

BILL ANALYSIS

C.S.S.B. 1397
By: Schwertner
Environmental Regulation
Committee Report (Substituted)

BACKGROUND AND PURPOSE

As the state's environmental regulator, the Texas Commission on Environmental Quality (TCEQ) permits and monitors the emission, discharge, and disposal of hazardous chemicals and pollution into the air, water, and soil. During its review of the TCEQ, the Sunset Advisory Commission found that the TCEQ performs admirably administering its complex programs and recommended continuing the agency for 12 years. However, to increase transparency, the sunset commission recommended improvements to the TCEQ's decision-making processes and additional opportunities for public input and dissemination of public information. The sunset commission also recommended updating the TCEQ's enforcement practices to better focus on the riskiest actors and ensure staff treat potential violations consistently and based on severity. C.S.S.B. 1397 seeks to continue the TCEQ for the recommended 12 years and implement certain of the other recommendations from the sunset review process.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.S.B. 1397 amends the Water Code to continue the Texas Commission on Environmental Quality (TCEQ) under the Texas Sunset Act until September 1, 2035, and to remove language that subjects the TCEQ's governing provisions to expiration under the act. The bill makes further updates to the TCEQ's administration and operation as detailed below.

TCEQ Permits

Information Included in a Public Notice

C.S.S.B. 1397 requires the TCEQ to provide for each public notice issued or published by the TCEQ or by a person under TCEQ jurisdiction as required by law or by TCEQ rule to include, to the extent applicable, the applicant's name, the type of permit applied for, and the location of each proposed or existing site subject to the proposed permit.

Community Outreach

C.S.S.B. 1397 requires the TCEQ to provide outreach and education to the public on participating in the permitting process under the air, waste, and water programs within TCEQ jurisdiction.

Online Posting of Permit Applications

C.S.S.B. 1397 requires the TCEQ to post the following on its website at the time a permit application becomes administratively complete:

- the permit application and any associated materials; and
- for an application for a permit to use state water, any map accompanying the application.

If a permit application is revised or amended after becoming administratively complete, the TCEQ must also post the revised or amended application on its website. The TCEQ may exempt any associated materials from being posted on its website on making a determination that posting the materials would be unduly burdensome or that the materials are too large to be posted.

C.S.S.B. 1397 requires the TCEQ to require each applicant for a permit, permit amendment, or permit renewal that requires notice be published to include in the notice the website address where the public can access that permit information. The bill requires the TCEQ, in implementing these provisions, to consider and accommodate residents of each area affected by a proposed permit, permit amendment, or permit renewal who may need assistance accessing the application and associated materials because of a lack of Internet access, particularly when there is a heightened public interest or in response to public comment.

General Permitting Procedures for Air, Waste, and Water Programs

C.S.S.B. 1397 sets out the following general permitting procedures applicable to programs and permits arising under the air, waste, or water programs within TCEQ jurisdiction:

- in addition to any other notice requirement, the TCEQ must publish notice of a permit application on its website and may provide additional electronic notice through other means, including direct email;
- in electronically publishing a notice of a permit application, the TCEQ must consider and accommodate residents of each area affected by a proposed permit, permit amendment, or permit renewal who may need assistance because of a lack of Internet access, particularly when there is a heightened public interest or in response to public comment;
- if a permit applicant is required to publish notice in a newspaper, the applicant must provide to the 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;
- the TCEQ may 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;
- the TCEQ must send notice of receipt of a permit application for which public notice is required to each state senator and state representative who represent the area in which the facility or activity to which the application relates is or will be located; and
- a person who holds a temporary permit or permit with an indefinite term that does not otherwise have a regular reporting requirement must report to the TCEQ annually whether the activity subject to the permit is ongoing with the first report due not later than December 31, 2024.

For purposes of these provisions of the bill, the bill defines "permit" as a permit, approval, registration, or other form of authorization required by law for a person to engage in an action.

