

BILL ANALYSIS

Senate Research Center
79R12627 QS-D

C.S.S.B. 344
By: Duncan
Natural Resources
5/3/2005
Committee Report (Substituted)

AUTHOR'S/SPONSOR'S STATEMENT OF INTENT

Chapter 36, Water Code, authorizes a groundwater conservation district to adopt rules and issue permits related to the regulation and management of groundwater resources located within its boundaries. Although Chapter 36 sets forth a requirement that rules be adopted only after notice and hearing, as well as makes reference to a hearings process for permit applications, the statute is silent on most aspects of the exact nature of the notice and hearings process that districts should utilize in rulemaking and permit considerations.

Since groundwater conservation districts are not subject to the Administrative Procedures Act, it is necessary to clarify and prescribe the notice and hearing process to be utilized by the districts. It is also necessary to clarify that, where appropriate, groundwater conservation districts may utilize alternative dispute resolution (ADR) procedures in the permitting process in order to facilitate resolution of conflicts and minimize costs for both the district and parties to a permit hearing.

C.S.S.B. 344 sets forth uniform procedures to be utilized by groundwater conservation districts regarding the notice and hearings process for both rulemaking hearings and permit application hearings, and clarifies that districts may use ADR procedures.

RULEMAKING AUTHORITY

Rulemaking authority previously granted to the board of directors of a groundwater conservation district is modified by SECTION 1 (Section 36.101, Water Code) of this bill.

Rulemaking authority is expressly granted to the board of directors of a groundwater conservation district in SECTION 2 (Section 36.1011, Water Code).

Rulemaking authority is expressly granted to a groundwater conservation district in SECTION 3 (Section 36.114, Water Code) and SECTION 5 (Sections 36.406, 36.415, 36.417, and 36.418, Water Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 36.101, Water Code, by amending Subsection (b) and adding Subsections (d)-(l), as follows:

(b) Creates an exception, as provided by Section 36.1011, to the requirement that the board of directors (board) of a groundwater conservation district (district) adopt and enforce rules to implement this chapter. Deletes the requirement that notice of the rulemaking hearing of the board include publication of the agenda of the hearing in one or more newspapers of general circulation in the county or counties in which the district is located.

(d) Requires the general manager for the district or board, not later than the 20th day before the date of a rulemaking hearing, to provide notice by certain specified methods.

(e) Requires the notice provided under Subsection (d) to include certain information.

(f) Requires the presiding officer of the board to conduct a rulemaking hearing in the manner the presiding officer determines to be most appropriate to obtain information and

comments relating to the proposed rule as conveniently and expeditiously as possible. Authorizes comments to be submitted orally at the hearing or in writing. Authorizes the presiding officer to hold the record open for a specified period after the conclusion of the hearing to receive additional written comments.

(g) Authorizes a district to require each person who participates in a rulemaking hearing to submit a hearing registration form containing certain information.

(h) Requires the presiding officer to prepare and keep a record of each rulemaking hearing in one of certain formats.

(i) Authorizes a person to submit to the district a written request for notice of a rulemaking hearing. Provides that a request is effective for the remainder of the calendar year in which the request is received by the district. Requires a person, to receive notice of a rulemaking hearing in a later year, to submit a new request. Provides that an affidavit of an officer or employee of the district establishing attempted service by various specified methods is proof that notice was provided by the district.

(j) Authorizes a district to use an informal conference or consultation to obtain the opinions and advice of interested persons about contemplated rules. Authorizes a district to appoint advisory committees of experts, interested persons, or public representatives to advise the district about contemplated rules.

(k) Provides that failure to provide notice to persons requesting notice under Subsection (i) does not invalidate an action taken by the district at a rulemaking hearing.

(l) Provides that Subsections (b)-(k) do not apply to the Edwards Aquifer Authority.

SECTION 2. Amends Subchapter D, Chapter 36, Water Code, by adding Section 36.1011, as follows:

Sec. 36.1011. EMERGENCY RULES. (a) Authorizes a board to adopt an emergency rule without prior notice or hearing, or with an abbreviated notice and hearing, if certain conditions apply.

(b) Prohibits a rule adopted under this section from being effective for longer than 90 days, except as provided by Subsection (c).

(c) Provides that if notice of a hearing on the final rule is given not later than the 90th day after the date the rule is adopted, the rule is effective for an additional 90 days.

