

1-1 By: Bonnen, et al. (Senate Sponsor - Armbrister) H.B. No. 2877  
1-2 (In the Senate - Received from the House May 6, 2003;  
1-3 May 8, 2003, read first time and referred to Committee on Natural  
1-4 Resources; May 23, 2003, reported adversely, with favorable  
1-5 Committee Substitute by the following vote: Yeas 8, Nays 1;  
1-6 May 23, 2003, sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR H.B. No. 2877 By: Armbrister

1-8 A BILL TO BE ENTITLED  
1-9 AN ACT

1-10 relating to certain permitting procedures of the Texas Commission  
1-11 on Environmental Quality.

1-12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-13 SECTION 1. Subsection (a), Section 5.555, Water Code, is  
1-14 amended to read as follows:

1-15 (a) The executive director, in accordance with procedures  
1-16 provided by commission rule, shall file with the chief clerk of the  
1-17 commission a response to each relevant and material public comment  
1-18 on the preliminary decision filed in writing during the public  
1-19 comment period.

1-20 SECTION 2. Section 5.556, Water Code, is amended by  
1-21 amending Subsections (a), (c), and (d) and adding Subsections (g)  
1-22 and (h) to read as follows:

1-23 (a) A person may request that the commission reconsider the  
1-24 executive director's decision or hold a contested case hearing. A  
1-25 request for reconsideration of the executive director's decision or  
1-26 for a contested case hearing must be filed with the commission after  
1-27 transmittal of the executive director's response to public comments  
1-28 and during the period provided by commission rule.

1-29 (c) The commission may not grant a request for a contested  
1-30 case hearing unless the commission determines that the request was  
1-31 filed by an affected person, as defined by Section 5.115, who  
1-32 submitted written comments during the public comment period or by a  
1-33 local government with authority under state law over the issues  
1-34 contemplated by the application upon a showing of good cause for not  
1-35 having submitted written comments during the comment period.

1-36 (d) The commission may not refer an issue to the State  
1-37 Office of Administrative Hearings for a hearing unless the  
1-38 commission determines that ~~[the issue]~~:

1-39 (1) the issue involves a disputed question of fact;

1-40 (2) the hearing request is based on information in the  
1-41 record establishing a reasonable basis for the factual dispute and  
1-42 describes how the executive director's response to comments failed  
1-43 to resolve the dispute;

1-44 (3) the issue is a specific, identifiable, technical  
1-45 dispute regarding the application or draft permit rather than an  
1-46 expression of generalized public health or environmental concerns  
1-47 or objections;

1-48 (4) the issue was raised during the public comment  
1-49 period by the person requesting the hearing; and

1-50 (5) the issue ~~[(3)]~~ is relevant and material to the  
1-51 decision on the application.

1-52 (g) Notwithstanding other law, public notice of a contested  
1-53 case hearing that the commission grants under this section is not  
1-54 required. Notice of a hearing shall be provided to the applicant,  
1-55 the office of public interest counsel, the executive director, and  
1-56 the person whose hearing requests have been granted.

1-57 (h) Notwithstanding other law, an application to upgrade a  
1-58 permitted landfill facility to meet the requirements of 40 C.F.R.  
1-59 Part 258 submitted to the commission before April 30, 2003, shall be  
1-60 considered by the commission as a modification as defined by  
1-61 commission rules.

1-62 SECTION 3. Section 7.0025, Water Code, is amended to read as  
1-63 follows:

2-1           Sec. 7.0025. INITIATION OF ENFORCEMENT ACTION USING  
2-2 INFORMATION PROVIDED BY PRIVATE INDIVIDUAL. (a) In this section,  
2-3 "relevant commission protocols" means protocols that are used by  
2-4 the commission or determined to be acceptable by the executive  
2-5 director.

2-6           (b) The commission may initiate an enforcement action on a  
2-7 matter under its jurisdiction under this code or the Health and  
2-8 Safety Code based on a combination of information the commission  
2-9 [~~it~~] receives from a private individual and information developed  
2-10 by the commission if that combined information, in the commission's  
2-11 judgment, is of sufficient value and credibility to warrant the  
2-12 initiation of an enforcement action.