Standard Permit for Certain Temporary Concrete Plants

C.S.S.B. 1397 amends the Health and Safety Code to require the TCEQ to issue a standard permit that meets the requirements applicable to a standard permit for a permanent concrete plant for a temporary concrete plant that performs wet batching, dry batching, or central mixing

to support a public works project. The bill, with respect to a plant operating under the permit, does the following:

- prohibits the plant from supporting a project that is not related to the public works project; and
- requires the plant to be located in or contiguous to the right-of-way of the public works project.

A permitted temporary plant may occupy a designated site for not more than 180 consecutive days or to supply material for a single project, but not other unrelated projects.

Public Comment Period for Permit Applications Under the Texas Clean Air Act

C.S.S.B. 1397 requires the TCEQ to hold open the public comment period and the period for which a contested case hearing may be requested for any permit application under the Texas Clean Air Act for which consolidated notice was issued for at least 36 hours after the end of the public meeting for the application, if one is held.

Compliance History

C.S.S.B. 1397 includes setting the number of major, moderate, and minor violations needed to be classified as a repeat violator among the criteria that the TCEQ must establish for classifying such a repeat violator with respect to a person's compliance history. The bill authorizes the executive director of the TCEQ to review, suspend, or reclassify a person's compliance history in accordance with TCEQ rules if the executive director determines that exigent circumstances exist.

TCEQ Administrative Penalties

C.S.S.B. 1397 increases the amount of the maximum daily administrative penalty for a violation within TCEQ jurisdiction that is not otherwise specified in applicable statutory provisions from \$25,000 to \$40,000 under the following circumstances:

- the violation involves either of the following:
 - an actual release of pollutants to the air, water, or land that exceeds levels that are protective of human health or environmental receptors; or
 - 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;
- the person previously committed a violation of the same nature that resulted in the assessment of an administrative penalty; and
- the TCEQ determines the person could have reasonably anticipated and avoided the violation.

These provisions apply only to a violation that occurs on or after the bill's effective date.

Enforcement Diversion Program for Small Businesses and Local Governments

C.S.S.B. 1397 requires the TCEQ to establish an enforcement diversion program for applicable small businesses and local governments that includes the following:

- resources developed for the TCEQ's small business compliance assistance program;
- compliance assistance training; and
- on-site technical assistance and training performed by TCEQ staff.

The bill authorizes the TCEQ to enroll a small business or local government into the enforcement diversion program before initiating an enforcement action for a violation committed by the business or government. The bill prohibits the TCEQ from enrolling a small business or local government into the program if an enforcement action against the business or government is required by federal law. The TCEQ may not initiate an enforcement action against a small business or local government for a violation that prompted enrollment in the program

after the business or government has successfully completed the program. The bill makes a small business or local government ineligible to enroll in the program if the business or government was enrolled in the program in the two years preceding the date of the violation or the business or government committed a violation that resulted in an imminent threat to public health or that was classified as a major violation. For these purposes, a "small business" is a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees.

Environmental Flows for River Basins and Bay Systems

C.S.S.B. 1397 requires the environmental flows advisory group to periodically review the environmental flow standards for each river basin and bay system adopted by the TCEQ. The bill requires the advisory group to do the following in conducting such a review:

- 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 state law providing for the development of environmental flow regime recommendations;
- take into consideration the work plans developed by basin and bay area stakeholder committees;
- analyze previous environmental flow recommendations and standards;
- prescribe future monitoring, studies, and activities needed to better understand the environmental flow; and
- validate or refine the following:
 - the environmental flow recommendations;
 - the environmental flow standards adopted by the TCEQ; and
 - strategies to achieve the environmental flow standards.

The bill requires the advisory group to develop a biennial statewide work plan to prioritize and schedule the review of these standards and requires the work plan to establish prioritization methodology and a timeline for the review. The bill requires the advisory group to submit the work plan to the TCEQ as well as any review the advisory group conducts, including recommendations to the TCEQ for use in adopting rules relating to environmental flow standards and set-asides. The bill requires the advisory group to produce and deliver to the TCEQ the first work plan not later than January 1, 2025.

