

By: Phelan

H.B. No. 3742

A BILL TO BE ENTITLED

AN ACT

1  
2 relating to the procedure for contested case hearings regarding  
3 water rights permit applications and amendments to certain water  
4 management plans.

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

6 SECTION 1. Section 5.115, Water Code, is amended by adding  
7 Subsection (h) to read as follows:

8 (h) This section does not apply to a hearing on an  
9 application for a water rights permit or an amendment to a water  
10 rights permit under Chapter 11.

11 SECTION 2. Section 11.1273(d), Water Code, is amended to  
12 read as follows:

13 (d) The commission shall provide an opportunity for public  
14 comment and a contested case [~~public~~] hearing on the application,  
15 consistent with the process for other water rights applications.

16 SECTION 3. Sections 11.132(a), (c), and (d), Water Code,  
17 are amended to read as follows:

18 (a) Notice shall be given to the persons who in the judgment  
19 of the commission may be affected by an application, including  
20 those persons listed in Subdivision (2), Subsection (d), of this  
21 section. The commission, on the motion of a commissioner or on the  
22 request of the executive director, the applicant, or any affected  
23 person, shall hold a contested case [~~public~~] hearing on the  
24 application.

1 (c) In the notice, the commission shall:

2 (1) state the name and address of the applicant;

3 (2) state the date the application was filed;

4 (3) state the purpose and extent of the proposed  
5 appropriation of water;

6 (4) identify the source of supply and the place where  
7 the water is to be stored or taken or diverted from the source of  
8 supply;

9 (5) describe the process by which the commission will  
10 consider the application [~~specify the time and location where the~~  
11 ~~commission will consider the application~~]; [~~and~~]

12 (6) provide notice that, not later than the 30th day  
13 after the date of the notice, a person described by Subsection (a)  
14 may:

15 (A) request a contested case hearing; or

16 (B) submit:

17 (i) comments on the application; or

18 (ii) disputed issues of fact or mixed  
19 questions of fact and law that are relevant and material to the  
20 decision on the application;

21 (7) describe the process for the submissions and  
22 requests described by Subdivision (6); and

23 (8) give any additional information the commission  
24 considers necessary.

25 (d) The commission may act on the application without  
26 holding a contested case [~~public~~] hearing if:

27 (1) not less than 30 days before the date of action on

1 the application by the commission, the applicant has published the  
2 commission's notice of the application at least once in a newspaper  
3 regularly published or circulated within the section of the state  
4 where the source of water is located;

5 (2) not less than 30 days before the date of action on  
6 the application by the commission, the commission mails a copy of  
7 the notice by first-class mail, postage prepaid, to:

8 (A) each claimant or appropriator of water from  
9 the source of water supply, the record of whose claim or  
10 appropriation has been filed with the commission; and

11 (B) all navigation districts within the river  
12 basin concerned; and

13 (3) within 30 days after the date of the newspaper  
14 publication of the commission's notice:

15 (A) [7] a contested case [public] hearing has not  
16 been requested in writing by a commissioner, the executive  
17 director, the applicant, or an affected person; or

18 (B) no disputed issue of fact or mixed question  
19 of fact and law that is relevant and material to the decision on the  
20 application has been submitted by the applicant or an affected  
21 person [who objects to the application].

22 SECTION 4. Subchapter D, Chapter 11, Water Code, is amended  
23 by adding Section 11.1321 to read as follows:

24 Sec. 11.1321. AFFECTED PERSON. (a) In this section,  
25 "timely" means within the period described by Section 11.132.

26 (b) For the purpose of an administrative hearing held by or  
27 for the commission involving a contested case under this chapter,

1 "affected person," or "person affected," or "person who may be  
2 affected" means a person who has a personal justiciable interest  
3 related to a legal right, duty, privilege, power, or economic  
4 interest affected by the administrative hearing. An interest  
5 common to members of the general public does not qualify as a  
6 personal justiciable interest.

7 (c) Unless an application is referred to the State Office of  
8 Administrative Hearings under Section 11.133(a), the commission  
9 shall determine whether a person is an affected person at a public  
10 meeting of the commission.

