

BILL ANALYSIS

Senate Research Center

S.B. 1397
By: Schwertner et al.
Natural Resources & Economic Development
6/29/2023
Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

S.B. 1397 enacts the statutory recommendations of the Sunset Advisory Commission regarding the Texas Commission on Environmental Quality (TCEQ). As the state's environmental regulator, TCEQ permits and monitors the emission, discharge, or disposal of hazardous chemicals and pollution into the air, water, and soil.

TCEQ is subject to abolishment under the Sunset Act on September 1, 2023, unless continued by the legislature. Overall, the Sunset Commission found TCEQ performs admirably administering its complex programs and recommends continuing the agency for 12 years. However, the commission recommends improvements to TCEQ's decision-making transparency, opportunities for public input, and dissemination of public information. The Sunset Commission also recommends updating TCEQ's enforcement practices to better focus on the riskiest actors and ensure staff treat potential violations consistently and based on severity.

TCEQ is governed by Chapters 5 and 7, Water Code, and Chapters 361, 363, and 382, Health and Safety Code, among numerous others.

This legislation addresses issues differently from current law by:

- Continuing TCEQ for 12 years and ensures only TCEQ, not its statute, is subject to abolishment.
- Directs TCEQ to provide outreach and education to the public on the public participation process for permitting.
- Requiring the public comment period and opportunity to request a contested case hearing for certain air permit applications to remain open for at least 36 hours after a public meeting on the permit.
- Requiring TCEQ to post permit applications and associated materials on its website once an application is administratively complete.
- Authorizing TCEQ to hold virtual public meetings and to use electronic posting rather than physical notices for permit applications.
- Requiring TCEQ to consider all severities of violations when classifying an entity as a repeat violator.
- Increasing TCEQ's maximum administrative penalty from \$25,000 to \$40,000 per day for certain violations.
- Creating an enforcement diversion program for small businesses and local governments.
- Requiring TCEQ-regulated entities with temporary or open-ended permits to annually confirm their operation status.
- Creating a permit for concrete batch plant operations supporting a public works project.

- Requiring the legislative Environmental Flows Advisory Group to adopt a biennial statewide work plan for updating environmental flow standards.

S.B. 1397 amends current law relating to the continuation and functions of the Texas Commission on Environmental Quality.

RULEMAKING AUTHORITY

Rulemaking authority previously granted to the Texas Commission on Environmental Quality is modified in SECTION 1 (Section 382.05101, Health and Safety Code) and SECTION 9 (Section 5.129, Water Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 382.05101, Health and Safety Code, as follows:

Sec. 382.05101. DE MINIMIS AIR CONTAMINANTS. Authorizes the Texas Commission on Environmental Quality (TCEQ) to develop by rule the criteria to establish a de minimis level of air contaminants for facilities or groups of facilities below which the following types of permits are not required:

- (1) a permit under certain sections;
- (2) a standard permit under Section 382.05195 (Standard Permit), 382.05198 (Standard Permit for Certain Concrete Plants), or 382.051985; or
- (3) a permit by rule under Section 382.05196 (Permits by Rule).

Makes nonsubstantive changes.

SECTION 2. Amends Section 382.0511(c), Health and Safety Code, to make nonsubstantive and conforming changes.

SECTION 3. Amends Subchapter C, Chapter 382, Health and Safety Code, by adding Section 382.051985, as follows:

Sec. 382.051985. STANDARD PERMIT FOR CERTAIN TEMPORARY CONCRETE PLANTS FOR PUBLIC WORKS. (a) Requires TCEQ to issue a standard permit that meets the requirements of Section 382.05195 for a temporary concrete plant that performs wet batching, dry batching, or central mixing to support a public works project. Provides that a plant operating under the permit:

- (1) is prohibited from supporting a project that is not related to the public works project; and
 - (2) is required to be located in or contiguous to the right-of-way of the public works project.
- (b) Authorizes a plant permitted under this section to occupy a designated site for not more than 180 consecutive days or to supply material for a single project, but not other unrelated projects.