(d) Requires a rule adopted under this section to be adopted at a meeting held as provided by Chapter 551 (Open Meetings), Government Code.

(e) Provides that this section does not apply to the Edwards Aquifer Authority.

SECTION 3. Amends Sections 36.113 and 36.114, Water Code, as follows:

Sec. 36.113. New title: PERMITS FOR WELLS; PERMIT AMENDMENTS. (a) Requires a district, except as provided by Section 36.117 (Exemptions; Exception; Limitations), to require a permit for certain actions related to wells. Includes operating a well as an activity for which a permit is required. Authorizes a district to require that a change in the withdrawal or use of groundwater during the term of a permit issued by the district not be made unless the district has first approved a permit amendment authorizing the change. Makes a nonsubstantive change.

(a-1) Prohibits a district from requiring a permit or a permit amendment for maintenance or repair of a well if the maintenance or repair does not increase the production capabilities of the well to more than its authorized or permitted production rate.

(b) Requires a district to require that an application for a permit or permit amendment, rather than for a permit, be in writing and sworn to.

(c) Makes a conforming change.

(d) Makes a conforming change.

(e) Makes conforming and nonsubstantive changes.

(f) Authorizes permits and permit amendments to be issued subject to the rules promulgated by the district and subject to terms and provisions with reference to the operation of or production of groundwater from certain wells or pumps. Makes conforming and nonsubstantive changes.

(g) Deletes this subsection authorizing a district to require that changes in the withdrawal and use of groundwater under a permit not be made without the prior approval of a permit amendment issued by the district.

Sec. 36.114. New title: PERMIT; PERMIT AMENDMENT; APPLICATION AND HEARING. (a) Requires the district by rule to determine each activity regulated by the district for which a permit or permit amendment is required.

(b) Requires the district, by rule, for each activity for which the district determines a permit or permit amendment is required, to determine whether a hearing on the permit or permit amendment application is required.

(c) Requires the board, for all applications for which a hearing is not required, to act on the application at a meeting unless the board, by rule, has delegated to the general manager the authority to act on the application.

(d) Requires the district to promptly consider and act on each administratively complete application for a permit amendment as provided by Subsection (c) or Subchapter M. Creates this subsection from existing text.

(e) Provides that if, within 60, rather than 30, days after an administratively complete application is submitted, the application has not been acted on or set for a hearing, the applicant may petition the district court for certain remedies. Creates this subsection from existing text. Makes nonsubstantive changes.

(f) Requires an initial hearing under this subsection to be held for applications requiring a hearing within 35 days after the setting of the date. Requires the district to act on the application within 60, rather than 35, days after the date the final hearing on the application is concluded. Creates this subsection from existing text. Makes nonsubstantive changes.

(g) Creates this subsection from existing text.

(h) Creates this subsection from existing text.

SECTION 4. Amends Subchapter L, Chapter 36, Water Code, by adding Section 36.3705, as follows:

Sec. 36.3705. DEFINITION. Defines "applicant."

SECTION 5. Amends Chapter 36, Water Code, by adding Subchapter M, as follows:

SUBCHAPTER M. PERMIT AND PERMIT AMENDMENT APPLICATIONS;
NOTICE AND HEARING PROCESS

Sec. 36.401. DEFINITION. Defines "applicant."

Sec. 36.402. APPLICABILITY. Provides that, except as provided by Section 36.416, this subchapter applies to the notice and hearing process used by a district for permit and permit amendment applications.

Sec. 36.403. SCHEDULING OF HEARING. (a) Authorizes the general manager or board to schedule a hearing on permit or permit amendment applications received by the district as necessary, as provided by Section 36.114.

(b) Authorizes the general manager or board to schedule more than one application for consideration at a hearing.

(c) Requires a hearing to be held at the district office or regular meeting location of the board unless the board provides for hearings to be held at a different location.

(d) Authorizes a hearing to be held in conjunction with a regularly scheduled board meeting.

Sec. 36.404. NOTICE. (a) Requires the general manager or board, if either schedules a hearing on an application for a permit or permit amendment, to give notice of the hearing as provided by this section.

(b) Sets forth the information the notice must include.

(c) Requires the general manager or board, not later than 10 days before the date of the hearing, to provide notice in certain specified ways.

