

By: Bonnen

H.B. No. 2758

A BILL TO BE ENTITLED

AN ACT

1
2 relating to certain permitting procedures of the Texas Commission
3 on Environmental Quality.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Section 5.228(b), Water Code, is amended to read
6 as follows:

7 (b) The executive director shall be named a party in
8 hearings before the commission [~~in a matter in which the executive~~
9 ~~director bears the burden of proof~~].

10 SECTION 2. Section 5.555(a), Water Code, is amended to read
11 as follows:

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

17 SECTION 3. Section 5.556, Water Code, is amended by
18 amending Subsections (a), (b), (c), (d), and (f) and adding
19 Subsection (g) to read as follows:

20 (a) A person may request that the commission reconsider the
21 executive director's decision or hold a contested case hearing. A
22 request for reconsideration of the executive director's decision
23 must be filed with the commission after publication of the
24 preliminary decision under Section 5.553 and during the period

1 provided by commission rule. A request for a contested case hearing
2 must be filed with the commission after transmittal of the
3 executive director's response to public comments under Section
4 5.555 and during the period provided by commission rule.

5 (b) The commission shall act on a request made under
6 Subsection (a) or a preliminary recommendation made by the State
7 Office of Administrative Hearings under Section 5.5561 during the
8 period provided by commission rule.

9 (c) The commission may not grant a request for a contested
10 case hearing unless the commission determines that the request was
11 filed by an affected person as defined by Section 5.115 who
12 submitted written comments during the public comment period.

13 (d) The commission may not refer an issue to the State
14 Office of Administrative Hearings for a contested case hearing
15 unless the commission determines that [~~the issue~~]:

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

17 (2) there is a reasonable basis for the factual
18 dispute and the executive director's response to comments has
19 failed to resolve the dispute;

20 (3) the issue is discrete and not a broad or
21 generalized objection;

22 (4) the issue was raised during the public comment
23 period by the person requesting the hearing; and

24 (5) the issue [~~(3)~~] is relevant and material to the
25 decision on the application.

26 (f) Notwithstanding other law, if an issue is raised by an
27 affected person in a contested case hearing and found by the

1 commission to prevent issuance of the permit unless it is corrected
2 and the issue can be corrected by a change to the technical aspects
3 or requirements of the permit or the permit application, the
4 commission shall require the applicant to make the change to the
5 permit application or the executive director to make the change to
6 the permit conditions without requiring any further administrative
7 process ~~[This section does not preclude the commission from~~
8 ~~holding a hearing if it determines that the public interest~~
9 ~~warrants doing so].~~

10 (g) Notwithstanding other law, public notice of a contested
11 case hearing that the commission grants under this section is not
12 required. Notice of a hearing that the commission grants under this
13 section is required to be provided only to the applicant, the office
14 of public interest counsel, the executive director, and the person
15 who requested the hearing.

16 SECTION 4. Subchapter M, Chapter 5, Water Code, is amended
17 by adding Section 5.5561 to read as follows:

18 Sec. 5.5561. PRELIMINARY PROCEEDING ON REQUEST FOR
19 CONTESTED CASE HEARING. (a) On written request of an applicant,
20 the commission shall refer a request for a contested case hearing
21 under Section 5.556 to the State Office of Administrative Hearings
22 for a preliminary review of whether the person requesting the
23 contested case hearing meets the requirements for bringing a
24 contested case hearing under Sections 5.556(c) and (d).

25 (b) On receiving a referral from the commission under
26 Subsection (a), the State Office of Administrative Hearings shall
27 schedule a preliminary review proceeding not later than the 60th

1 day after the date the commission refers the request to the office.

2 (c) During the preliminary review proceeding, the State
3 Office of Administrative Hearings shall require that the person
4 requesting the contested case hearing demonstrate through
5 testimony or affidavit a prima facie case that the person is an
6 affected person and that the issue raised by the person meets the
7 criteria provided by Section 5.556(d).

8 (d) Not later than the 30th day after the date of the
9 preliminary review proceeding, the State Office of Administrative
10 Hearings shall make a recommendation to the commission on whether
11 the person requesting the contested case hearing is an affected
12 person and whether the person has demonstrated through prima facie
13 evidence that the issue raised by the person meets the criteria
14 provided by Section 5.556(d).

15 SECTION 5. Section 26.028(d), Water Code, is amended to
16 read as follows:

17 (d) Notwithstanding any other provision of this chapter,
18 the commission, at a regular meeting without the necessity of
19 holding a public hearing, may approve an application for a permit,
20 permit amendment, or renewal of [~~to renew or amend~~] a permit, except
21 that a permit for a new major source, as defined by commission rule,
22 may not be issued except after an opportunity for a public hearing
23 on the application [~~if:~~

24 [~~(1) the applicant is not applying to:~~

25 [~~(A) increase significantly the quantity of~~
26 ~~waste authorized to be discharged, or~~

27 [~~(B) change materially the pattern or place of~~

1 ~~discharge,~~

2 ~~[(2) the activities to be authorized by the renewed or~~
3 ~~amended permit will maintain or improve the quality of waste~~
4 ~~authorized to be discharged,~~