2-13           (c) [~~(b)~~] The executive director or the executive  
2-14 director's designated representative may evaluate the value and  
2-15 credibility of information received from a private individual and  
2-16 the merits of any proposed enforcement action based on that  
2-17 information. In evaluating information under this subsection, the  
2-18 executive director or the executive director's designated  
2-19 representative shall consider the following criteria:

2-20           (1) the individual providing the information must be  
2-21 willing to:

2-22                   (A) submit a sworn affidavit attesting to the  
2-23 facts that constitute the alleged violation and authenticating any  
2-24 writings, recordings, or photographs provided by the individual;  
2-25 and

2-26                   (B) testify in any enforcement proceedings  
2-27 regarding the alleged violation; and

2-28           (2) if the executive director relies on any physical  
2-29 or sampling data submitted by an individual to prove one or more  
2-30 elements of an enforcement case:

2-31                   (A) the data must have been collected or gathered  
2-32 in accordance with relevant commission protocols; and

2-33                   (B) the individual submitting the physical or  
2-34 sampling data must submit a sworn affidavit that the individual  
2-35 followed relevant commission protocols when collecting the data.

2-36           (d) [~~(c)~~] The commission by rule may adopt additional  
2-37 criteria for the executive director to use in evaluating the value  
2-38 and credibility of information received from a private individual  
2-39 and for use of that information in an enforcement action.

2-40           (e) [~~(d)~~] A private individual who submits information on  
2-41 which the commission relies for all or part of an enforcement case  
2-42 may be called to testify in the enforcement proceedings and is  
2-43 subject to all sanctions under law for knowingly falsifying  
2-44 evidence. If the commission relies on the information submitted by  
2-45 a private individual to prove an enforcement case, any physical or  
2-46 sampling data must have been collected or gathered in accordance  
2-47 with commission protocols. The commission is not required to call a  
2-48 private individual who provides information on which the commission  
2-49 relies unless doing so is essential to the enforcement action.

2-50           (f) The commission may not use information provided by a  
2-51 private individual if the information was obtained by trespass or  
2-52 another illegal act.

2-53           (g) Information provided by a private individual that is  
2-54 used in an enforcement action is subject to the rules of evidence.

2-55           SECTION 4. Subchapter C, Chapter 361, Health and Safety  
2-56 Code, is amended by adding Section 361.1145 to read as follows:

2-57           Sec. 361.1145. PROHIBITION OF PERMIT FOR CERTAIN  
2-58 SOLIDIFIED, COMMERCIAL INDUSTRIAL SOLID WASTE FACILITIES. The  
2-59 commission may not issue a permit for the storage, processing, or  
2-60 disposal of solidified, commercial, industrial solid waste in a  
2-61 solution-mined salt dome cavern or a sulphur mine located within  
2-62 one mile of a drinking water well, school, place of worship, or  
2-63 public park.

2-64           SECTION 5. Section 382.056, Health and Safety Code, is  
2-65 amended by amending Subsections (b), (g), (h), (i), (l), (m), and  
2-66 (n) and adding Subsections (s) and (t) to read as follows:

2-67           (b) The notice must include:  
2-68                   (1) a description of the location or proposed location  
2-69 of the facility or federal source;

3-1 (2) the location at which a copy of the application is  
3-2 available for review and copying as provided by Subsection (d);

3-3 (3) a description, including a telephone number, of  
3-4 the manner in which the commission may be contacted for further  
3-5 information;

3-6 (4) a description, including a telephone number, of  
3-7 the manner in which the applicant may be contacted for further  
3-8 information;

3-9 (5) a description of the applicable procedural rights  
3-10 and obligations of the public, printed in a font style or size that  
3-11 clearly provides emphasis and distinguishes it from the remainder  
3-12 of the notice [~~that includes a statement that a person who may be~~  
3-13 ~~affected by emissions of air contaminants from the facility,~~  
3-14 ~~proposed facility, or federal source is entitled to request a~~  
3-15 ~~hearing from the commission];~~

3-16 (6) a statement that a person who may be affected by  
3-17 emissions of air contaminants from the facility, proposed facility,  
3-18 or federal source is entitled to file a notice of contest;

3-19 (7) a description of the procedure by which a person  
3-20 may be placed on a mailing list in order to receive additional  
3-21 information about the application;

3-22 (8) [~~(7)~~] the time and location of any public meeting  
3-23 to be held under Subsection (e); and

3-24 (9) [~~(8)~~] any other information the commission by rule  
3-25 requires.