SECTION 4. Amends Section 382.056, Health and Safety Code, by adding Subsection (k-2), as follows:

(k-2) Requires TCEQ, if TCEQ holds a public meeting for a permit application for which consolidated notice was issued under Subchapter C (Permits), to hold open the public comment period and the period for which a contested case hearing is authorized to be requested for the permit application for at least 36 hours after the end of the meeting, notwithstanding any other law.

SECTION 5. Amends Section 5.014, Water Code, as follows:

Sec. 5.014. SUNSET PROVISION. Provides that TCEQ, unless continued in existence as provided by Chapter 325 (Sunset Law), Government Code, is abolished September 1, 2035, rather than TCEQ is abolished and Chapter 5 (Texas Commission on Environmental Quality) expires September 1, 2023.

SECTION 6. Amends Section 5.0535, Water Code, by amending Subsection (b) and adding Subsection (d), as follows:

(b) Requires that the training program provide the person with information regarding:

- (1) the law governing TCEQ operations;
- (2) the programs, functions, rules, and budget of TCEQ;
- (3) the scope of and limitations on the rulemaking authority of TCEQ;
- (4) the results of the most recent formal audit of TCEQ;
- (5) the requirements of laws relating to open meetings, public information, administrative procedure, and disclosing conflicts-of-interest; and other laws applicable to members of a state policy-making body in performing their duties; and
- (6) any applicable ethics policies adopted by TCEQ or the Texas Ethics Commission.

Deletes existing text requiring that the training program provide the person with information regarding the legislation that created TCEQ; the programs operated by TCEQ; the role and functions of TCEQ; the rules of TCEQ, with an emphasis on the rules that relate to disciplinary and investigatory authority; the current budget for TCEQ, the results of recent significant internal and external audits of TCEQ; and the requirements of the open meetings law, Chapter 551 (Open Meetings), Government Code, the public information law, Chapter 552 (Public Information), Government Code, the administrative procedure law, Chapter 2001 (Administrative Procedure), Government Code, and other laws relating to public officials, including conflict-of-interest laws.

(d) Requires the executive director of TCEQ (executive director) to create a training manual that includes the information required by Subsection (b). Requires the executive director to distribute a copy of the training manual annually to each member of TCEQ. Requires each member of TCEQ to sign and submit to the executive director a statement acknowledging that the member received and has reviewed the training manual.

SECTION 7. Amends Section 5.113, Water Code, as follows:

Sec. 5.113. COMMISSION AND STAFF RESPONSIBILITY POLICY. Requires TCEQ to develop and implement policies that clearly separate the policy-making responsibilities of TCEQ and the management responsibilities of the executive director and the staff of TCEQ. Makes a nonsubstantive change.

SECTION 8. Amends the heading to Section 5.129, Water Code, to read as follows:

Sec. 5.129. SUMMARY OF AND INFORMATION PROVIDED BY PUBLIC NOTICES.

SECTION 9. Amends Section 5.129, Water Code, by amending Subsection (a) and adding Subsection (a-1), as follows:

(a) Requires TCEQ by rule to provide for each public notice issued or published by TCEQ or by a person under the jurisdiction of TCEQ as required by law or by TCEQ rule to include:

(1) makes nonsubstantive changes to this subdivision; and

(2) to the extent applicable, the name of the permit applicant, the type of permit applied for, and the address of each proposed or existing site subject to the proposed permit.

(a-1) Requires that the rules adopted under this section provide that a summary statement is required to be designed to inform the reader of the subject matter of the notice without having to read the entire text of the notice.

SECTION 10. Amends Subchapter D, Chapter 5, Water Code, by adding Section 5.136, as follows:

Sec. 5.136. COMMUNITY OUTREACH. Requires TCEQ to provide outreach and education to the public on participating in the permitting process under the air, waste, and water programs within TCEQ's jurisdiction.

SECTION 11. Amends Subchapter E, Chapter 5, Water Code, by adding Section 5.1734, as follows:

Sec. 5.1734. ELECTRONIC POSTING OF PERMIT APPLICATIONS. (a) Requires TCEQ to post on its website at the time a permit application becomes administratively complete:

(1) the permit application and any associated materials; and

(2) for a permit application under Subchapter D (Permits to Use State Water), Chapter 11, any map accompanying the permit application.

