

BILL ANALYSIS

Senate Research Center

S.B. 709
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Natural Resources & Economic Development
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Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Under the current environmental permitting process at the Texas Commission on Environmental Quality (TCEQ), permit applicants are subject to an aspect of the process known as a “contested case hearing” in order to obtain a final permit from TCEQ. A contested case hearing is conducted by an administrative law judge at the State Office of Administrative Hearings (SOAH). One significant issue with the current process is that SOAH is under no timeline to complete a contested case hearing, and the process can significantly delay the issuance of a permit. This process has become detrimental to the state’s ability to competitively attract business due to the uncertainty and expense created by the threat of a lengthy contested case hearing.

S.B. 709 preserves the current public participation opportunities available in the environmental permitting process.

S.B. 709 establishes that the starting place for a contested case hearing is a presumption that a draft permit issued by TCEQ meets all legal and technical requirements and is protective of public health and the environment. TCEQ is legally obligated to thoroughly review permit applications and only issue a draft permit that meets this standard.

S.B. 709 amends current law relating to procedures for certain environmental permit applications.

[**Note:** Although the statutory reference in SECTION 1 of this bill is to the Texas Natural Resource Conservation Commission (TNRCC), the following amendments affect the Texas Commission on Environmental Quality, as the successor agency to TNRCC.]

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Texas Commission on Environmental Quality in SECTION 2 (Section 5.115, Water Code) of this bill.

Rulemaking authority previously granted to the Texas Commission on Environmental Quality is modified in SECTION 2 (Section 5.115, Water Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 2003.047, Government Code, by adding Subsections (e-1), (e-2), (e-3), (e-4), (e-5), (i-1), (i-2), and (i-3), as follows:

(e-1) Provides that this subsection applies only to a matter referred under Section 5.556 (Request for Reconsideration or Contested Case Hearing), Water Code. Requires that each issue referred by TNRCC have been raised by an affected person in a comment submitted by that affected person in response to a permit application in a timely manner. Requires that the list of issues submitted under Subsection (e) (relating to TNRCC providing a list of disputed issues to the law judge) be detailed and complete, and contain either only factual questions or mixed questions of fact and law.

(e-2) Provides that, for a matter referred under Section 5.556 or 5.557 (Direct Referral to Contested Case Hearing), Water Code, the administrative law judge is required to complete the proceeding and provide a proposal for decision to TNRCC not later than the earlier of:

- (1) the 180th day after the date of the preliminary hearing; or
- (2) the date specified by TNRCC.

(e-3) Authorizes the deadline specified by Subsection (e-2) to be extended:

- (1) by agreement of the parties with the approval of the administrative law judge; or
- (2) by the administrative law judge if the judge determines that failure to extend the deadline would unduly deprive a party of due process or another constitutional right.

(e-4) Provides that, for the purposes of Subsection (e-3)(2), a political subdivision has the same constitutional rights as an individual.

(e-5) Provides that this subsection applies only to a matter referred under Section 5.557, Water Code. Prohibits the administrative law judge from holding a preliminary hearing until after the executive director of TNRCC has issued a response to public comments under Section 5.555 (Response to Public Comments), Water Code.

(i-1) Provides that, in a contested case regarding a permit application referred under Section 5.556 or 5.557, Water Code, the filing with the Office of Administrative Hearings (SOAH) of the application, the draft permit prepared by the executive director of TNRCC, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that:

- (1) the draft permit meets all state and federal legal and technical requirements; and
- (2) a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.

(i-2) Authorizes a party to rebut a demonstration under Subsection (i-1) by presenting evidence that:

- (1) relates to a matter referred under Section 5.557, Water Code, or an issue included in a list submitted under Subsection (e) in connection with a matter referred under Section 5.556, Water Code; and
- (2) demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.

(i-3) Provides that, if in accordance with Subsection (i-2) a party rebuts a presumption established under Subsection (i-1), the applicant and the executive director may present additional evidence to support the draft permit.

SECTION 2. Amends Section 5.115, Water Code, by amending Subsections (a) and (d) and adding Subsection (a-1), as follows:

(a) Makes no change to this subsection;

(a-1) Creates this subdivision from existing text. Provides that, for a matter referred under Section 5.556, the Texas Commission on Environmental Quality (TCEQ):

(1) is authorized to consider:

(A) the merits of the underlying application, including whether the application meets the requirements for permit issuance;

(B) the likely impact of regulated activity on the health, safety, and use of the property of the hearing requestor;

(C) the administrative record, including the permit application and any supporting documentation;

(D) the analysis and opinions of the executive director of TCEQ; and

(E) any other expert reports, affidavits, opinions, or data submitted on or before any applicable deadline to TCEQ by the executive director, the applicant, or a hearing requestor; and

(2) is prohibited from finding that:

(A) a group or association is an affected person unless the group or association identifies, by name and physical address in a timely request for a contested case hearing, a member of the group or association who would be an affected person in the person's own right; or

(B) a hearing requestor is an affected person unless the hearing requestor timely submitted comments on the permit application.

(d) Requires TCEQ to adopt rules for the notice required by this section. Requires that the rules provide for the notice required by this section to be posted on the Internet by TCEQ.

SECTION 3. Amends Section 5.228(c), Water Code, as follows:

(c) Requires the executive director to participate as a party in contested case permit hearings before TCEQ or SOAH to support the executive director's position developed in the underlying proceeding, unless the executive director has revised or reversed that position.

SECTION 4. Amends Subchapter M, Chapter 5, Water Code, by adding Section 5.5553, as follows:

Sec. 5.5553. NOTICE OF DRAFT PERMIT. (a) Provides that this section applies only to a permit application that is eligible to be referred for a contested case hearing under Section 5.556 or 5.557.

(b) Requires the executive director of TCEQ, notwithstanding any other law, not later than the 30th day before the date TCEQ issues a draft permit in connection with a permit application, to provide written notice to the state senator and state representative of the area in which the facility that is the subject of the permit is located.

SECTION 5. (a) Provides that the changes in law made by this Act apply only to:

(1) a permit application that is filed with TCEQ on or after the effective date of this Act; or

(2) a judicial proceeding initiated on or after the effective date of this Act that challenges an act or decision of TCEQ made during a permit proceeding.

(b) Provides that a permit application filed or a judicial proceeding initiated before the effective date of this Act is governed by the law in effect when the permit application was filed or the judicial proceeding was initiated, and the former law is continued in effect for that purpose.

(c) Provides that, notwithstanding Subsection (a), the changes in law made by this Act do not apply to:

(1) a permit application:

(A) filed after the effective date of this Act; and

(B) that is substantially similar to a permit application for which a draft permit has been issued and that was:

(i) filed before the effective date of this Act; and

(ii) withdrawn at the request of the permit applicant; or

(2) a judicial proceeding:

(A) initiated after the effective date of this Act; and

(B) that is substantially similar to a judicial proceeding initiated before the effective date of this Act that has been dismissed at the request of the permit applicant.

(d) Requires TCEQ to, not later than January 1, 2016, to adopt rules to implement the changes in law made by this Act. Requires TCEQ, for an application filed after the effective date of this Act but before the adoption of rules to implement the changes in law made by this Act, to provide sufficient notice to the applicant and other participants in the permit proceeding that the changes in law made by this Act apply to the proceeding.

SECTION 6. Effective date: September 1, 2015.