

BILL ANALYSIS

Senate Research Center
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S.B. 1542
By: Armbrister
Natural Resources
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AUTHOR'S/SPONSOR'S STATEMENT OF INTENT

H.B. 801, 76th Regular Session, 1999, modified the permitting process for certain environmental permit programs administered by the Texas Commission on Environmental Quality (TCEQ) for which public notice and opportunity for hearing were required. The purpose of H.B. 801 was to improve public notice, clarify the role of notice and comment in the state process, and utilize contested case hearings more effectively. The process also envisioned that issues would be narrowed or eliminated as a permit in controversy went through the process. Following passage of the bill, a number of concerns have developed.

S.B. 1542 clarifies and executes the original goals of H.B. 801. S.B. 1542 provides that TCEQ 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 decisions 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 in an affected person; strengthens the requirements for specific issues to be referred to a contested case; clarifies the process in the air permitting statutes that currently allow an early request for a 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 Administrative Hearings.

S.B. 1542 also prescribes that TCEQ, by rule, may establish types of cases which TCEQ may review and grant permits without the necessity of a contested case hearing involving less significant matters that do not require the trial-like proceeding.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Texas Commission on Environmental Quality in SECTION 7 (Section 361.088, Health and Safety Code) of this bill.

Rulemaking authority previously granted to the Texas Commission on Environmental Quality is modified in SECTION 8 (Section 382.056, Health and Safety Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 5.228(b), Water Code, to delete existing text requiring the executive director of the Texas Commission on Environmental Quality (executive director) to be named a party in hearings before the commission only in matters in which the executive director bears the burden of proof.

SECTION 2. Amends Section 5.555(a), Water Code, to require the executive director to file responses to certain matters in writing during the public comment period.

SECTION 3. Amends Section 5.556, Water Code, by amending Subsections (a), (b), (c), (d), and (f), and adding Subsection (g), as follows:

- (a) Requires a request for reconsideration of the executive director's decision to be filed with the Texas Commission on Environmental Quality (TCEQ) after publication of the preliminary decision under Section 5.553 (Preliminary Decision: Notice and Public Comment) and during the period provided by commission 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 under Section 5.555 and during the period provided by commission rule.

(b) Requires TCEQ to act on a request made under Subsection (a) or a preliminary recommendation made by the State Office of Administrative Hearings (office) under Section 5.5561 during the period provided by commission 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 (Persons Affected in Commission Hearings; Notice of Application) who submitted written comments during the public comment period.

(d) Prohibits TCEQ from referring an issue to the office for a contested case hearing unless TCEQ determines that certain circumstances are present.

(f) Requires TCEQ, notwithstanding other law, if an issue is raised by an affected person in a contested case hearing and found by TCEQ to prevent issuance of the permit unless it is corrected and the issue can be corrected by a change to the technical aspects or requirements of the permit or the permit application, to require the applicant to make the change to the permit application or the executive director to make the change to the permit conditions without requiring any further administrative process. Deletes existing text relating to this section not precluding TCEQ from holding a hearing if it determines that the public interest warrants doing so.

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

SECTION 4. Amends Subchapter M, Chapter 5, Water Code, by adding Section 5.5561, as follows:

Sec. 5.5561. PRELIMINARY PROCEEDING ON REQUEST FOR CONTESTED CASE HEARING. (a) Requires TCEQ, on written request of an applicant, to refer a request for a contested hearing under Section 5.556 to the office for a preliminary review of whether the person requesting the contested case hearing meets the requirements for bringing a contested case hearing under Section 5.556(c) and (d).

(b) Requires the office, on receiving a referral from TCEQ under Subsection (a), to schedule a preliminary review proceeding not later than the 60th day after the date TCEQ refers the request to the office.

(c) Requires the office, during the preliminary review proceeding, to require that the person requesting the contested case hearing demonstrate through testimony or affidavit a prima facie case that the person is an affected person and that the issue raised by the person meets the criteria provided by Section 5.556(d).