3-26 (g) If, in response to the notice published under Subsection  
3-27 (a) for a permit or permit amendment under Section 382.0518 or a  
3-28 permit renewal review under Section 382.055, a person files a  
3-29 notice of contest [requests] during the period provided by  
3-30 commission rule [~~that the commission hold a public hearing]~~ and the  
3-31 notice of contest [request] is not withdrawn before the date the  
3-32 preliminary decision is issued, the applicant shall publish notice  
3-33 of the preliminary decision in a newspaper, and the commission  
3-34 shall seek public comment on the preliminary decision in accordance  
3-35 with[. ~~The commission shall consider the request for public~~  
3-36 ~~hearing under]~~ the procedures provided by Subsections (i)-(n).  
3-37 However, the [The] commission may not seek further public comment  
3-38 or hold a public hearing [under the procedures provided by  
3-39 Subsections (i)-(n)] in response to a notice of contest [request  
3-40 for a public hearing] on an amendment, modification, or renewal  
3-41 that would not result in an increase in allowable emissions and  
3-42 would not result in the emission of an air contaminant not  
3-43 previously emitted.

3-44 (h) The commission shall consider any hearing request  
3-45 regarding [if, in response to the notice published under Subsection  
3-46 (a) for] a permit under Section 382.054[, a person requests during  
3-47 the public comment period provided by commission rule that the  
3-48 commission hold a public hearing, the commission shall consider the  
3-49 request] under the procedures provided by Section 382.0561 and not  
3-50 under the procedures provided by Subsections (i)-(n).

3-51 (i) The commission by rule shall establish the form and  
3-52 content of the notice of preliminary decision under Subsection (g),  
3-53 the manner of publication, and the duration of the public comment  
3-54 period. The notice must include:

3-55 (1) the information required by Subsections  
3-56 [~~Subsection] (b) (1)-(5) and (7)-(9);~~

3-57 (2) a summary of the preliminary decision;

3-58 (3) the location at which a copy of the preliminary  
3-59 decision is available for review and copying as provided by  
3-60 Subsection (j);

3-61 (4) a description of the manner in which comments  
3-62 regarding the preliminary decision may be submitted; and

3-63 (5) any other information the commission by rule  
3-64 requires.

3-65 (l) The executive director, in accordance with procedures  
3-66 adopted by the commission by rule, shall file with the chief clerk  
3-67 of the commission a response to each relevant and material public  
3-68 comment on the preliminary decision filed in writing during the  
3-69 public comment period.

4-1 (m) The chief clerk of the commission shall transmit the  
4-2 executive director's decision, the executive director's response to  
4-3 public comments, and instructions for requesting that the  
4-4 commission reconsider the executive director's decision or hold a  
4-5 contested case hearing to:

- 4-6 (1) the applicant;
- 4-7 (2) any person who submitted comments during the  
4-8 public comment period;
- 4-9 (3) any person who requested to be on the mailing list  
4-10 for the permit action; and
- 4-11 (4) any person who timely filed a notice of contest  
4-12 [~~request for a public hearing~~] in response to the notice published  
4-13 under Subsection (a).

4-14 (n) Except as provided by Section 382.0561, the commission  
4-15 shall consider a request that the commission reconsider the  
4-16 executive director's decision or hold a contested case [~~public~~]  
4-17 hearing in accordance with the procedures provided by Sections  
4-18 5.556 and 5.557, Water Code.

4-19 (s) If a notice of contest is not filed or is withdrawn under  
4-20 Subsection (g), any public hearing requested in response to a later  
4-21 public notice required solely by federal program requirements, if  
4-22 granted, shall be conducted in accordance with Section 382.0561 and  
4-23 not under Chapter 2001, Government Code.

4-24 (t) The commission shall extend the public comment period  
4-25 automatically until the close of the public meetings held under  
4-26 Subsection (k). The commission may not extend the period during  
4-27 which a notice of contest or request for reconsideration may be  
4-28 filed.