11 (d) The commission shall make a determination that a person  
12 is an affected person regarding the application if the person:

13 (1) is the applicant;

14 (2) owns or leases a permit, certified filing, or  
15 certificate of adjudication of a senior or superior water right in  
16 the same basin as the basin affected by the application;

17 (3) has an application pending before the commission  
18 for a new or amended water right in the same basin as the basin  
19 affected by the application;

20 (4) has an application pending before the commission  
21 for a change of ownership of a water right in the same basin as the  
22 basin affected by the application; or

23 (5) has timely submitted one or more disputed issues  
24 of fact or mixed questions of fact and law that:

25 (A) are relevant and material to the decision on  
26 the application; and

27 (B) have the potential to affect the justiciable

1 interest asserted by the person.

2 (e) The following are not affected persons:

3 (1) a group or association that does not:

4 (A) timely request a contested case hearing in  
5 writing; and

6 (B) identify by name and physical address or  
7 location a member of the group or association who would be an  
8 affected person in the person's own right;

9 (2) a hearing requestor, even if otherwise an affected  
10 person, who did not timely submit in writing a disputed issue of  
11 fact or mixed question of fact and law that is relevant and material  
12 to the decision on the application; or

13 (3) a person, even if otherwise an affected person,  
14 who did not timely request a contested case hearing.

15 (f) For a person other than those described by Subsection  
16 (d) or (e), the commission shall make a determination regarding  
17 whether a person is an affected person by considering:

18 (1) the likely impact of approving the application on  
19 the health, safety, and use of the property of the hearing  
20 requestor, to the extent the impact relates to issues within the  
21 commission's jurisdiction;

22 (2) the administrative record, including the permit  
23 application and any supporting documentation;

24 (3) the analysis and opinions of the executive  
25 director; and

26 (4) any other expert reports, affidavits, opinions, or  
27 data submitted on or before any applicable deadline to the

1 commission by the executive director, the applicant, or a hearing  
2 requestor.

3 SECTION 5. Section 11.133, Water Code, is amended to read as  
4 follows:

5 Sec. 11.133. HEARING. (a) If an applicant requests a  
6 contested case hearing and that the hearing be referred to the State  
7 Office of Administrative Hearings, the commission shall refer the  
8 hearing to the State Office of Administrative Hearings.

9 (b) If the commission determines at a public meeting of the  
10 commission that a contested case hearing has been requested by an  
11 affected person, the commission shall either:

12 (1) hold a contested case hearing on the application  
13 before the commission at a time and place designated by the  
14 commission; or

15 (2) refer the application to the State Office of  
16 Administrative Hearings.

17 (c) [At the time and place stated in the notice, the  
18 commission shall hold a hearing on the application.] Any affected  
19 person may appear at the hearing in person or by attorney or may  
20 enter the person's [his] appearance in writing. Any affected  
21 person who appears may present objection to the issuance of the  
22 permit. The commission or the State Office of Administrative  
23 Hearings may receive evidence, orally or by affidavit, in support  
24 of or in opposition to the issuance of the permit, and it may hear  
25 arguments. Chapter 2001, Government Code, applies to a contested  
26 case hearing held under this section.

27 (d) If the commission grants a request for a hearing, the

1 commission shall:

2 (1) for a hearing other than a hearing referred to the  
3 State Office of Administrative Hearings under Subsection (a),  
4 determine the number and scope of issues to be considered in the  
5 contested case hearing; and

6 (2) consistent with the nature and number of issues to  
7 be considered at the hearing, specify the maximum duration of the  
8 hearing, beginning on the date of the preliminary hearing and  
9 concluding with the issuance of a proposal for decision, which may  
10 not exceed a period of 270 days, unless the commission determines  
11 that the nature and number of issues to be considered at the hearing  
12 requires that the period be extended.

13 (e) An issue included in the scope of issues determined  
14 under Subsection (d)(1) must be an issue the commission determines:

15 (1) involves a disputed question of fact or a mixed  
16 question of fact and law;

17 (2) is relevant and material to the decision on the  
18 application; and

19 (3) was raised by an affected person during the notice  
20 period described by Section [11.132](#).