C.S.S.B. 1397 requires the TCEQ to consider this review of environmental flow standards by the advisory group when altering an environmental flow standard or environmental flow set-aside and includes the biennial statewide work plan among the factors the TCEQ must consider in establishing a schedule for the alteration of an environmental flow standard or environmental flow set-aside. The bill requires the TCEQ to submit a biennial report to the advisory group on the implementation and effectiveness of environmental flow standards, which must include the following:

- a description of progress made over the previous biennium in implementing the standards, including the status of any efforts to set aside unappropriated water for environmental flow protection;
- input provided by the Texas Water Development Board and the Parks and Wildlife Department on their activities related to the standards and their recommendations for the biennial statewide work plan; and
- recommendations for the work plan.

The first biennial report is due not later than January 1, 2024.

C.S.S.B. 1397 repeals the provisions subjecting the environmental flows advisory group, the Texas Environmental Flows Science Advisory Committee, and each basin and bay area stakeholder committee and basin and bay expert science team to abolishment.

Notice Regarding the Proposed Creation of Certain Water Districts

C.S.S.B. 1397 requires the TCEQ to provide notice that an application for the creation of an applicable water district by the TCEQ is administratively complete to each state representative and state senator who represents an area inside the proposed district's boundaries.

Across-the-Board Provisions Recommended by Sunset Commission

C.S.S.B. 1397 makes changes relating to the following to implement certain of the Sunset Advisory Commission's across-the-board recommendations:

- TCEQ member training requirements; and
- the separation of TCEQ and staff responsibilities.

The bill provides for the transition to the new training requirements for TCEQ members appointed before the bill's effective date.

Repealed Provisions

C.S.S.B. 1397 repeals the following provisions of the Water Code:

- Section 11.0236(m);
- Section 11.02361(g); and
- Section 11.02362(s).

EFFECTIVE DATE

September 1, 2023.

COMPARISON OF SENATE ENGROSSED AND SUBSTITUTE

While C.S.S.B. 1397 may differ from the engrossed in minor or nonsubstantive ways, the following summarizes the substantial differences between the engrossed and committee substitute versions of the bill.

The substitute does not include a provision present in the engrossed that established that the required online posting of a permit application by the TCEQ under applicable bill provisions is in lieu of a requirement that a physical copy of the permit be made available in a public place. The substitute revises the provision in the engrossed allowing the TCEQ to exempt any materials associated with a permit application that are too large or unduly burdensome to post online from the materials that are posted online to allow the TCEQ also to exempt on those same grounds any materials associated with a revised or amended permit application.

Whereas the engrossed authorized the TCEQ to publish notice of a permit application by electronic means instead of by printed means and required the TCEQ, if it did so, to post the notice on the TCEQ website, the substitute instead requires the TCEQ, without any such contingency, to publish such a notice on the website. Whereas the engrossed established that the TCEQ's authority in the engrossed version to electronically publish notice of a permit application does not authorize the TCEQ to use an electronic means of notice instead of newspaper publication or another form of notice if an applicable federal law requires a particular form of notice, the substitute establishes that the required website publication of a notice under the substitute's provisions is in addition to any other notice requirement.

The substitute does not include provisions present in the engrossed that authorized the TCEQ to hold a public meeting virtually through the Internet provided that members of the public are able to participate in the meeting.

The substitute includes provisions absent in the engrossed that do the following:

- require a permit applicant that is required to publish notice in a newspaper to provide to the 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;
- authorize the 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; and
- require the TCEQ to send notice of receipt of a permit application for which public notice is required to each state senator and state representative who represent the area in which the facility or activity to which the application relates is or will be located.

Whereas the engrossed provided a definition for "permit" only with respect to provisions relating to temporary and indefinite permit reporting, the substitute provides for that definition with respect to broader provisions relating to general permitting procedures applicable to programs and permits arising under the air, waste, or water programs within TCEQ jurisdiction.