4-29 SECTION 6. Section 382.0564, Health and Safety Code, is  
4-30 amended to read as follows:

4-31 Sec. 382.0564. NOTIFICATION TO OTHER GOVERNMENTAL  
4-32 ENTITIES. (a) The commission by rule may allow for notification of  
4-33 and review by the administrator and affected states of permit  
4-34 applications, revisions, renewals, or draft permits prepared under  
4-35 Sections 382.054-382.0543.

4-36 (b) The commission shall mail notice of intent to obtain a  
4-37 permit, permit amendment, or other authorization for a  
4-38 rock-crushing facility associated with blasting operations to an  
4-39 affected municipality.

4-40 (c) An affected municipality entitled to notice under  
4-41 Subsection (b) may submit comments to the commission within 30 days  
4-42 of receiving a notice of intent under Subsection (b).

4-43 (d) The commission may not issue a permit, permit amendment,  
4-44 or other authorization for a rock-crushing facility associated with  
4-45 blasting operations if the commission receives from an affected  
4-46 municipality a resolution in opposition to issuance of the permit,  
4-47 permit amendment, or other authorization during the 30-day comment  
4-48 period.

4-49 (e) The commission shall prohibit a currently permitted  
4-50 rock-crushing facility from being associated with blasting  
4-51 operations if:

- 4-52 (1) blasting operations have not taken place on the  
4-53 tract for 10 or more years before April 10, 2003; and
- 4-54 (2) the commission receives from an affected  
4-55 municipality a resolution in opposition to the currently permitted  
4-56 rock-crushing facility.

4-57 (f) For purposes of this section, an "affected  
4-58 municipality" means a municipality whose primary source of drinking  
4-59 water is an aquifer made, wholly or partly, of water-bearing  
4-60 limestone or dolomite which is located in a county:

- 4-61 (1) that is adjacent to a county with a population of  
4-62 500,000 or more; and
- 4-63 (2) in which is located a portion of a body of water  
4-64 into which a discharge of pollutants is prohibited by the  
4-65 commission under 30 T.A.C. Chapter 311.

4-66 SECTION 7. Section 2003.047, Government Code, is amended by  
4-67 adding Subsections (p) and (q) to read as follows:

4-68 (p) In designating parties to a hearing on a permit  
4-69 application, the administrative law judge may name as parties only

5-1 the executive director of the commission, the office of public  
 5-2 interest counsel, the permit applicant, and other persons whose  
 5-3 hearing requests have been granted by the commission and whose  
 5-4 issues have been referred by the commission for a contested case  
 5-5 hearing. The executive director may participate in a contested  
 5-6 case hearing only to the extent described in Section 5.228, Water  
 5-7 Code.

5-8 (g) An administrative law judge may grant a motion for a  
 5-9 summary disposition on any or all of the issues referred for hearing  
 5-10 and issue a proposal for decision that resolves the contested case  
 5-11 without an evidentiary hearing or with a limited evidentiary  
 5-12 hearing as provided by commission rules.

5-13 SECTION 8. Subchapter B, Chapter 11, Water Code, is amended  
 5-14 by adding Sections 11.0235, 11.0236, and 11.0237 to read as  
 5-15 follows:

5-16 Sec. 11.0235. POLICY REGARDING WATERS OF THE STATE.

5-17 (a) The waters of the state are held in trust for the public, and  
 5-18 the right to use state water may be appropriated only as expressly  
 5-19 authorized by law.

5-20 (b) Maintaining the biological soundness of the state's  
 5-21 rivers, lakes, bays, and estuaries is of great importance to the  
 5-22 public's economic health and general well-being.

5-23 (c) The legislature has expressly required the commission  
 5-24 while balancing all other interests to consider and provide for the  
 5-25 freshwater inflows necessary to maintain the viability of the  
 5-26 state's bay and estuary systems in the commission's regular  
 5-27 granting of permits for the use of state waters.

5-28 (d) The legislature has not expressly authorized granting  
 5-29 water rights exclusively for:

5-30 (1) instream flows dedicated to environmental needs or  
 5-31 inflows to the state's bay and estuary systems; or

5-32 (2) other similar beneficial uses.

