

BILL ANALYSIS

C.S.H.B. 2877

By: Bonnen

Environmental Regulation

Committee Report (Substituted)

BACKGROUND AND PURPOSE

In 1999, the Texas Legislature passed HB 801 after weeks of negotiations by representatives of groups supporting and opposed to the legislation. The version that was passed represented a compromise by very diverse interests.

The purpose of HB 801 was to improve public notice, clarify the role of notice and comment in state process, and restrict contested cases to issues involving permits instead of the whole permit. The process also envisioned that issues would be narrowed or eliminated as a permit in controversy went through the process outlined in HB 801.

As in any hurriedly-crafted compromise, following passage a number of problems were uncovered. Some of the issues were discussed extensively by the negotiating parties, and the agreed language has proved inadequate to accomplish the original goals. Some of the issues were understood by the parties agreeing, but written in a way that the agency interpreted them otherwise. At least one issue was simply not foreseen by the participants.

The purpose of CSHB 2877 is to provide that the TCEQ only has to respond to written comments during the notice and comment process; clarify the times that a request for reconsideration of the executive director's decision and a request for a contested case hearing are made; clarify 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; tighten 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; clarify 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 limit who can be named parties to a hearing at the State Office of Hearing Examiners.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill modifies rulemaking authority to the Texas Commission on Environmental Quality in SECTION 4 (Section 382.056, Health and Safety Code) of this bill.

ANALYSIS

SECTION 1. Amends Sec. 5.554, Water Code, by adding a Subsection (b) providing that the public comment period will be automatically extended to the close of any public meeting held in accordance with Subsection (a). The deadline for filing requests for initiation of the public participation process or requests for reconsideration will not be extended due to a public meeting.

SECTION 2. Amends Sec. 5.555(a), Water Code, to specify that the executive director must respond only to comments filed in writing.

SECTION 3. Amends Sec. 5.556(a), Water Code, to clarify that a request for reconsideration of the executive's director's decision must be filed after publication of the preliminary decision and that a request for a contested case hearing must be filed after the executive director's response to public

comments is transmitted as provided by commission rule.

Amends Sec. 5.556(c), Water Code, by restricting the granting of contested case hearings to affected persons who submitted written comments during the public comment period.

Amends Sec. 5.556(d), Water Code, by adding requirements when the commission is referring issues to the State Office of Administrative Hearings that the hearing request must provide substantial information establishing a reasonable basis for the factual dispute and describe how the executive director's response to comments failed to resolve the dispute. The new language also provides that the issue is discrete and not a broad or generalized objection and that the issue was raised during the public comment period by the person requesting the hearing.

Amends Sec. 5.556, Water Code by adding a new Subsection (g) that provides that public notice is not required for a contested case hearing the commissione grants under this section.

SECTION 4. Amends Sec. 382.056(b), Health and Safety Code, by adding the word "applicable" to modify "procedural rights" in the notice requirement, deleting a statement that an affected person can request a hearing and adding in its place a statement that an affected person can request initiation of the public participation process.

Amends Sec. 382.056(g), Health and Safety Code, by clarifying that a request this point in the process is for initiation of the public participation process and not a contested case hearing.

Amends Sec. 382.056(h), Health and Safety Code, by clarifying that the commission initiates the public participation process and not a contested case hearing at this point in the process.

Amends Sec. 382.056(i), Health and Safety Code, by clarifying that this second notice is of the preliminary decision and changes the notice to an affected person to reference the right to request a hearing.

Amends Sec. 382.056(l), Health and Safety Code, to specify that the executive director must respond only to comments filed in writing

Amends Sec. 382.056(m), Health and Safety Code, to clarify that the person who receives the notice at this point includes those who filed a request to initiate the public participation process instead of a public hearing.

Amends Sec. 382.056 (n), Health and Safety Code, by changing the word "public" to "contested case".

Amends Sec. 382.056, Health and Safety Code, by adding a new Subsection (s) that provides that when no timely request to initiate the public participation process is filed for a preconstruction permit or permit amendment under Section 382.0516 or a permit renewal under Section 382.055, a public hearing held in response to a subsequent public notice required solely by federal program requirements is conducted in accordance with Section 382.0561 and not under Chapter 2001, Government Code.

Amends Sec. 382.056, Health and Safety Code, by adding a new Subsection (t) that provides that the public comment period will automatically be extended to the close of any public meeting. The deadline for filing requests for initiation of the public participation process or requests for reconsideration will not be extended due to a public meeting.

SECTION 5. Amends Sec. 2003.047, Government Code, by adding a new Subsection (p) limiting the State Office of Administrative Hearings to only allowing the executive director, the office of public interest counsel, the permit applicant, and other persons whose hearing requests have been granted by the commission and whose issues have been referred by the commission for a contested case hearing to be named as parties for a hearing on a permit application. The section also limits the executive director's participation to that described in Sec. 5.228, Water Code.

Amends Sec. 2003.047, Government Code, by adding a new Subsection (q) clarifying that an administrative law judge may dispose of the issues referred by the TCEQ by summary disposition, as applicable under TCEQ rules.

SECTION 6. Provides an effective date of September 1, 2003, and limits the application of these changes in law to applications for a permit, permit, amendment, or permit renewal filed with the Texas Commission on Environmental Quality on or after September 1, 2003. This SECTION further provides that a permit, permit amendment, or permit renewal filed before that date is governed by the

law in effect on the date it was filed and continues the law in effect for that purpose.

EFFECTIVE DATE

September 1, 2003

COMPARISON OF ORIGINAL TO SUBSTITUTE

SECTION 1 revisions amend Section 5.554 of the Water Code to add a Subsection (b) that provides that the public comment period will be automatically extended to the close of any public meeting held in accordance with Subsection (a). But the deadline for filing requests for initiation of the public participation process or requests for reconsideration will not be extended due to a public meeting.

SECTION 2 is SECTION 1 renumbered.

SECTION 3 revisions amend Section 5.556 of the Water Code to revise Paragraph (d)(2) to prohibit the TCEQ from referring an issue to SOAH for a hearing unless the hearing request 1) provides substantial information establishing a reasonable basis for the requisite factual dispute and 2) describes how the executive director's response to comments failed to resolve the dispute.

SECTION 3 revisions add a new Subsection (g) to Section 5.556 of the Water Code that provides that if the TCEQ grants a request for contested case hearing, public notice of the contested case hearing shall not be required.

SECTION 4 revisions amend Section 5.556 of the Water Code to add a new Subsection (s) to provide that when no timely request to initiate the public participation process is filed for a preconstruction permit or permit amendment under Section 382.0516 or a permit renewal under Section 382.055, a public hearing held in response to a subsequent public notice required solely by federal program requirements is conducted in accordance with Section 382.0561 and not under Chapter 2001, Government Code.

SECTION 4 revisions amend Section 5.556 of the Water Code to add a new Subsection (t) to provide that the public comment period will automatically be extended to the close of any public meeting. But the deadline for filing requests for initiation of the public participation process or requests for reconsideration will not be extended due to a public meeting. This language parallels the change made by Section 1 above.

SECTION 5 revisions amend Section 2003.047 of the Government Code by adding Subsection (q), which clarifies that an administrative law judge may dispose of the issues referred by the TCEQ by summary disposition, as applicable under TCEQ rules.

SECTION 6 is SECTION 5 renumbered.