream flows dedicated to environmental needs or bay and estuary inflows.

(b) Provides that this section does not alter TCEQ's obligations under Section 11.042(b), 11.046(b), 11.085(k)(2)(F), 11.134(b)(3)(D), 11.147, 11.1491, 16.058, or 16.059.

(c) Provides that this section expires September 1, 2005.

SECTION 9. Amends Sections 11.147(d) and (e), Water Code, as follows:

(d) Requires TCEQ, in its consideration of an application to store, take, or divert water, to include in the permit, to the extent practicable when considering all public interests, those conditions considered by TCEQ necessary to maintain, rather than consider the effect, if any, of the issuance of the permit on, existing instream uses and water quality of the stream or river to which the application applies.

(e) Requires TCEQ to include in the permit, to the extent practicable when considering all public interests, those conditions considered by TCEQ necessary to maintain, rather than consider the effect, if any, of the issuance of the permit on, fish and wildlife habitats.

SECTION 10. Provides that rules adopted by TCEQ under Section 26.040, Water Code, before

the effective date of this Act are validated as of the dates they were adopted and remain valid until they are modified or repealed by TCEQ.

SECTION 11. (a) Provides that except as provided by subsection (b) of this section, this Act takes effect September 1, 2003.

(b) Provides that Sections 8 and 9 of this Act take effect immediately if this Act receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. Provides that if this Act does not receive the vote necessary for immediate effect, Sections 8 and 9 of this Act take effect September 1, 2003.

(c) Provides that the changes in law made by Sections 1, 2, 4, 5, and 7 of this Act apply only to an application for a permit, permit amendment, or permit renewal for which the notice of preliminary decision required by Section 5.553, Water Code, or Section 382.056(g), Health and Safety Code, is published on or after September 1, 2003. Provides that a permit, permit amendment, or permit renewal for which the notice of preliminary decision required by Section 5.533, Water Code, or Section 382.056(g), Health and Safety Code, is published before September 1, 2003, is governed by the law in effect on the date it was published, and that law is continued in effect for that purpose.

(d) Provides that the changes in law made by Sections 8 and 9 of this Act apply to a permit application pending before TCEQ on the effective date of those sections or filed with TCEQ on or after that date.