(b) Requires TCEQ, if a permit application is revised or amended after the permit application has become administratively complete, to post on its website the revised or amended permit application.

(c) Authorizes TCEQ to exempt any associated materials from being posted on its website under Subsections (a) and (b) if TCEQ determines that:

(1) posting the materials on the website would be unduly burdensome; or

(2) the materials are too large to be posted on the website.

(d) Requires TCEQ, notwithstanding any other law, to require each applicant for a permit, permit amendment, or permit renewal that requires notice be published to include in the notice the address of the website where the public can access information about the permit as described by Subsection (a).

(e) Requires TCEQ, in implementing this section, to consider and accommodate residents of each area affected by proposed permit, permit amendment, or permit renewal who may need assistance accessing the application and associated materials because of a lack of access to Internet services, particularly when there is a heightened public interest or in response to public comment.

SECTION 12. Amends Chapter 5, Water Code, by adding Subchapter M-1, as follows:

SUBCHAPTER M-1. PERMITTING PROCEDURES GENERALLY

Sec. 5.581. DEFINITION. Defines "permit."

Sec. 5.582. APPLICABILITY. Provides that this subchapter applies to programs and permits arising under the air, waste, or water programs within TCEQ's jurisdiction.

Sec. 5.583. ELECTRONIC PUBLICATION OF NOTICE. (a) Requires TCEQ to publish notice of a permit application on TCEQ's website and authorizes TCEQ to provide additional electronic notice through other means, including direct e-mail. Provides that the notice published under this section is in addition to any other notice requirement.

(b) Requires TCEQ to consider and accommodate residents of each area affected by a proposed permit, permit amendment, or permit renewal who may need assistance accessing notice published by electronic means because of a lack of access to Internet services, particularly when there is a heightened public interest or in response to public comment.

Sec. 5.584. VERIFICATION OF NOTICE BY NEWSPAPER. Requires the applicant, if an applicant for a permit is required to publish notice in a newspaper, to provide to TCEQ a copy of the published notice and an affidavit from the publisher certifying that the notice was published and the publication meets all applicable requirements, including newspaper circulation.

Sec. 5.585. SECURITY AT PUBLIC MEETING OR PUBLIC HEARING. Authorizes TCEQ to request that an applicant for a permit that is the subject of a public meeting or public hearing provide uniformed security at the meeting or hearing sufficient to provide for the safety of all attendees and orderly conduct at the meeting or hearing.

Sec. 5.586. NOTICE TO STATE SENATOR AND STATE REPRESENTATIVE. (a) Provides that this section applies only to a permit application for which public notice is required.

(b) Requires TCEQ to send notice of receipt of the application for a permit to each state senator and state representative who represent the area in which the facility or activity which the application relates is or will be located.

Sec. 5.587. TEMPORARY AND INDEFINITE PERMIT REPORTING. (a) Provides that this section does not apply to a person who holds a temporary permit or permit with an indefinite term that has a regular reporting requirement.

(b) Requires a person who holds a temporary permit or permit with an indefinite term to report to TCEQ annually whether the activity subject to the permit is ongoing.

SECTION 13. Amends Section 5.754, Water Code, by amending Subsection (c) and adding Subsection (c-1), as follows:

(c) Requires TCEQ, in classifying a person's compliance history, to:

(1) makes no change to this subdivision;

(2) establish criteria for classifying a repeat violator, including setting the number of major, moderate, and minor violations needed to be classified as a repeat violator; and giving consideration to the size and complexity of the site at which the violations occurred, and limiting consideration to violations of the same nature and the same environmental media that occurred in the preceding five years; and

(3) makes no change to this subdivision.

(c-1) Authorizes the executive director to review, suspend, or reclassify a person's compliance history in accordance with TCEQ rules if the executive director determines that exigent circumstances exist.