(d) Requires the office, not later than the 30th day after the date of the preliminary review proceeding, to make a recommendation to TCEQ on whether the person requesting the contested case hearing is an affected person and whether the person has demonstrated through prima facie evidence that the issue raised by the person meets the criteria provided by Section 5.556(d).

SECTION 5. Amends Section 26.028(d), Water Code, to authorize TCEQ, notwithstanding any other provision of this chapter, at a regular meeting without the necessity of holding a public hearing, to approve an application for a permit, permit amendment, or renewal of a permit, except that a permit for a new major source, as defined by commission rule, is prohibited from being issued except after an opportunity for a public hearing on the application. Deletes existing text making the prohibition of issuance conditional.

SECTION 6. Amends Section 27.018, Water Code, by amending Subsection (a) and adding Subsection (e), as follows:

(a) Provides an exception to this subsection as provided by Subsection (e).

(e) Authorizes TCEQ, notwithstanding any other provision of this chapter, after public notice and an opportunity for public comment, at a regular meeting and without the necessity of holding a public hearing, to approve an application for a permit, permit amendment, or renewal of a permit, unless the application is for a new injection well at a site at which there is no existing permitted injection in the injection zone for which the application seeks authorization.

SECTION 7. Amends Section 361.088(e), Health and Safety Code, to authorize TCEQ, after complying with Sections 5.552-5.555, Water Code, without providing an opportunity for a contested case hearing, to act on an application for a permit, permit amendment, or renewal of a permit, unless the application is for a new or a major expansion of an existing commercial industrial solid waste processing or disposal facility or a new or a major expansion of an existing municipal solid waste disposal facility. Requires TCEQ, by rule, to define "major expansion" for purposes of this section. Deletes existing text specifying various uses for the issued permits.

SECTION 8. Amends Section 382.056, Health and Safety Code, by amending Subsection (b), (g), (h), (i), (l), (m), and (n) and adding Subsections (t) and (u), as follows:

(b) Amends the information the notice of intent to obtain preconstruction permit is required to include.

(g) Requires an applicant, 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 notice of contest during the period provided by commission rule, rather than requests during said period that TCEQ hold a public hearing, and the notice of contest is not withdrawn before the date the preliminary decision is issued, 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). Deletes existing text relating to the request for public hearing. Prohibits TCEQ from seeking further public comment or holding a public hearing in response to a notice of contest on a permit, permit amendment, permit modification, or renewal of a permit, with certain exceptions. Deletes existing exception relating to an amendment, modification, or renewal that would not result in an increase in allowable emissions. Makes conforming changes.

(h) Requires TCEQ to consider any hearing request regarding a permit under Section 382.054 under the procedures provided by Section 382.0561 and not under the procedures provided by Subsections (i)-(n). Deletes existing text relating to a request for a public hearing.

(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. Makes a conforming change.

(l) Requires the executive director to file with the chief clerk of TCEQ a specific response to each relevant and material public comment on the preliminary decision file in writing during the public comment period.

(m) Makes a conforming change.

(n) Makes a conforming change.

(t) Requires any public hearing requested in response to a later public notice required solely by federal program requirements, if a notice of contest is not filed or is withdrawn under Subsection (g), to be conducted in accordance with Section 382.0561 and not under Chapter 2001, Government Code.

(u) 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 a notice of contest or request for reconsideration may be filed.

SECTION 9. Amends Section 2003.047, Government Code, by adding Subsections (p) and (q), to authorize the administrative law judge, in designating parties to a hearing on a permit application, to name as parties only certain persons and to grant a motion for a summary disposition on any or all of the issues referred for hearing and issue a proposal for decision that resolves the contested case without an evidentiary hearing or with a limited evidentiary hearing as provided by commission rules.

SECTION 10. Repealer: Sections 5.228(c), (d), (e), and (f) (Appearances at Hearings) and Section 26.028(e) (Action on Application), Water Code.

SECTION 11. Makes application of this Act prospective.

SECTION 12. Effective date: September 1, 2005.