

By: Kacal

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

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

SECTION 1.02. Section 5.311, Water Code, is amended to read as follows:

Sec. 5.311. DELEGATION OF RESPONSIBILITY. (a) The commission by rule may delegate to an administrative law judge of the commission [~~State Office of Administrative Hearings~~] the responsibility to hear any matter before the commission, if consistent with the responsibilities of the office of administrative law judge.

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

(a) Except as provided in Subsection (b) and otherwise in this subchapter, all permit decisions shall be made within 180 days of the receipt of the permit application or application amendment

1 or the determination of administrative completeness, whichever is  
2 later.

3 SECTION 1.04. Section 5.315, Water Code, is amended to read  
4 as follows:

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

11 SECTION 1.05. Subchapter H, Chapter 5, Water Code, is  
12 amended by adding Sections 5.316 through 5.326 to read as follows:

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

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

20 Sec. 5.317. ADMINISTRATIVE LAW JUDGES AND TECHNICAL  
21 ADVISORS. (a) The commission may contract with qualified  
22 individuals to serve as temporary or permanent administrative law  
23 judges or technical advisors as necessary.

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

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

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

4           (c) The commission may also appoint a technical advisor to  
5 assist the administrative law judge in presiding over a delegated  
6 hearing.

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

16           (b) For a matter sent to hearing under Section 5.556 or  
17 5.557, the administrative law judge shall complete the proceeding  
18 and provide a proposal for decision to the commission not later than  
19 the earlier of:

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

22           (2) the date specified by the commission.

23           (c) The timeline specified by Subsection (b) or (f), as  
24 applicable, may be extended:

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

27           (2) by the administrative law judge if the judge

1 determines that failure to extend the timeline would unduly deprive  
2 a party of due process or another constitutional right.

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

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

9 (f) For a matter relating to an application described by  
10 Section 11.122(b-1), the administrative law judge must complete the  
11 proceeding and provide a proposal for decision to the commission  
12 not later than the 270th day after the date the matter was sent to  
13 hearing.

14 Sec. 5.319. SCOPE OF HEARING. (a) In delegating a matter  
15 for hearing, the commission shall provide to the administrative law  
16 judge a list of specified issues. Each specified issue must have  
17 been raised by an affected person in a comment submitted by that  
18 affected person in response to a permit application in a timely  
19 manner. The list of issues provided must:

20 (1) be detailed and complete; and

21 (2) contain either:

22 (A) only factual questions; or

23 (B) mixed questions of fact and law.

24 (b) Except as otherwise provided by this subsection, the  
25 scope of the hearing is limited to the issues specified by the  
26 commission. On the request of a party, the administrative law judge  
27 may consider an issue that was not specified by the commission if

1 the administrative law judge determines that:

2 (1) the issue is material;

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

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

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

9 (1) any matter that:

10 (A) is reasonably calculated to lead to the  
11 discovery of admissible evidence regarding any issue specified by  
12 the commission; or

13 (B) the administrative law judge has agreed to  
14 consider; and

15 (2) the production of documents:

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

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

21 (b) The commission by rule shall:

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

24 (2) require that discovery be conducted in accordance  
25 with the Texas Rules of Civil Procedure, except that the commission  
26 by rule shall determine the level of discovery under Rule 190, Texas  
27 Rules of Civil Procedure, appropriate for each type of case

1 considered by the commission, taking into account the nature and  
2 complexity of the case.

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

- 9 (1) the issues that are appropriate for certification;  
10 and  
11 (2) the procedure to be used in certifying an issue.

12 Sec. 5.322. PRIMA FACIE DEMONSTRATION IN CERTAIN CASES.

13 (a) In a contested case regarding a permit application sent to  
14 hearing under Section 5.556 or Section 5.557, the filing with the  
15 administrative law judge of the application, the draft permit  
16 prepared by the executive director, the preliminary decision issued  
17 by the executive director, and other sufficient supporting  
18 documentation in the administrative record of the permit  
19 application establishes a prima facie demonstration that:

- 20 (1) the draft permit meets all state and federal legal  
21 and technical requirements; and  
22 (2) a permit, if issued consistent with the draft  
23 permit, would protect human health and safety, the environment, and  
24 physical property.

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

- 27 (1) relates to a matter sent to hearing under Section

1 5.557, or an issue included in a list submitted under Section 5.319  
2 in connection with a matter specified under Section 5.556; and

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

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

10 Sec. 5.323. SANCTIONS. (a) An administrative law judge  
11 hearing a case on behalf of the commission, on the judge's own  
12 motion or on motion of a party and after notice and an opportunity  
13 for a hearing, may impose appropriate sanctions as provided by  
14 Subsection (b) against a party or its representative for:

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

17 (A) in bad faith;

18 (B) for the purpose of harassment; or

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

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

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

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

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

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

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

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

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

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

15           Sec. 5.324. PROPOSAL FOR DECISION. (a) After hearing  
16 evidence and receiving legal argument, an administrative law judge  
17 shall:

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

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

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

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

27           Sec. 5.325. COMMISSION CONSIDERATION OF AND ACTION ON



1 PROPOSAL FOR DECISION. (a) Except as provided by Section 361.0832,  
2 Health and Safety Code, the commission shall consider the proposal  
3 for decision prepared by the administrative law judge, the  
4 exceptions of the parties, and the briefs and argument of the  
5 parties.

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

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

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

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

17 (d) The commission shall serve a copy of the commission's  
18 order, including its finding of facts and conclusions of law, on  
19 each party.

20 Sec. 5.326. ALTERNATIVE DISPUTE RESOLUTION. (a) An  
21 administrative law judge hearing a case on behalf of the commission  
22 may not, without the agreement of all parties, issue an order  
23 referring the case to an alternative dispute resolution procedure  
24 if the commission has already conducted an unsuccessful alternative  
25 dispute resolution procedure.

26 (b) If the commission has not already conducted an  
27 alternative dispute resolution procedure, the administrative law

1 judge shall consider the commission's recommendation in  
2 determining whether to issue an order referring the case to the  
3 procedure.

4 SECTION 1.06. Sections 5.556(d) and (e), Water Code, are  
5 amended to read as follows:

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

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

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

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

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

22 SECTION 1.07. Section 5.557(b), Water Code, is amended to  
23 read as follows:

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

(2) Section 5.313, Water Code.

1                   ARTICLE 4. TRANSITION; EFFECTIVE DATE

2                   SECTION 4.01. The changes in law made by this Act apply only  
3 to a contested case hearing referred by the Texas Commission on  
4 Environmental Quality to an administrative law judge on or after  
5 the effective date of this Act. A contested case hearing referred  
6 by the Texas Commission on Environmental Quality to an  
7 administrative law judge before the effective date of this Act is  
8 governed by the law in effect at the time the case was referred and  
9 the former law is continued in effect for that purpose.

10                  SECTION 4.02. This Act takes effect September 1, 2019.