SECTION 14. Amends Section 7.052(c), Water Code, as follows:

(c) Creates an exception under this subsection. Prohibits the amount of the penalty for such a violation from exceeding \$40,000 a day if:

(1) the violation involves:

(A) an actual release of pollutants to the air, water, or land that exceeds levels that are protective of human health or environmental receptors; or

(B) an actual unauthorized diversion, taking, or storage of state water or an unauthorized change in the flood elevation of a stream that deprives others of water, severely affects aquatic life, or results in a safety hazard, property damage, or economic loss;

(2) the person previously committed a violation of the same nature that resulted in the assessment of an administrative penalty; and

(3) TCEQ determines the person could have reasonably anticipated and avoided the violation.

SECTION 15. Amends Subchapter C, Chapter 7, Water Code, by adding Section 7.0675, as follows:

Sec. 7.0675. ENFORCEMENT DIVERSION PROGRAM FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS. (a) Defines "small business."

(b) Requires TCEQ to establish an enforcement diversion program for small businesses and local governments. Requires that the program include:

(1) resources developed for the small business compliance assistance program under Section 5.135 (Small Business Compliance Assistance Program);

(2) compliance assistance training; and

(3) on-site technical assistance and training performed by TCEQ staff.

(c) Authorizes TCEQ, before TCEQ initiates an enforcement action for a violation committed by a small business or local government, to enroll the business or government into the enforcement diversion program.

(d) Prohibits TCEQ from enrolling a small business or local government into the enforcement diversion program if an enforcement action against the business or government is required by federal law.

(e) Prohibits TCEQ from initiating against a small business or local government an enforcement action for a violation that prompted enrollment in the enforcement diversion program after the business or government has successfully completed the program.

(f) Provides that a small business or local government is not eligible to enroll in the enforcement diversion program if the business or government:

(1) committed a violation that:

(A) resulted in an imminent threat to public health; or

(B) was a major violation, as classified under Section 5.754 (Classification and Use of Compliance History); or

(2) was enrolled in the program in the two years preceding the date of the violation.

SECTION 16. Amends Subchapter B, Chapter 11, Water Code, by adding Section 11.02363, as follows:

Sec. 11.02363. PERIODIC REVIEW OF ENVIRONMENTAL FLOW STANDARDS; STATEWIDE WORK PLAN. (a) Requires the environmental flows advisory group (advisory group), periodically, to review the environmental flow standards for each river basin and bay system adopted by TCEQ under Section 11.1471 (Environmental Flow Standards and Set-Asides). Requires the advisory group, in conducting a review of the environmental flow standards, to:

(1) work with the science advisory committee and the pertinent basin and bay area stakeholder committees and basin and bay expert science teams in a manner similar to that provided by Section 11.02362 (Development of Environmental Flow Regime Recommendations);

(2) take into consideration the work plans developed under Section 11.02362(p) (relating to requiring each basin and bay area stakeholders committee, with the assistance of the pertinent basin and bay expert science team, in recognition of the importance of adaptive management, after submitting its recommendations regarding environmental flow standards and strategies to meet the environmental flow standards to TCEQ, to prepare and submit for approval by the advisory group a work plan);

(3) analyze previous environmental flow regime recommendations and standards;

(4) prescribe future monitoring, studies, and activities needed to better understand the environmental flow; and

(5) validate or refine:

(A) the environmental flow recommendations;

(B) the environmental flow standards adopted by TCEQ; and

(C) strategies to achieve the environmental flow standards.

(b) Requires the advisory group to develop a biennial statewide work plan to prioritize and schedule the review of environmental flow standards under Subsection (a). Requires that the work plan establish:

(1) the methodology used to prioritize the review of the environmental flow standards of each river basin and bay system; and

(2) a timeline for the review of the environmental flow standards of each river basin and bay system.

(c) Requires the advisory group to submit to TCEQ:

(1) any review conducted under Subsection (a), including recommendations to TCEQ for use in adopting rules under Section 11.1471; and

(2) the biennial work plan developed under Subsection (b).

