86R22186 SLB-F

By:  Kacal H.B. No. 3114

Substitute the following for H.B. No. 3114:

By:  Lozano C.S.H.B. No. 3114

A BILL TO BE ENTITLED

AN ACT

relating to contested case hearings on matters under the jurisdiction of the Texas Commission on Environmental Quality.

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

ARTICLE 1. CONTESTED CASE HEARINGS

SECTION 1.01.  Section 5.001, Water Code, is amended by amending Subdivision (1) and adding Subdivision (1-a) to read as follows:

(1)  "Administrative law judge" means an individual who presides at an administrative hearing held under Subchapters H and H-1.

(1-a)  "Board" means the Texas Water Development Board.

SECTION 1.02.  Subchapter D, Chapter 5, Water Code, is amended by adding Section 5.1101 to read as follows:

Sec. 5.1101.  ADMINISTRATIVE LAW JUDGES. (a) The commission may employ or contract with administrative law judges to assist the commission in carrying out the duties of the commission under this code and other law.

(b)  Administrative law judges are independent of the executive director of the commission.

SECTION 1.03.  Section 5.228(c), Water Code, is amended to read as follows:

(c)  The executive director shall participate as a party in contested case permit hearings before the commission [~~or the State Office of Administrative Hearings~~] to:

(1)  provide information to complete the administrative record; and

(2)  support the executive director's position developed in the underlying proceeding, unless the executive director has revised or reversed that position.

SECTION 1.04.  The heading to Subchapter H, Chapter 5, Water Code, is amended to read as follows:

SUBCHAPTER H. [~~DELEGATION OF~~] HEARINGS

SECTION 1.05.  Subchapter H, Chapter 5, Water Code, is amended by adding Sections 5.301, 5.302, and 5.310 to read as follows:

Sec. 5.301.  POWERS OF ADMINISTRATIVE LAW JUDGE. (a) An administrative law judge employed by the commission or a temporary administrative law judge may:

(1)  administer an oath;

(2)  take testimony;

(3)  rule on a question of evidence;

(4)  issue an order relating to discovery or another hearing or prehearing matter, including an order imposing a sanction;

(5)  issue an order that refers a case to an alternative dispute resolution procedure, determines how the costs of the procedure will be apportioned, and appoints an impartial third party as described by Section 2009.053, Government Code, to facilitate that procedure;

(6)  issue a proposal for decision that includes findings of fact and conclusions of law; and

(7)  serve as an impartial third party as described by Section 2009.053, Government Code, for a dispute referred by the commission or an administrative law judge, unless one of the parties objects to the appointment.

(b)  An administrative law judge may not serve as an impartial third party for a dispute that the administrative law judge refers to an alternative dispute resolution procedure.

Sec. 5.302.  EX PARTE CONSULTATIONS. (a) Except as provided by Subsection (b), the provisions of Section 2001.061, Government Code, apply in relation to a matter before the commission without regard to whether the matter is considered a contested case under this chapter.

(b)  The provisions of Section 2001.061, Government Code, do not apply to a matter before the commission to the extent that the commission is conducting an alternative dispute resolution procedure in relation to the matter. The commission shall adopt rules that prescribe the types of alternative dispute resolution procedures in which ex parte consultations are prohibited and the types of alternative dispute resolution procedures in which ex parte consultations are allowed. For alternative dispute resolution procedures in which ex parte consultations are prohibited, the commission in adopting rules under this subsection shall model the prohibition after Section 2001.061, Government Code, but may vary the extent of the prohibition if necessary to take into account the nature of alternative dispute resolution procedures.

Sec. 5.310.  APPLICABILITY. This subchapter applies to hearings held for matters under the jurisdiction of the commission.

SECTION 1.06.  Section 5.311, Water Code, is amended to read as follows:

Sec. 5.311.  DELEGATION OF RESPONSIBILITY. (a) The commission may delegate to an administrative law judge employed or contracted by [~~of~~] the commission [~~State Office of Administrative Hearings~~] the responsibility to hear any matter before the commission.

(b)  The [~~Except as provided in Subsection (a), the~~] administrative law judge shall report to the commission on the hearing in the manner provided by law.

SECTION 1.07.  Section 5.312(a), Water Code, is amended to read as follows:

(a)  Except as provided in Subsection (b) and otherwise in this subchapter and Subchapter H-1, all permit decisions shall be made within 180 days of the receipt of the permit application or application amendment or the determination of administrative completeness, whichever is later.