5 ~~[(3) for NPDES permits, notice and the opportunity to~~
6 ~~request a public meeting shall be given in compliance with NPDES~~
7 ~~program requirements, and the commission shall consider and respond~~
8 ~~to all timely received and significant public comment; and~~

9 ~~[(4) the commission determines that an applicant's~~
10 ~~compliance history under the method for evaluating compliance~~
11 ~~history developed by the commission under Section 5.754 raises no~~
12 ~~issues regarding the applicant's ability to comply with a material~~
13 ~~term of its permit].~~

14 SECTION 6. Section 27.018, Water Code, is amended by
15 amending Subsection (a) and adding Subsection (e) to read as
16 follows:

17 (a) If it is considered necessary and in the public
18 interest, the commission may hold a public hearing on the
19 application. Except as provided by Subsection (e), the ~~[The]~~
20 commission shall hold a hearing on a permit application for an
21 injection well to dispose of industrial and municipal waste if a
22 hearing is requested by a local government located in the county of
23 the proposed disposal well site or by an affected person. In this
24 subsection, "local government" has the meaning provided for that
25 term by Chapter 26 of this code.

26 (e) Notwithstanding any other provision of this chapter,
27 after public notice and an opportunity for public comment, the

1 commission may, at a regular meeting and without the necessity of
2 holding a public hearing, approve an application for a permit,
3 permit amendment, or renewal of a permit, unless the application is
4 for a new injection well at a site at which there is no existing
5 permitted injection in the injection zone for which the application
6 seeks authorization.

7 SECTION 7. Section 361.088(e), Health and Safety Code, is
8 amended to read as follows:

9 (e) After complying with Sections 5.552-5.555, Water Code,
10 the commission, without providing an opportunity for a contested
11 case hearing, may act on an application for ~~[to renew]~~ a permit,
12 permit amendment, or renewal of a permit, unless the application is
13 for a new or a major expansion of an existing commercial industrial
14 solid waste processing or disposal facility or a new or a major
15 expansion of an existing municipal solid waste disposal facility.
16 The commission by rule shall define "major expansion" for purposes
17 of this subsection ~~[for:~~

18 ~~[(1) storage of hazardous waste in containers, tanks,~~
19 ~~or other closed vessels if the waste:~~

20 ~~[(A) was generated on-site, and~~

21 ~~[(B) does not include waste generated from other~~
22 ~~waste transported to the site, and~~

23 ~~[(2) processing of hazardous waste if:~~

24 ~~[(A) the waste was generated on-site,~~

25 ~~[(B) the waste does not include waste generated~~
26 ~~from other waste transported to the site, and~~

27 ~~[(C) the processing does not include thermal~~

1 processing].

2 SECTION 8. Section 382.056, Health and Safety Code, is
3 amended by amending Subsections (b), (g), (h), (i), (l), (m), and
4 (n) and adding Subsections (t) and (u) to read as follows:

5 (b) The notice must include:

6 (1) a description of the location or proposed location
7 of the facility or federal source;

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

10 (3) a description, including a telephone number, of
11 the manner in which the commission may be contacted for further
12 information;

13 (4) a description, including a telephone number, of
14 the manner in which the applicant may be contacted for further
15 information;

16 (5) a description of the applicable procedural rights
17 and obligations of the public, printed in a font style or size that
18 clearly provides emphasis and distinguishes it from the remainder
19 of the notice[~~, that includes a statement that a person who may be~~
20 ~~affected by emissions of air contaminants from the facility,~~
21 ~~proposed facility, or federal source is entitled to request a~~
22 ~~hearing from the commission];~~

23 (6) a statement that a person who may be affected by an
24 emission of air contaminants from the facility, proposed facility,
25 or federal source is entitled to file a notice of contest;

26 (7) a description of the procedure by which a person
27 may be placed on a mailing list in order to receive additional

1 information about the application;

2 (8) [~~(7)~~] the time and location of any public meeting
3 to be held under Subsection (e); and

4 (9) [~~(8)~~] any other information the commission by rule
5 requires.

6 (g) If, in response to the notice published under Subsection
7 (a) for a permit or permit amendment under Section 382.0518 or a
8 permit renewal review under Section 382.055, a person files a
9 notice of contest [~~requests~~] during the period provided by
10 commission rule [~~that the commission hold a public hearing~~] and the
11 notice of contest [~~request~~] is not withdrawn before the date the
12 preliminary decision is issued, the applicant shall publish notice
13 of the preliminary decision in a newspaper, and the commission
14 shall seek public comment on the preliminary decision in accordance
15 with [~~. The commission shall consider the request for public~~
16 ~~hearing under~~] the procedures provided by Subsections (i)-(n). The
17 commission may not seek further public comment or hold a public
18 hearing [~~under the procedures provided by Subsections (i)-(n)~~] in
19 response to a notice of contest [~~request for a public hearing~~] on a
20 permit, permit amendment, permit modification, or renewal of a
21 permit, unless the application concerns:

22 (1) construction of a major new source or a major
23 modification of an existing source as those terms are used in the
24 context of the federal regulations relating to prevention of
25 significant deterioration of air quality and review of new sources
26 and modifications in nonattainment areas (40 C.F.R. Part 51,
27 Subpart I);

1 (2) construction of a major source of hazardous air
2 pollutants as defined by Section 112 of the federal Clean Air Act
3 (42 U.S.C. Section 7412); or

4 (3) the proposed modification of an existing source
5 that would result in the source becoming a major source of hazardous
6 air pollutants [~~an amendment, modification, or renewal that would~~
7 ~~not result in an increase in allowable emissions and would not~~
8 ~~result in the emission of an air contaminant not previously~~
9 ~~emitted~~].