5-33 (e) The fact that greater pressures and demands are being  
 5-34 placed on the water resources of the state makes it of paramount  
 5-35 importance to reexamine the process for ensuring that these  
 5-36 important priorities are effectively addressed in clear  
 5-37 delegations of authority to the commission.

5-38 Sec. 11.0236. STUDY COMMISSION ON WATER FOR ENVIRONMENTAL  
 5-39 FLOWS. (a) In recognition of the importance that the ecological  
 5-40 soundness of our riverine, bay, and estuary systems and riparian  
 5-41 lands has on the economy, health, and well-being of the state there  
 5-42 is created the Study Commission on Water for Environmental Flows.

5-43 (b) The study commission is composed of 15 members as  
 5-44 follows:

5-45 (1) two members appointed by the governor;  
 5-46 (2) five members appointed by the lieutenant governor;  
 5-47 (3) five members appointed by the speaker of the house  
 5-48 of representatives;

5-49 (4) the presiding officer of the commission or the  
 5-50 presiding officer's designee;

5-51 (5) the chairman of the board or the chairman's  
 5-52 designee; and

5-53 (6) the presiding officer of the Parks and Wildlife  
 5-54 Commission or the presiding officer's designee.

5-55 (c) Of the members appointed under Subsection (b)(2):

5-56 (1) one member must represent a river authority or  
 5-57 municipal water supply agency or authority;

5-58 (2) one member must represent an entity that is  
 5-59 distinguished by its efforts in resource protection; and

5-60 (3) three members must be members of the senate.

5-61 (d) Of the members appointed under Subsection (b)(3):

5-62 (1) one member must represent a river authority or  
 5-63 municipal water supply agency or authority;

5-64 (2) one member must represent an entity that is  
 5-65 distinguished by its efforts in resource protection; and

5-66 (3) three members must be members of the house of  
 5-67 representatives.

5-68 (e) Each appointed member of the study commission serves at  
 5-69 the will of the person who appointed the member.

6-1 (f) The appointed senator with the most seniority and the  
6-2 appointed house member with the most seniority serve together as  
6-3 co-presiding officers of the study commission.

6-4 (g) A member of the study commission is not entitled to  
6-5 receive compensation for service on the study commission but is  
6-6 entitled to reimbursement of the travel expenses incurred by the  
6-7 member while conducting the business of the study commission, as  
6-8 provided by the General Appropriations Act.

6-9 (h) The study commission may accept gifts and grants from  
6-10 any source to be used to carry out a function of the study  
6-11 commission.

6-12 (i) The commission shall provide staff support for the study  
6-13 commission.

6-14 (j) The study commission shall conduct public hearings and  
6-15 study public policy implications for balancing the demands on the  
6-16 water resources of the state resulting from a growing population  
6-17 with the requirements of the riverine, bay, and estuary systems  
6-18 including granting permits for instream flows dedicated to  
6-19 environmental needs or bay and estuary inflows, use of the Texas  
6-20 Water Trust, and any other issues that the study commission  
6-21 determines have importance and relevance to the protection of  
6-22 environmental flows. In evaluating the options for providing  
6-23 adequate environmental flows, the study commission shall take  
6-24 notice of the strong public policy imperative that exists in this  
6-25 state recognizing that environmental flows are important to the  
6-26 biological health of our parks, game preserves, and bay and estuary  
6-27 systems and are high priorities in the permitting process. The  
6-28 study commission shall specifically address ways that the  
6-29 ecological soundness of these systems will be ensured in the water  
6-30 allocation process.

6-31 (k) The study commission:

6-32 (1) shall appoint an advisory scientific committee  
6-33 that will:

6-34 (A) serve as impartial scientific advisors and  
6-35 reviewers for the study commission; and

6-36 (B) have a membership of no fewer than five and no  
6-37 more than nine total members chosen by the study commission to  
6-38 represent a variety of areas of relevant technical expertise;

6-39 (2) may appoint additional advisory committees to  
6-40 assist the study commission; and

6-41 (3) may draft proposed legislation to modify existing  
6-42 water-rights permitting statutes.