(d) Authorizes a person to request notice from the district of a hearing on a permit or a permit amendment application. Requires the request to be in writing and provides that the request is effective for the remainder of the calendar year in which the request is received by the district. Requires a person to submit a new request to receive notice of a hearing in a later year. Provides that an affidavit of an officer or employee of the district establishing attempted service by certain specified methods is proof that notice was provided by the district.

(e) Provides that failure to provide notice by certain specified methods to any person who has requested notice under Subsection (d) does not invalidate an action taken by the district at the hearing.

Sec. 36.405. HEARING REGISTRATION. Authorizes the district to require each person who participates in a hearing to submit a hearing registration form stating certain information.

Sec. 36.406. HEARING PROCEDURES. (a) Requires a hearing to be conducted by a quorum of the board or by an individual to whom the board has delegated in writing the responsibility to preside as hearings examiner over the hearing or matters related to the hearing.

(b) Requires the board president or the hearings examiner to serve as the presiding officer at the hearing, except as provided by Subsection (c).

(c) Authorizes the directors conducting the hearing, if the hearing is conducted by a quorum of the board and the board president is not present, to select a director to serve as presiding officer.

(d) Sets forth the functions related to the hearing that the presiding officer is authorized to perform.

(e) Authorizes a district, except as provided by a rule adopted under Section 35.415, to allow any person, including the general manager or a district employee, to provide comments at a hearing on an uncontested application.

(f) Authorizes the presiding officer to allow testimony to be submitted in writing and to require that written testimony be sworn to. Authorizes the presiding officer, on motion of a party to the hearing, to exclude written testimony if the person who submits the testimony is not available for cross-examination by phone, a deposition before the hearing, or other reasonable means.

(g) Authorizes the presiding officer, if the board has not acted on the application, to allow a person who testifies at the hearing to supplement the testimony by filing additional written materials with the presiding officer not later than the 10th day after the date of the hearing. Requires a person who files additional written material with the presiding officer under this subsection to also provide the material, not later than the 10th day after the date of the hearing, to any person who provided comments on an uncontested application or any party to a contested hearing. Authorizes a person who receives additional written material under this subsection to file a response to the material with the presiding officer not later than the 10th day after the date the material was received.

(h) Permits the district, by rule adopted under Section 36.417, to authorize the presiding officer, at the presiding officer's discretion, to issue an order at any time before board action under Section 36.411 that refers parties to an alternative dispute resolution procedure, apportions costs among the parties, and appoints an impartial third party to facilitate the alternative dispute resolution.

Sec. 36.407. EVIDENCE. Requires the presiding officer to admit evidence that is relevant to an issue at the hearing. Authorizes the presiding officer to exclude evidence that is irrelevant, immaterial, or unduly repetitious.

Sec. 36.408. RECORDING. (a) Requires the presiding officer, except as provided by Subsection (b), to prepare and keep a record of each hearing in certain formats. Requires the presiding officer, on the request of a party to a contested hearing, to have the hearing transcribed by the court reporter. Authorizes the presiding officer to assess any court reporter transcription costs against the party that requested the transcription or among the parties to the hearing. Authorizes the presiding officer, except as provided by this subsection, to exclude a party from further participation in a hearing for failure to pay costs assessed under this subsection in a timely manner. Prohibits the presiding officer from excluding a party from further participation in a hearing as provided by this subsection if the parties have agreed that the costs assessed against that party will be paid by another party.

(b) Authorizes the presiding officer, if the hearing is uncontested, to substitute minutes or the report required under Section 36.410 for the record of the hearing provided by Subsection (a).

Sec. 36.409. CONTINUANCE. Authorizes the presiding officer to continue a hearing from time to time and from place to place without providing notice under Section 36.404. Requires the presiding officer, if the presiding officer continues a hearing without announcing at the hearing certain information regarding the continued hearing, to provide notice of the continued hearing by regular mail to the parties.

Sec. 36.410. REPORT. (a) Requires the presiding officer, except as provided by Subsection (f), to submit a report to the board not later than the 30th day after a hearing is concluded.

(b) Sets forth the information the report is required to include.

(c) Requires the presiding officer or general manager to provide a copy of the report to certain persons.

(d) Authorizes a person who receives a copy of the report under Subsection (c) to submit to the board written exceptions to the report.

(e) Requires the presiding officer, if the hearing was conducted by a quorum of the board and if the presiding officer prepared a record of the hearing as provided by Section 36.408(a), to determine whether to prepare and submit a report under this section.