SECTION 1.08.  Section 5.315, Water Code, is amended to read as follows:

Sec. 5.315.  DISCOVERY IN CASES USING PREFILED WRITTEN TESTIMONY. In a contested case hearing delegated by the commission to an administrative law judge [~~the State Office of Administrative Hearings~~] that uses prefiled written testimony, all discovery must be completed before the deadline set by the administrative law judge for the submission of that testimony in accordance with Section 5.318.

SECTION 1.09.  Subchapter H, Chapter 5, Water Code, is amended by adding Sections 5.316 through 5.325 to read as follows:

Sec. 5.316.  HEARING BEFORE COMMISSION; APPLICABILITY OF OTHER LAW. (a) An administrative law judge to whom the commission has delegated a contested case hearing shall conduct the hearing.

(b)  The provisions of Chapter 2001, Government Code, apply to contested case hearings for the commission to the extent not inconsistent with this subchapter.

Sec. 5.317.  ADMINISTRATIVE LAW JUDGES. (a) The commission may employ or contract with qualified individuals to serve as temporary or permanent administrative law judges or technical advisors as necessary.

(b)  To be eligible to preside at a hearing on behalf of the commission, an administrative law judge, regardless of temporary or permanent status, must:

(1)  be licensed to practice law in this state; and

(2)  have the expertise necessary to conduct hearings regarding technical or other specialized subjects that may come before the commission.

Sec. 5.318.  HEARING TIMELINES. (a) The commission shall specify the date by which the administrative law judge is expected to complete the proceeding and provide a proposal for decision to the commission. The administrative law judge may extend the proceeding if the administrative law judge determines that failure to grant an extension would deprive a party of due process or another constitutional right. The administrative law judge shall establish a procedural scheduling order designed to complete the proceeding by the date specified by the commission.

(b)  For a matter relating to an application described by Section 11.122(b-1), the administrative law judge must complete the proceeding and provide a proposal for decision to the commission not later than the 270th day after the date the commission's interim order was signed.

(c)  The timeline specified by Subsection (b) may be extended:

(1)  by agreement of the parties with the approval of the administrative law judge; or

(2)  by the administrative law judge if the judge determines that failure to extend the timeline would unduly deprive a party of due process or another constitutional right.

Sec. 5.319.  SCOPE OF HEARING. In delegating a matter for hearing, the commission shall provide to the administrative law judge a list of specified issues. Except as otherwise provided by this section, the scope of the hearing is limited to the issues specified by the commission. On the request of a party, the administrative law judge may consider an issue that was not specified by the commission if the administrative law judge determines that:

(1)  the issue is material;

(2)  the issue is supported by evidence; and

(3)  there are good reasons for the failure to supply available information regarding the issue during the public comment period.

Sec. 5.320.  DISCOVERY. (a) The scope of permissible discovery is limited to:

(1)  any matter that:

(A)  is reasonably calculated to lead to the discovery of admissible evidence regarding any issue;

(B)  is specified by the commission; or

(C)  the administrative law judge has agreed to consider; and

(2)  the production of documents:

(A)  reviewed or relied on in preparing application materials or selecting the site of the proposed facility; or

(B)  relating to the ownership of the applicant or the owner or operator of the facility or proposed facility.

(b)  The commission by rule shall:

(1)  provide for subpoenas and commissions for depositions; and

(2)  require that discovery be conducted in accordance with the Texas Rules of Civil Procedure, except that the commission by rule shall determine the level of discovery under Rule 190, Texas Rules of Civil Procedure, appropriate for each type of case considered by the commission, taking into account the nature and complexity of the case.

Sec. 5.321.  CERTIFICATION OF ISSUES. The commission shall adopt rules providing for certification to the commission of an issue that involves an ultimate finding of compliance with or satisfaction of a statutory standard the determination of which is committed to the discretion or judgment of the commission by law. The rules must address, at a minimum:

(1)  the issues that are appropriate for certification; and

(2)  the procedure to be used in certifying an issue.