6-43 (1) Not later than December 1, 2004, the study commission  
6-44 shall issue a report summarizing:

6-45 (1) any hearings conducted by the study commission;

6-46 (2) any studies conducted by the study commission;

6-47 (3) any legislation proposed by the study commission;

6-48 and

6-49 (4) any other findings and recommendations of the  
6-50 study commission.

6-51 (m) The study commission shall promptly deliver copies of  
6-52 the report to the governor, lieutenant governor, and speaker of the  
6-53 house of representatives.

6-54 (n) The study commission shall adopt rules to administer  
6-55 this section.

6-56 (o) The study commission is abolished and this section  
6-57 expires September 1, 2005.

6-58 Sec. 11.0237. WATER RIGHTS FOR INSTREAM FLOWS DEDICATED TO  
6-59 ENVIRONMENTAL NEEDS OR BAY AND ESTUARY INFLOWS. (a) The commission  
6-60 may not issue a new permit for instream flows dedicated to  
6-61 environmental needs or bay and estuary inflows. This section does  
6-62 not prohibit the commission from issuing an amendment to an  
6-63 existing permit or certificate of adjudication to change the use to  
6-64 or add a use for instream flows dedicated to environmental needs or  
6-65 bay and estuary inflows.

6-66 (b) This section does not alter the commission's  
6-67 obligations under Section 11.042(b), 11.046(b), 11.085(k)(2)(F),  
6-68 11.134(b)(3)(D), 11.147, 11.1491, 16.058, or 16.059.

6-69 (c) This section expires September 1, 2005.

7-1 SECTION 9. Subsections (d) and (e), Section 11.147, Water  
7-2 Code, are amended to read as follows:

7-3 (d) In its consideration of an application to store, take,  
7-4 or divert water, the commission shall include in the permit, to the  
7-5 extent practicable when considering all public interests, those  
7-6 conditions considered by the commission necessary to maintain  
7-7 ~~[consider the effect, if any, of the issuance of the permit on]~~  
7-8 existing instream uses and water quality of the stream or river to  
7-9 which the application applies.

7-10 (e) The commission shall include in the permit, to the  
7-11 extent practicable when considering all public interests, those  
7-12 conditions considered by the commission necessary to maintain ~~[also~~  
7-13 ~~consider the effect, if any, of the issuance of the permit on]~~ fish  
7-14 and wildlife habitats.

7-15 SECTION 10. Rules adopted by the Texas Commission on  
7-16 Environmental Quality under Section 26.040, Water Code, before the  
7-17 effective date of this Act are validated as of the dates they were  
7-18 adopted and remain valid until they are modified or repealed by the  
7-19 commission.

7-20 SECTION 11. (a) Except as provided by Subsection (b) of  
7-21 this section, this Act takes effect September 1, 2003.

7-22 (b) Sections 8 and 9 of this Act take effect immediately if  
7-23 this Act receives a vote of two-thirds of all the members elected to  
7-24 each house, as provided by Section 39, Article III, Texas  
7-25 Constitution. If this Act does not receive the vote necessary for  
7-26 immediate effect, Sections 8 and 9 of this Act take effect September  
7-27 1, 2003.

7-28 (c) The changes in law made by Sections 1, 2, 4, 5, and 7 of  
7-29 this Act apply only to an application for a permit, permit  
7-30 amendment, or permit renewal for which the notice of preliminary  
7-31 decision required by Section 5.553, Water Code, or Section  
7-32 382.056(g), Health and Safety Code, is published on or after  
7-33 September 1, 2003. A permit, permit amendment, or permit renewal  
7-34 for which the notice of preliminary decision required by Section  
7-35 5.553, Water Code, or Section 382.056(g), Health and Safety Code,  
7-36 is published before September 1, 2003, is governed by the law in  
7-37 effect on the date it was published, and that law is continued in  
7-38 effect for that purpose.

7-39 (d) The changes in law made by Sections 8 and 9 of this Act  
7-40 apply to a permit application pending before the Texas Commission  
7-41 on Environmental Quality on the effective date of those sections or  
7-42 filed with the commission on or after that date.

7-43 \* \* \* \* \*