

BILL ANALYSIS

S.B. 738
By: Duncan
Natural Resources
Committee Report (Amended)

BACKGROUND AND PURPOSE

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 a 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 consideration. Because groundwater conservation districts are not subject to the Administrative Procedures Act, it is necessary to clarify and prescribe the notice and hearings 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. This bill 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 utilize ADR procedures.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

SECTION 1. Amends Section 36.101, Water Code, by amending Subsection (b) and adding Subsections (d), (e), (f), (g), (h), and (i), as follows:

- (b) Deletes text requiring notice in this section to include publication of the water conservation district board's agenda in one or more newspapers.
- (d) Requires the district's general manager or the board of directors of a district (board), not later than 10th day before a rulemaking hearing, to take certain actions, regarding notice.
- (e) Requires the notice to provided by Subsection (d) to include the time, date, and location of the hearing, a brief explanation of the subject of the hearing and a location at which a copy of the proposed rules may be reviewed or copied.
- (f) Requires the presiding officer to conduct a rulemaking hearing in the fashion the presiding officer deems to be appropriate to obtain information and testimony regarding the proposed rules as conveniently and expeditiously as possible without prejudicing the rights of any person at the hearing.
- (g) Sets forth requirements related to the recordation of a rulemaking hearing, authorizes the assessment of costs for a court reporter transcription.
- (h) Authorizes a person to submit a request for notice of a rulemaking hearing; limits the effectiveness of the request to a period of one year; provides that a person must submit a new request after a request expires.
- (i) Provides that failure to provide certain notice does not invalidate any action taken by a district at a hearing.

SECTION 2. Amends Section 36.113, Water Code, as follows: Sec. 36.113. New heading: PERMITS FOR WELLS; PERMIT AMENDMENTS.

- (a) Adds well operation to the list of activities for which a district shall require a permit. Authorizes the district to require that a change in the withdrawal or use of groundwater under a permit issued by the district may not be made unless the district has first approved a permit amendment authorizing the change. Prohibits a district from requiring a permit or permit amendment for well maintenance or repair in certain instances.
- (b) Requires a district to require that an application for a permit or permit amendment be in writing and sworn to.
- (c) Makes a conforming change.
- (d) Makes a conforming change.
- (e) Authorizes the district to impose more restrictive permits conditions on new permit applications and permit amendment applications to increase use by historic users if the limitations meet certain standards. Makes conforming and nonsubstantive changes.
- (f) Authorizes the permits and permit amendments to be issued subject to the rules promulgated by the district and subject to terms and provisions with reference to drilling, equipping, completion, alternation, or operation of, or production of groundwater from, wells or pumps that may be necessary to prevent waste and achieve water conservation, minimize as far as practicable the drawdown of the water table or the reduction of artesian pressure, lessen interference between wells, or control and prevent subsidence.
- (g) Authorizes a district to require certain proof of groundwater usage by an existing or historic user if the district implements Section 36.113(e) or 36.116(b), Water Code.
- (h) Authorizes a district in implementing Subsection (g),(1) to issue a permit for existing or historic use based on an extrapolation of use for certain users; (2) to issue a permit for use based on agricultural irrigation based on either the maximum annual use or the acreage irrigated during the period established under Subsection (g).
- (i) Provides that an annual report of groundwater use previously submitted to a state agency is admissible as evidence of existing or historic use under Subsection (g) or (h).
- (j) Provides that a district may not discriminate against land or wells enrolled or participating in the federal conservation reserve program. Sets forth certain rules a district could adopt that shall not be considered discriminatory for purposes of Chapter 36, Water Code. Deletes existing Section 36.113(g), Water Code, which has been moved to Section 36.113(a).

SECTION 3. Amends Subchapter D, Chapter 36, Water Code, by adding Section 36.1132 as follows:

Sec. 36.1132 DEFINED HISTORIC USE PERIODS FOR CERTAIN DISTRICTS.

- (a) Provides that this section only applies to certain groundwater conservation districts that fall with certain specified criteria.
- (b) Provides that a district, in implementing Sections 36.113(e) or 36.116(b), Water Code, may require an existing or historic user to prove the maximum annual amount of groundwater applied to a beneficial use during the period from: (1) June 1, 1972, to December 31,1991; or (2) January 1, 1992, to January 7, 2003.
- (c) Requires a district to issue a permit under Subsection (b) to certain users based on an extrapolation of their use.
- (d) Provides that, if a district limits or permitted production in a certain manner, a district shall proportionately reduce such production equally among classes of users in the following order, with all reductions that can be made in one class being made in that class before proceeding with limitations or reductions in the next subsequent class: (1) new users, except as provided by Subdivision (2); (2) the class of users described by Subsections (b)(1) and (c) or any new user who was issued a permit by the district on or before May 1, 2003; and (3) the class of users described by Subsection (b) (2).