10 (h) The commission shall consider any hearing request
11 regarding [~~If, in response to the notice published under Subsection~~
12 ~~(a) for~~] a permit under Section 382.054 [~~, a person requests during~~
13 ~~the public comment period provided by commission rule that the~~
14 ~~commission hold a public hearing, the commission shall consider the~~
15 ~~request~~] under the procedures provided by Section 382.0561 and not
16 under the procedures provided by Subsections (i)-(n).

17 (i) The commission by rule shall establish the form and
18 content of the notice of preliminary decision under Subsection (g),
19 the manner of publication, and the duration of the public comment
20 period. The notice must include:

21 (1) the information required by Subsections
22 [~~Subsection~~] (b)(1)-(5) and (7)-(9);

23 (2) a summary of the preliminary decision;

24 (3) the location at which a copy of the preliminary
25 decision is available for review and copying as provided by
26 Subsection (j);

27 (4) a description of the manner in which comments

1 regarding the preliminary decision may be submitted; and

2 (5) any other information the commission by rule
3 requires.

4 (1) The executive director, in accordance with procedures
5 adopted by the commission by rule, shall file with the chief clerk
6 of the commission a response to each relevant and material public
7 comment on the preliminary decision filed in writing during the
8 public comment period.

9 (m) The chief clerk of the commission shall transmit the
10 executive director's decision, the executive director's response to
11 public comments, and instructions for requesting that the
12 commission reconsider the executive director's decision or hold a
13 contested case hearing to:

14 (1) the applicant;

15 (2) any person who submitted comments during the
16 public comment period;

17 (3) any person who requested to be on the mailing list
18 for the permit action; and

19 (4) any person who timely filed a notice of contest
20 [~~request for a public hearing~~] in response to the notice published
21 under Subsection (a).

22 (n) Except as provided by Section 382.0561, the commission
23 shall consider a request that the commission reconsider the
24 executive director's decision or hold a contested case [~~public~~]
25 hearing in accordance with the procedures provided by Sections
26 5.556 and 5.557, Water Code.

27 (t) If a notice of contest is not filed or is withdrawn under

1 Subsection (g), any public hearing requested in response to a later
2 public notice required solely by federal program requirements shall
3 be conducted in accordance with Section 382.0561 and not under
4 Chapter 2001, Government Code.

5 (u) The commission shall extend the public comment period
6 automatically until the close of the public meetings held under
7 Subsection (k). The commission may not extend the period during
8 which a notice of contest or request for reconsideration may be
9 filed.

10 SECTION 9. Section 2003.047, Government Code, is amended by
11 adding Subsections (p) and (q) to read as follows:

12 (p) In designating parties to a hearing on a permit
13 application, the administrative law judge may name as parties only
14 the executive director of the commission, the office of public
15 interest counsel, the permit applicant, and other persons whose
16 hearing requests have been granted by the commission and whose
17 issues have been referred by the commission for a contested case
18 hearing.

19 (q) An administrative law judge may grant a motion for a
20 summary disposition on any or all of the issues referred for hearing
21 and issue a proposal for decision that resolves the contested case
22 without an evidentiary hearing or with a limited evidentiary
23 hearing as provided by commission rules.

24 SECTION 10. Sections 5.228(c), (d), (e), and (f) and
25 Section 26.028(e), Water Code, are repealed.

26 SECTION 11. (a) Except as provided by Subsection (b) of this
27 section, the changes in law made by this Act apply only to a permit

1 application for which the notice of preliminary decision required
2 by Section 5.553, Water Code, or Section 382.056(g), Health and
3 Safety Code, is published on or after September 1, 2005. An
4 application for which the notice of preliminary decision required
5 by Section 5.553, Water Code, or Section 382.056(g), Health and
6 Safety Code, is published before September 1, 2005, is governed by
7 the law in effect on the date it was published, and that law is
8 continued in effect for that purpose.

9 (b) The changes in law made by this Act to Section 2003.047,
10 Government Code, apply only to an application for a permit issued by
11 the Texas Commission on Environmental Quality other than a permit
12 issued under Chapter 361 or 382, Health and Safety Code, or Chapter
13 26 or 27, Water Code, that was received by the commission on or
14 after September 1, 2005. An application received before that date
15 is governed by the law in effect on the date the application was
16 received, and that law is continued in effect for that purpose.

17 SECTION 12. This Act takes effect September 1, 2005.