Sec. 5.322.  SANCTIONS. (a) An administrative law judge hearing a case on behalf of the commission, on the judge's own motion or on motion of a party and after notice and an opportunity for a hearing, may impose appropriate sanctions as provided by Subsection (b) against a party or its representative for:

(1)  filing a motion or pleading that is groundless and brought:

(A)  in bad faith;

(B)  for the purpose of harassment; or

(C)  for any other improper purpose, such as to cause unnecessary delay or needless increase in the cost of the proceeding;

(2)  abuse of the discovery process in seeking, making, or resisting discovery; or

(3)  failure to obey an order of the administrative law judge or the commission.

(b)  A sanction imposed under Subsection (a) may include, as appropriate and justified, issuance of an order:

(1)  disallowing further discovery of any kind or of a particular kind by the offending party;

(2)  charging all or any part of the expenses of discovery against the offending party or its representatives;

(3)  holding that designated facts be considered admitted for purposes of the proceeding;

(4)  refusing to allow the offending party to support or oppose a designated claim or defense or prohibiting the party from introducing designated matters into evidence;

(5)  wholly or partly disallowing requests for relief by the offending party and excluding evidence in support of those requests; and

(6)  wholly or partly striking pleadings or testimony, or both.

Sec. 5.323.  PROPOSAL FOR DECISION. (a) After hearing evidence and receiving legal argument, an administrative law judge shall:

(1)  separately state findings of fact, conclusions of law, and any ultimate findings required by statute; and

(2)  make a proposal for decision to the commission and serve the proposal for decision on all parties.

(b)  An opportunity shall be given to each party to file exceptions to the proposal for decision and briefs related to the issues addressed in the proposal for decision.

(c)  The commission shall consider and act on the proposal for decision.

Sec. 5.324.  COMMISSION CONSIDERATION OF AND ACTION ON PROPOSAL FOR DECISION. (a) Except as provided by Section 361.0832, Health and Safety Code, the commission shall consider the proposal for decision prepared by the administrative law judge, the exceptions of the parties, and the briefs and argument of the parties.

(b)  The commission may amend the proposal for decision, including any finding of fact, but an amendment to the proposal for decision and order must be based solely on the record made before the administrative law judge. An amendment by the commission must be accompanied by an explanation of the basis of the amendment.

(c)  The commission may return the matter back to the administrative law judge to:

(1)  reconsider any findings and conclusions set forth in the proposal for decision; or

(2)  take additional evidence or to make additional findings of fact or conclusions of law.

(d)  The commission shall issue its decision and order in accordance with Subchapter F, Chapter 2001, Government Code.

Sec. 5.325.  ALTERNATIVE DISPUTE RESOLUTION. (a) On a joint motion agreed to by all parties, an administrative law judge hearing a case on behalf of the commission may issue an order referring the case to an alternative dispute resolution procedure.

(b)  If the commission has not already conducted an alternative dispute resolution procedure, the administrative law judge shall consider the commission's recommendation in determining whether to issue an order referring the case to the procedure.

SECTION 1.10.  Chapter 5, Water Code, is amended by adding Subchapter H-1 to read as follows:

SUBCHAPTER H-1. HEARINGS ON CERTAIN APPLICATIONS

Sec. 5.340.  APPLICABILITY. This subchapter applies to contested cases regarding permit applications:

(1)  filed on or after September 1, 2015; and

(2)  referred to hearing under Section 5.555 or 5.557.

Sec. 5.341.  HEARING TIMELINES. (a) An administrative law judge shall complete a proceeding to which this subchapter applies and provide a proposal for decision to the commission not later than the earlier of:

(1)  the 180th day after the date of the preliminary hearing; or

(2)  the date specified by the commission.

(b)  The timeline specified by Subsection (a) or Section 5.318, as applicable, may be extended:

(1)  by agreement of the parties with the approval of the administrative law judge; or

(2)  by the administrative law judge if the judge determines that failure to extend the timeline would unduly deprive a party of due process or another constitutional right.

(c)  For the purposes of Subsection (b)(2), a political subdivision has the same constitutional rights as an individual.

(d)  This subsection applies only to a matter sent to hearing under Section 5.557. The administrative law judge may not hold a preliminary hearing until after the executive director has issued a response to public comments under Section 5.555.

Sec. 5.342.  SCOPE OF HEARING. This section applies only to a matter referred to hearing under Section 5.556. Each issue specified by the commission for hearing must have been raised by an affected person in a comment submitted by that affected person in response to a permit application in a timely manner. The list of issues provided must:

(1)  be detailed and complete; and

(2)  contain either:

(A)  only factual questions; or

(B)  mixed questions of fact and law.