Sec. 36.411. BOARD ACTION. Requires the board to act on a permit or permit amendment application not later than the 60th day after the date the final hearing on the application is concluded.

Sec. 36.412. REQUEST FOR REHEARING OR FINDINGS AND CONCLUSIONS.

(a) Authorizes an applicant in a contested or uncontested hearing on an application or a party to a contested hearing to administratively appeal a decision of the board on a permit or permit amendment application by requesting written findings and conclusions or a rehearing before the board not later than the 20th day after the date of the board's decision.

(b) Requires the board, on receipt of a timely written request, to make written findings and conclusions regarding a decision of the board on a permit or permit amendment application. Requires the board to provide certified copies of the findings and conclusions to the person who requested them, and to each person who provided comments or each designated party, not later than the 35th day after the date the board receives the request. Authorizes a person who receives a certified copy of the findings and conclusions from the board to request a rehearing before the board not later than the 20th day after the date the board issues the findings and conclusions.

(c) Requires a request for rehearing to be filed in the district office and to state the grounds for the request. Requires the person requesting the rehearing, if the original hearing was a contested hearing, to provide copies of the request to all parties to the hearing.

(d) Requires the board, if the board grants the request for rehearing, to schedule the rehearing not later than the 45th day after granting the request.

(e) Provides that the failure of the board to grant or deny a request for rehearing before the 91st day after the request is submitted is a denial of the request.

Sec. 36.413. DECISION; WHEN FINAL. (a) Provides that a decision by the board on a permit or permit amendment is final if certain conditions apply.

(b) Authorizes an applicant or a party to a contested hearing, except as provided by Subsection (c), to file a suit against the district under Section 36.251 (authorizing suits by any person or entity affected by any rule or order challenging the validity of the rule or order) to appeal a decision on a permit or permit amendment application not later than the 60th day after the date on which the decision becomes final.

(c) Prohibits an applicant or a party to a contested hearing from filing suit against the district under Section 36.251 if a request for a rehearing was not filed on time.

Sec. 36.414. CONSOLIDATED HEARING ON APPLICATIONS. (a) Requires the district, except as provided by Subsection (b), to process applications from a single applicant under consolidated notice and hearing procedures on written request by the applicant if the district requires a separate permit or permit amendment application for certain activities relating to wells, well pumps, and groundwater.

(b) Provides that a district is not required to use consolidated notice and hearing procedures to process separate permit or permit amendment applications from a single applicant if the board cannot adequately evaluate one application until it has acted on another application.

Sec. 36.415. RULES; ADDITIONAL PROCEDURES. (a) Requires a district by rule to adopt procedural rules to implement this subchapter. Authorizes a district to adopt notice and hearing procedures in addition to those provided by this subchapter.

(b) Requires the district, in adopting the rules, to define under what circumstances an application is considered contested, and limit participation in a hearing on a contested application to persons with a personal justiciable interest.

Sec. 36.416. HEARINGS CONDUCTED BY STATE OFFICE OF ADMINISTRATIVE HEARINGS. Requires the hearing, if a district contracts with the State Office of Administrative Hearings to conduct a hearing, to be conducted as provided by Subchapters C, D, and F, Chapter 2001 (Administrative Procedure), Government Code.

Sec. 36.417. RULES; ALTERNATIVE DISPUTE RESOLUTION. Authorizes a district, by rule, to develop and use alternative dispute resolution procedures in the manner provided for governmental bodies under Chapter 2009 (Alternative Dispute Resolution for use by Governmental Bodies), Government Code.

Sec. 36.418. APPLICABILITY OF ADMINISTRATIVE PROCEDURE. (a) Authorizes a district to adopt rules establishing procedures for contested hearings consistent with Subchapters C, D, and F, Chapter 2001, Government Code, including the authority to issue a subpoena, require a deposition, or order other discovery.

(b) Provides that, except as provided by Section 36.416, Chapter 2001, Government Code, does not apply to a hearing under this subchapter.

Sec. 36.419. EDWARDS AQUIFER AUTHORITY. (a) Provides that this subchapter does not apply to the Edwards Aquifer Authority, except as provided by Subchapter (b).

(b) Provides that Sections 36.412 and 36.413 apply to the Edwards Aquifer Authority.

SECTION 6. Repealer: Section 36.001(17) (defining "applicant"), Water Code.

SECTION 7. Makes application of this Act prospective.

SECTION 8. Effective date: September 1, 2005.