SECTION 17. Amends Section 11.1471, Water Code, by amending Subsection (f) and adding Subsection (g), as follows:

(f) Requires TCEQ to consider the review of environmental flow standards by the advisory group under Section 11.02363(a) when altering an environmental flow standard or environmental flow set-aside. Requires TCEQ, in establishing a schedule, to consider the work plan developed by the advisory group under Section 11.02363(b) and the applicable work plan approved by the advisory group under Section 11.02362(p). Prohibits TCEQ's schedule from providing for the rulemaking process to occur more frequently than once every 10 years unless the work plans provide for a periodic review under Sections 11.02363(a) and 11.02362(p) to occur more frequently than once every 10 years. Makes nonsubstantive changes.

(g) Requires TCEQ to submit a biennial report to the advisory group on the implementation and effectiveness of environmental flow standards. Requires that the report include:

(1) a description of progress made over the previous biennium in implementing environmental flow standards, including the status of any efforts to set aside unappropriated water for environmental flow protection;

(2) input provided by the Texas Water Development Board and the Texas Parks and Wildlife Department on their:

(A) activities related to environmental flow standards; and

(B) recommendations for the work plan developed under Section 11.02363(b); and

(3) recommendations for the work plan developed under Section 11.02363(b).

SECTION 18. Amends the heading to Chapter 28A, Water Code, to read as follows:

CHAPTER 28A. CERTAIN AGGREGATE PRODUCTION OPERATIONS

SECTION 19. Amends Chapter 28A, Water Code, by adding Subchapter D, as follows:

SUBCHAPTER D. BEST MANAGEMENT PRACTICES

Sec. 28A.151. BEST MANAGEMENT PRACTICES. (a) Requires TCEQ to develop and make accessible on TCEQ's Internet website recommended best management practices for aggregate production operations that operate under the jurisdiction of TCEQ. Requires that the best management practices include operational issues related to:

(1) dust control;

(2) water use; and

(3) water storage.

(b) Authorizes TCEQ to coordinate with other agencies when developing the best management practices under this section.

(c) Provides that the best management practices developed under this section are not subject to enforcement by TCEQ.

SECTION 20. Amends Section 49.011(b), Water Code, to require TCEQ to provide the notice to each state representative and state senator who represents an area inside the proposed district's boundaries.

SECTION 21. Repealers: Sections 11.0236(m) (relating to abolishing the advisory group on the date that TCEQ has adopted environmental flow standards for all of the river basin and bay systems in this state) and 11.02361(g) (relating to abolishing the science advisory committee on the date the advisory group is abolished), Water Code.

Repealer: Section 11.02362(s) (relating to abolishing each basin and bay area stakeholders committee and basin and bay expert science team on the date the advisory group is abolished), Water Code.

SECTION 22. (a) Provides that Section 5.0535, Water Code, as amended by this Act, except as provided by Subsection (b) of this section, applies to a member of TCEQ appointed before, on, or after the effective date of this Act.

(b) Provides that a member of TCEQ who, before the effective date of this Act, completed the training program required by Section 5.0535 (Required Training Program for Commission Members), Water Code, as that law existed before the effective date of this Act, is only required to complete additional training on the subjects added by this Act to the training program required by Section 5.0535, Water Code. Prohibits a member described by this subsection from voting, deliberating, or being counted as a member in attendance at a meeting of TCEQ held on or after December 1, 2023, until the member completes the additional training.

SECTION 23. Requires a permit holder subject to Section 5.587, Water Code, as added by this Act, to first report to TCEQ the status of the permitted activity not later than December 31, 2024.

SECTION 24. Makes application of the change in law made by this Act to Section 7.052, Water Code, prospective.

SECTION 25. (a) Requires TCEQ, not later than January 1, 2024, to submit to the advisory group the first biennial report on the implementation and effectiveness of environmental flow standards under Section 11.1471(g), Water Code, as added by this Act.

(b) Requires the advisory group to produce and deliver to TCEQ the first biennial statewide work plan developed under Section 11.02363, Water Code, as added by this Act, not later than January 1, 2025.

SECTION 26. Effective date: September 1, 2023.