SECTION 4. Amends Section 36.114, Water Code, as follows:

Sec. 36.114. New heading: 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 to determine whether a hearing on the permit or permit amendment application is required, for each activity for which the district determines a permit or

permit amendment is required under Subsection (a).

(c) Requires the board, for all applications for which a hearing is not required under Subsection (b), to act on the application at a meeting as defined by Section 551.001(4) (defining meeting), Government Code, 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 or permit amendment as provided by Subsection (c) or Subchapter M.

(e) Authorizes the applicant, if, within 60 days, rather than 30 days, after the date an administratively complete application is submitted, the application fails to be acted on or set for hearing on specific date, to petition the district court of the county where the land is located for a writ of mandamus to compel the district to act on the application or set a date for a hearing on the application, as appropriate. Makes nonsubstantive changes.

(f) Requires the initial hearing, for applications requiring a hearing to be held within 35 days after the setting of the date and requires the district to act on the application within 60 days, rather than 35 days, after the date the final hearing on the application is concluded.

(g) Creates new subsection from existing text.

(h) Creates new subsection from existing text.

SECTION 5. Amends Subchapter L, Chapter 36, Water Code, by adding 36.3705, as follows:

Sec. 36.3705. DEFINITION. Defines "applicant."

SECTION 6. 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 this subchapter applies to the notice and hearing process used by a district for permit and permit amendment applications, except as provided by Section 36.415.

Sec. 36.403. SCHEDULING OF HEARING. (a) Requires the district's general manager or board to schedule a hearing on permit or permit 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 provides for hearings to be held at a different location in the district.

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

Sec. 36.404. NOTICE. (a) Requires the general manager or the board to give notice of each hearing on an application for a permit or permit amendment.

(b) Requires the notice to include certain information.

(c) Requires the general manager or the board, not later than the 10th day before the date of a hearing, to take certain actions.

(d) Clarifies that a person may submit to the district a written request for notice of a hearing on a permit or permit amendment application and that such a request is effective for one year from the date the request is received by the district.

(e) Provides that failure to provide notice does not invalidate any 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 in a certain manner.

(b) Requires the board president or the hearings examiner to serve as the presiding officer at the hearing.

(c) Requires the presiding officer to follow certain procedures.

(d) Authorizes any interested person, including the general manager or a district employee, to testify or present evidence at the hearing, unless the district or the presiding officer establishes certain restrictive measures.

(e) Authorizes the presiding officer to allow testimony to be submitted in writing and to require

that the written testimony be sworn to.

(f) Authorizes the presiding officer to allow a person who testifies at a hearing to supplement the testimony given at the hearing by filing additional written materials with the board or hearings examiner by the 10th day after the date of the hearing if no decision has been made by the board.

(g) Authorizes the presiding officer, at his or her discretion, to issue an order at any time before the board takes certain actions under Section 36.411, notwithstanding any other provision of this section, if authorized by rules of the district.

Sec. 36.407. EVIDENCE. (a) Requires the presiding officer to admit evidence if it is relevant to an issue at the hearing.

(b) Authorizes the presiding officer to exclude evidence that is irrelevant, immaterial, or unduly repetitious.

Sec. 36.408. RECORDING. (a) Requires the presiding officer to prepare and keep a record of each hearing in the form of minutes, audio or video recording, court reporter transcription. Provides that the hearing shall be transcribed by a court reporter based on the request of any party to the contested hearing. Authorizes the presiding officer, if a hearing is transcribed at the request of a party to the hearing, to assess the costs associated with producing the transcript to one or more parties. Provides that the presiding officer may exclude a party from further participation in a hearing for failure to pay in a timely manner any costs associated with a court reporter transcription which were assessed against that party.

(b) Provides that if a hearing is uncontested, the presiding officer may substitute the report required under Section 36.410 for a method of recording the described in 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 to provide notice of the continued hearing by regular mail to persons who submitted a hearing registration form under Section 36.405, if the presiding officer continues a hearing without announcing at the hearing the time, date, and location of the continued hearing.

Sec. 36.410. REPORT. (a) Requires the presiding officer to submit a report to the board by the 30th day after the date a hearing is concluded, unless the hearing was conducted by a quorum of the board. Requires the presiding officer, if the hearing was conducted by a quorum of the board, to determine at his or her discretion whether to prepare and submit a report under this section.

(b) Requires the report to include certain information.

(c) Authorizes a person who participated in the hearing to submit a written request to review a copy of the report and submit to the board written exceptions to the report.

(d) Requires the presiding officer or general manager to mail a copy of the report to each person who requests to review the report under Subsection (c).