Sec. 5.343.  PRIMA FACIE DEMONSTRATION. (a) In a contested case regarding a permit application to which this subchapter applies, the filing with the administrative law judge of the application, the draft permit prepared by the executive director, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that:

(1)  the draft permit meets all state and federal legal and technical requirements; and

(2)  a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.

(b)  A party may rebut a demonstration under Subsection (a) by presenting evidence that:

(1)  relates to a matter sent to hearing under Section 5.557, or an issue included in a list submitted under Section 5.342 in connection with a matter specified under Section 5.556; and

(2)  demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.

(c)  If in accordance with Subsection (b) a party rebuts a presumption established under Subsection (a), the applicant and the executive director may present additional evidence to support the draft permit.

SECTION 1.11.  Sections 5.556(d) and (e), Water Code, are amended to read as follows:

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

(1)  involves a disputed question of fact;

(2)  was raised during the public comment period; and

(3)  is relevant and material to the decision on the application.

(e)  If the commission grants a request for a contested case hearing it shall:

(1)  limit the number and scope of the issues to be specified [~~referred to the State Office of Administrative Hearings~~] for a hearing; and

(2)  consistent with the nature and number of the issues to be considered at the hearing, specify the maximum expected duration of the hearing.

SECTION 1.12.  Section 5.557(b), Water Code, is amended to read as follows:

(b)  Sections 5.318, 5.319, 5.554, 5.555, and 5.556 [~~of this code and Sections 2003.047(e) and (f), Government Code,~~] do not apply to an application referred for a hearing under Subsection (a).

ARTICLE 2. CONFORMING AMENDMENTS

SECTION 2.01.  Section 2003.024(d), Government Code, is amended to read as follows:

(d)  This section does not apply to hearings conducted:

(1)  under Section [~~2003.047 or~~] 2003.049; or

(2)  under the administrative license revocation program.

SECTION 2.02.  Section 2003.025(a), Government Code, is amended to read as follows:

(a)  This section applies to a state agency that has entered into a contract with the office for the conduct of hearings and alternative dispute resolution procedures for the agency, including a contract under Section 2003.024, [~~2003.048,~~] 2003.049, or 2003.105, during any of the three most recent state fiscal years.

SECTION 2.03.  Section 2003.0421(c), Government Code, is amended to read as follows:

(c)  This section applies to any contested case hearing conducted by the office, except hearings conducted on behalf of [~~the Texas Commission on Environmental Quality or~~] the Public Utility Commission of Texas which are governed by Section [~~Sections 2003.047 and~~] 2003.049.

ARTICLE 3. REPEALER

SECTION 3.01.  The following provisions are repealed:

(1)  Section 2003.047, Government Code;

(2)  Section 2003.048, Government Code; and

(3)  Section 5.313, Water Code.

ARTICLE 4. TRANSITION; EFFECTIVE DATE

SECTION 4.01.  Not later than September 1, 2020, the Texas Commission on Environmental Quality shall adopt rules to implement the changes in law made by this Act.

SECTION 4.02.  As soon as practicable after the effective date of this Act, the chief administrative law judge of the State Office of Administrative Hearings and the executive director of the Texas Commission on Environmental Quality shall enter into a memorandum of understanding to:

(1)  determine the number of administrative law judges necessary to conduct hearings for the Texas Commission on Environmental Quality effectively and other details related to the qualification and requirements of those administrative law judges;

(2)  make the necessary changes in the State Office of Administrative Hearings to implement the changes in law made by this Act; and

(3)  arrange for the transfer from the State Office of Administrative Hearings to the Texas Commission on Environmental Quality all equipment, data, facilities, and other items related to hearings conducted on behalf of the commission, to occur not later than September 1, 2020.

SECTION 4.03.  The changes in law made by this Act apply only to a contested case hearing referred by the Texas Commission on Environmental Quality to an administrative law judge on or after September 1, 2020. A contested case hearing referred by the Texas Commission on Environmental Quality to an administrative law judge before September 1, 2020, is governed by the law in effect at the time the case was referred, and the former law is continued in effect for that purpose.

SECTION 4.04.  This Act takes effect September 1, 2019.