SUBJECT: Limiting findings of fact in agreed orders by TNRCC

COMMITTEE: Natural Resources — favorable, without amendment

VOTE: 7 ayes — Counts, Combs, Corte, King, R. Lewis, Puente, Walker

0 nays

2 absent — Yost, Stiles

SENATE VOTE: On final passage, May 2 — voice vote; on suspension of rules — 27-4 (Ellis, Gallegos, Rosson, West)

WITNESSES: No public hearing

DIGEST: SB 1660 would amend the Water Code and various sections of the Health and Safety Code to provide that TNRCC would not be required to make findings of fact or conclusions of law, other than an uncontested finding that TNRCC has jurisdiction, in an agreed order compromising or settling an alleged violation.

An agreed order could include a reservation that: the order is not a violation; the occurrence of the violation is in dispute; or the order is not intended to become a part of a party's or a facility's compliance history.

An agreed administrative order issued by TNRCC could not be admissible against a party to that order in a civil proceeding, unless the proceeding was brought by the attorney general's office to enforce the terms of the order or pursue statutory violations.

The bill would take effect September 1, 1995.

SUPPORTERS SAY: Some TNRCC attorneys insist that agreed orders must contain findings of fact and conclusions of law beyond merely jurisdictional findings. There are no such statutory requirements. Other state agencies commonly settle disputed matters without including findings of fact and conclusions of law adverse to the defendant.

Recently, some TNRCC staff have also refused to include exculpatory language routinely as part of agreed orders. Language that stipulates, for example, that the order is not an admission of violation, can save a party to an agreed order from expensive third party lawsuits. SB 1660 would merely allow (not require) TNRCC to include such exculpatory language in its agreed orders and would state that TNRCC is not required to make findings of fact or conclusions of law in an agreed order settling an alleged violation.

SB 1660 would encourage agreed orders, which can stop behavior that may be damaging the environment and are much less expensive and time-consuming than going to trial. Plaintiffs settle with TNRCC for various reasons, including their desire to avoid the uncertainties of litigation. Parties who want to settle should have some degree of certainty that they are not opening themselves up to private suits by agreeing to settle with TNRCC.

A person who signs an agreed order that has detailed findings of fact and conclusions of law regarding the violation is waving a red flag at tort lawyers and leaving themselves open for actions by third parties. Texas recognizes a cause of action in negligence *per se*, so adverse findings and conclusions that a person violated a statute or regulation can be used by plaintiffs in tort litigation.

OPPONENTS SAY:

An agreed order should become a part of the party's compliance history since decisions about permit review are sometimes based on the compliance history of a company. Some industry representatives want TNRCC to stipulate that a hearing is unnecessary unless the company has a history of noncompliance. One way to examine the compliance history of a company would be to look at their agreed orders.

An agreed order may contain the only direct evidence of a problem or violation in which someone has been injured or a natural resource has been harmed. Omitting findings of fact and conclusions of law from agreed orders would limit attempts by the public to find out what the compliance problem is in their neighborhood or to substantiate an individual suit for damages. There is no reason why a flagrant violator of state law, should be protected from third party actions by the state.