

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

1 AN ACT
2 relating to contested case hearings on matters under the
3 jurisdiction of the Texas Commission on Environmental Quality.

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

5 ARTICLE 1. CONTESTED CASE HEARINGS

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

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

12 (1-a) "Board" means the Texas Water Development Board.

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

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

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

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

23 (c) The executive director shall participate as a party in
24 contested case permit hearings before the commission [~~or the State~~

1 ~~Office of Administrative Hearings]~~ to:

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

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

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

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

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

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

16 (1) administer an oath;

17 (2) take testimony;

18 (3) rule on a question of evidence;

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

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

27 (6) issue a proposal for decision that includes

1 findings of fact and conclusions of law; and

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

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

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

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

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

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

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

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

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

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

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

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

1 Section 5.318.

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

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

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

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

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

- 17 (1) be licensed to practice law in this state; and
18 (2) have the expertise necessary to conduct hearings
19 regarding technical or other specialized subjects that may come
20 before the commission.

21 Sec. 5.318. HEARING TIMELINES. (a) The commission shall
22 specify the date by which the administrative law judge is expected
23 to complete the proceeding and provide a proposal for decision to
24 the commission. The administrative law judge may extend the
25 proceeding if the administrative law judge determines that failure
26 to grant an extension would deprive a party of due process or
27 another constitutional right. The administrative law judge shall

1 establish a procedural scheduling order designed to complete the
2 proceeding by the date specified by the commission.

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

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

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

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

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

23 (1) the issue is material;

24 (2) the issue is supported by evidence; and

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

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

3 (1) any matter that:

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

6 (B) is specified by the commission; or

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

9 (2) the production of documents:

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

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

15 (b) The commission by rule shall:

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

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

24 Sec. 5.321. CERTIFICATION OF ISSUES. The commission shall
25 adopt rules providing for certification to the commission of an
26 issue that involves an ultimate finding of compliance with or
27 satisfaction of a statutory standard the determination of which is

1 committed to the discretion or judgment of the commission by law.

2 The rules must address, at a minimum:

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

4 and

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

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

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

13 (A) in bad faith;

14 (B) for the purpose of harassment; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 parties.

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

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

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

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

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

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

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

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

26 SUBCHAPTER H-1. HEARINGS ON CERTAIN APPLICATIONS

27 Sec. 5.340. APPLICABILITY. This subchapter applies to

1 contested cases regarding permit applications:

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

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

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

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

10 (2) the date specified by the commission.

11 (b) The timeline specified by Subsection (a) or Section
12 5.318, as applicable, may be extended:

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

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

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

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

24 Sec. 5.342. SCOPE OF HEARING. This section applies only to
25 a matter referred to hearing under Section 5.556. Each issue
26 specified by the commission for hearing must have been raised by an
27 affected person in a comment submitted by that affected person in

1 response to a permit application in a timely manner. The list of
2 issues provided must:

3 (1) be detailed and complete; and

4 (2) contain either:

5 (A) only factual questions; or

6 (B) mixed questions of fact and law.

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

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

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

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

22 (1) relates to a matter sent to hearing under Section
23 5.557, or an issue included in a list submitted under Section 5.342
24 in connection with a matter specified under Section 5.556; and

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

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

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

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

- 11 (1) involves a disputed question of fact;
12 (2) was raised during the public comment period; and
13 (3) is relevant and material to the decision on the
14 application.

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

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

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

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

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

1 (a).

2 ARTICLE 2. CONFORMING AMENDMENTS

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

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

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

7 (2) under the administrative license revocation
8 program.

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

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

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

18 (c) This section applies to any contested case hearing
19 conducted by the office, except hearings conducted on behalf of
20 [~~the Texas Commission on Environmental Quality or~~] the Public
21 Utility Commission of Texas which are governed by Section [~~Sections~~
22 ~~2003.047 and~~] 2003.049.

23 ARTICLE 3. REPEALER

24 SECTION 3.01. The following provisions are repealed:

25 (1) Section 2003.047, Government Code;

26 (2) Section 2003.048, Government Code; and

27 (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

1 time the case was referred, and the former law is continued in
2 effect for that purpose.

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