

BILL ANALYSIS

Senate Research Center
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S.B. 1397
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Natural Resources & Economic Development
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As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

S.B. 1397 enacts the statutory recommendations of the Sunset Advisory Commission on 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 the Texas Commission on Environmental Quality for 12 years and ensures only the agency, not its statute, is subject to abolishment.
- Requiring the public comment period for certain air permit applications to remain open for at least 36 hours after a public meeting on the permit, if one is held.
- 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.

As proposed, 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), SECTION 10 (Section 5.129, Water Code), and SECTION 12 (Section 5.552, 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. (a) Requires TCEQ to issue a standard permit 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;
- (2) is required to be located in or contiguous to the right-of-way of the public works project; and
- (3) is required to meet the requirements of Section 382.05198.

(b) Provides that a permit issued under this section:

- (1) is prohibited from having an initial term that exceeds one year;
- (2) is authorized to be renewed for an additional term not to exceed one year;
- (3) is authorized to be renewed for a second additional term not to exceed one year only on a finding of good cause by TCEQ; and
- (4) is prohibited from being renewed a third time.

SECTION 4. Amends Sections 382.05199(a), (b), and (h), Health and Safety Code, as follows:

(a) Prohibits a person from beginning construction of a permanent concrete plant that performs wet batching, dry batching, or central mixing under a standard permit issued under Section 382.05198 or a temporary concrete plant that performs wet batching, dry batching, or central mixing under a standard permit issued under Section 382.051985 unless TCEQ authorizes the person to use the permit as provided by Section 382.05199 (Standard Permit for Certain Concrete Batch Plants: Notice and Hearing). Makes a conforming change.

(b)-(h) Makes conforming changes to these subsections.

SECTION 5. Amends Section 382.056, Health and Safety Code, by amending Subsection (b) and adding Subsection (k-2), as follows:

(b) Deletes existing text requiring the notice to include the location at which a copy of the application is available for review and copying as provided by Subsection (d) (relating to requiring the applicant for a permit to make a copy of the application available for review and copying at a public place in the county in which the facility or federal source is located or proposed to be located). Makes nonsubstantive changes.

(k-2) Requires TCEQ, if TCEQ holds a public meeting for a permit application under Subchapter C (Permits), to hold open the public comment period for the permit application for at least 36 hours after the end of the meeting, notwithstanding any other law.

SECTION 6. 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 and Chapter 5 (Texas Commission on Environmental Quality) expires September 1, 2035, rather than September 1, 2023.

SECTION 7. 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 (TEC).

Deletes existing text requiring the training program to 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, 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 8. 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 9. 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 10. 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 a nonsubstantive change; 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 Section 5.129 (Summary for Public Notices) 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 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, 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).

(c) 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 interest in or response to public notice or comment.

(d) Requires that the notice posted under this section be in lieu of a requirement that a physical copy of the permit be made available in a public place.

SECTION 12. Amends Section 5.552(c), Water Code, to delete existing text requiring the notice to include the location at which a copy of the application is available for review and copying as provided by Subsection (e) (relating to requiring the applicant for a permit to make a copy of the application available for review and copying at a public place in the county in which the facility or federal source is located or proposed to be located) and to make nonsubstantive changes.

SECTION 13. Amends Chapter 5, Water Code, by adding Subchapter M-1, as follows:

SUBCHAPTER M-1. PERMITTING PROCEDURES GENERALLY

Sec. 5.581. APPLICABILITY. Provides that this subchapter applies to programs and permits arising under the air, waste, or water programs within TCEQ's jurisdiction.

Sec. 5.582. MEANS OF PUBLICATION OF NOTICE. (a) Authorizes TCEQ, notwithstanding any other law, to publish notice of a permit application by electronic means instead of by printed means.

(b) Requires TCEQ, if TCEQ publishes notice of a permit application by electronic means, to post the notice on TCEQ's website and is authorized to provide additional electronic notice through other means, including direct e-mail.

(c) 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 interest in or response to public notice or comment.

(d) Provides that this section does not authorize 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.

Sec. 5.583. VIRTUAL PUBLIC MEETING. (a) Authorizes TCEQ, notwithstanding any other law, to hold a public meeting virtually through the Internet provided that members of the general public are able to participate in the meeting.

(b) Requires TCEQ to consider and accommodate members of the public who may need assistance participating in a virtually held public meeting because of a lack of access to Internet services, particularly when there is a heightened interest in or response to public notice or comment.

(c) Provides that this section does not authorize TCEQ to hold a public meeting virtually instead of an in-person public meeting if an applicable federal law requires an in-person public meeting.

Sec. 5.584. TEMPORARY AND INDEFINITE PERMIT REPORTING. (a) Defines "permit."

(b) 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.

(c) 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 14. 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 TCEQ to review, suspend, or reclassify a person's compliance history at any time if TCEQ determines that exigent circumstances exist.

SECTION 15. Amends Sections 7.052(b-1) and (c), Water Code, as follows:

(b-1) Prohibits the amount of the penalty assessed against a manufacturer that does not label its computer equipment or covered television equipment or adopt and implement a recovery plan as required by certain sections, as applicable, from exceeding \$10,000 for the second violation or \$40,000, rather than \$25,000, for each subsequent violation.

(c) Makes a conforming change.

SECTION 16. 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 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.

(e) Provides that a small business or local government is not eligible to enroll in the enforcement diversion program if the small business or local 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 17. Amends Subchapter B, Chapter 11, Water Code, by adding Section 11.02363, as follows:

Sec. 11.02363. PERIODIC REVIEW OF ENVIRONMENTAL FLOW RECOMMENDATIONS; 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 18. 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 flows by the advisory group under Section 11.02363(a) when altering an environmental flow. 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 19. 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 20. Repealers: Section 382.056(d) (relating to requiring an applicant for a permit to make a copy of the application available for review and copying at a public place in the county in which the facility or federal source is located or proposed to be located), Health and Safety Code, and Section 5.552(e) (relating to requiring an applicant for a permit to make a copy of the application available for review and copying at a public place in the county in which the facility is located or proposed to be located), Water Code.

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 21. (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 22. Requires a permit holder subject to Section 5.584, 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 23. Makes application of Section 7.052, Water Code, prospective.

SECTION 24. (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 25. Effective date: September 1, 2023.