Sec. 36.411. BOARD ACTION. Requires the board to act on a permit or permit amendment application by the 60th day after the date the hearing on the application is concluded.

Sec.36.412. REQUEST FOR REHEARING AND APPEAL. (a) Authorizes an applicant to appeal a decision of the board on a permit or permit amendment application by requesting a rehearing before the board by the 20th day after the date of the board's decision.

(b) Requires a request for hearing to be filed in the district office and to state the grounds for the request.

(c) Requires the board, if the board grants a request for rehearing, to schedule the rehearing by the 45th day after the day of the request is granted.

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

Sec. 36.413. DECISION; WHEN FINAL. (a) Provides that under certain circumstances, a decision of the board on a permit or permit amendment application hearing is final.

(b) Provides that a decision by the board on a permit or permit amendment application is appealable if the decision is final under Subsection (a)(2).

Sec. 36.414. ADDITIONAL PROCEDURES. Requires a district by rule to adopt procedural rules to implement this subchapter and authorizes it to adopt notice and hearing procedures in

addition to those provided by this subchapter.

Sec. 36.415. HEARINGS CONDUCTED BY STATE OFFICE OF ADMINISTRATIVE HEARINGS. Provides that this subchapter does not apply to a hearing conducted by the State Office of Administrative Hearings under Section 2003.021(b)(4) (Office), Government Code. Requires the hearing to be conducted as provided by Subchapters C, D, and F, Chapter 2001, Government Code, if a district contracts with the State Office of Administrative Hearings to conduct a hearing.

Sec. 36.416. 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. 36.417. NONAPPLICABILITY OF CHAPTER 2001, GOVERNMENT CODE. Provides that except as provided by Section 36.415, Chapter 2001, Government Code is not applicable to a hearing under this chapter.

SECTION 7. Repealer: Section 36.001(17), Water Code (defining applicant).

SECTION 8. (a) Sets forth legislative findings.

(b) Provides that changes made by this Act do not effect certain powers and actions.

(c) Clarifies that a district may require certain wells previously exempt from permitting by district rule but not under Chapter 36 to comply with the permitting procedures and rules of the district, as amended. Clarifies that this subsection applies to certain actions but not other certain actions.

(d) Provides that a district that issues permits under certain sections of Chapter 36 may issue permits to certain electric entities based on certain activities.

SECTION 9. Makes application of this Act prospective.

SECTION 10. Effective date: September 1, 2003.

EFFECTIVE DATE

September 1, 2003

EXPLANATION OF AMENDMENTS

Committee Amendment No.1. In Section 36.113, Water Code, strikes proposed Subchapter (j), dealing with historic use of land or wells on land enrolled in the federal conservation reserve program.

Committee Amendment No.2. In proposed Subsection (d) of proposed Section 36.406, Water Code, between “Any” and “person” strikes “interested”. In proposed Subsection (d) of proposed Section 36.406, Water Code, between “employee,” and “may” inserts “who is determined by the presiding officer to be an affected party,”. In proposed Subsection (d) of proposed Section 36.406, Water Code, strikes “unless:” and substitutes “along with their witnesses and experts.” In proposed Subsection (d) of proposed Section 36.406, Water Code, strikes “(1) the district by rule limits testimony or the presentation of evidence to persons that the district determines to be affected by the subject matter of the hearing; or (2) the presiding officer, under authority granted to the presiding officer by district rule, limits testimony or the presentation of evidence to persons who, in the presiding officer’s determination, are affected by the subject matter of the hearing.”

Committee Amendment No.3. In proposed Section 36.410, Water Code, after “section.” inserts “If the application is contested, the presiding officer shall prepare and submit a report to the board under this section, and any board action on the application shall be accompanied by the report.”

Committee Amendment No. 4. Clarifies in Subsection (f) of Section 36.113, Water Code, that a district may not limit by rule the operation or production of groundwater under an existing permit, unless

such rule is uniformly applied to all existing permits of the same type or class issued by the district.

Committee Amendment No.5. In proposed Section 36.412, Water Code, inserts new Subchapter (e) by adding “(e) If an application for which a hearing was not held is denied by the board, the applicant will be entitled to request a rehearing on the application as a contested application.” and inserts in Subchapter (b) “the minimum quantity, rate of production or other grounds for which” a permit amendment application is required.

Committee Amendment No.6. Inserts a new SECTION 5 to the bill to add a new subsection (e) to Section 36.116, Water Code, to provide that when a district is regulating the production of groundwater and selecting a method under Section 36.116(a)(2), the district shall consider the hydrogeological conditions of the aquifer or aquifers in the district.

Committee Amendment No.7. In Subdivision (2) of Section 8 of the bill, between “may” and “include” inserts “or may not”.