21 SECTION 6. Subchapter D, Chapter [11](#), Water Code, is amended  
22 by adding Section 11.1335 to read as follows:

23 Sec. 11.1335. HEARINGS CONDUCTED BY THE STATE OFFICE OF  
24 ADMINISTRATIVE HEARINGS. (a) The presiding administrative law  
25 judge of a contested case hearing referred under Section  
26 [11.133](#)(b)(2):

27 (1) may not grant party status to a person who is not

1 an affected person as determined by the commission under Section  
2 11.1321; and

3 (2) shall limit the scope of the hearing to the  
4 disputed issues of fact or mixed questions of fact and law  
5 identified by the commission under Section 11.133(d)(1).

6 (b) The presiding administrative law judge of a contested  
7 case hearing referred under Section 11.133(a):

8 (1) may not grant party status to a person who is not  
9 an affected person; and

10 (2) shall limit the scope of the hearing to:

11 (A) disputed issues of fact or mixed questions of  
12 fact and law that:

13 (i) are relevant and material to the  
14 decision on the application; and

15 (ii) were raised by a party to the hearing  
16 within the period described by Section 11.132;

17 (B) issues that the parties have agreed to  
18 include in the hearing, with the approval of the presiding judge;  
19 and

20 (C) issues that the presiding judge determines  
21 are necessary to prevent the deprivation of due process or another  
22 constitutional right to a party.

23 (c) The administrative law judge who hears the case shall  
24 issue a proposal for decision on or before the deadline determined  
25 by the commission under Section 11.133(d)(2) unless the judge  
26 determines that failure to extend the deadline would unduly deprive  
27 a party to the hearing of due process or another constitutional



1 right.

2 (d) For the purposes of Subsections (b) and (c), a political  
3 subdivision has the same rights as an individual.

4 SECTION 7. Sections 11.143(d) and (g), Water Code, are  
5 amended to read as follows:

6 (d) Except as otherwise specifically provided by this  
7 subsection, before the commission may approve the application and  
8 issue the permit, it shall give notice and hold a hearing as  
9 prescribed by this section. The commission may act on the  
10 application without holding a contested case [~~public~~] hearing if:

11 (1) not less than 30 days before the date of action on  
12 the application by the commission, the applicant has published the  
13 commission's notice of the application at least once in a newspaper  
14 regularly published or circulated within the section of the state  
15 where the source of water is located;

16 (2) not less than 30 days before the date of action on  
17 the application by the commission, the commission mails a copy of  
18 the notice by first-class mail, postage prepaid, to each person  
19 whose claim or appropriation has been filed with the commission and  
20 whose diversion point is downstream from that described in the  
21 application; and

22 (3) within 30 days after the date of the newspaper  
23 publication of the commission's notice, a contested case [~~public~~]  
24 hearing is not requested in writing by a commissioner, the  
25 executive director, or an affected person who objects to the  
26 application.

27 (g) If on the date specified in the notice prescribed by

1 Subsection (d) of this section, the commission determines that a  
2 contested case [~~public~~] hearing must be held, the matter shall be  
3 remanded for hearing without the necessity of issuing further  
4 notice other than advising all parties of the time and place where  
5 the hearing is to convene.

6 SECTION 8. Section 11.174, Water Code, is amended to read as  
7 follows:

8 Sec. 11.174. COMMISSION MAY INITIATE PROCEEDINGS. When the  
9 commission finds that its records do not show that some portion of  
10 the water has been used during the past 10 years, the executive  
11 director may initiate proceedings, terminated by contested case  
12 [~~public~~] hearing, to cancel the permit, certified filing, or  
13 certificate of adjudication in whole or in part.

14 SECTION 9. Section 11.132(f), Water Code, is repealed.

15 SECTION 10. (a) As soon as practicable after the effective  
16 date of this Act, the Texas Commission on Environmental Quality  
17 shall adopt rules to implement the changes in law made by this Act.

18 (b) The changes in law made by this Act apply only to an  
19 application received by the Texas Commission on Environmental  
20 Quality on or after the effective date of the rules adopted under  
21 Subsection (a) of this section. An application received before the  
22 effective date of the rules adopted under Subsection (a) of this  
23 section is governed by the law in effect on the date the application  
24 was received, and the former law is continued in effect for that  
25 purpose.

26 SECTION 11. This Act takes effect September 1, 2017.