

## **BILL ANALYSIS**

Senate Research Center

C.S.S.B. 1874  
By: Bivins  
Natural Resources  
4-25-97  
Committee Report (Substituted)

### **DIGEST**

Two emergencies encountered by the Texas Natural Resource Conservation Commission (commission) in 1996 prompted an examination of the agency's authority regarding emergency and temporary orders. First, the agency discovered that it lacked the authority to grant a temporary disposal authorization when a large manufacturing facility experienced a tank leak during a downpour. Despite the threat to waters from the state, the agency was unable to authorize the facility to utilize an onsite injection well. Similarly, Texas experienced a severe drought in 1996, during which several municipal water systems experienced difficulties in obtaining enough water to provide adequate service. At the same time, some water rights went unused. The commission discovered that it lacked the statutory authority to effect a temporary transfer of rights or uses in severe emergencies. In addition, the agency has found that there exists a wide variation between program areas in the power to issue and requirements for issuing emergency and temporary orders.

C.S.S.B. 1874 would set forth a general process for issuance of emergency and temporary orders, including requirements for notice, hearing, and application; incorporates the existing requirements for specific program areas for emergency and temporary orders, including criteria for issuance of orders; and fills in the gaps in agency authority to issue emergency and temporary orders.

### **PURPOSE**

As proposed, C.S.S.B. 1874 amends and consolidates into one chapter the general process for the issuance by the Texas Natural Resource Conservation Commission (commission) of emergency and temporary orders, including requirements for notice, hearing, and application. In addition, this bill incorporates existing requirements for specific commission program areas for emergency and temporary orders.

### **RULEMAKING AUTHORITY**

Rulemaking authority is granted to the Texas Natural Resource Conservation Commission under SECTION 1 (Sections 5.501(c) and (d), Water Code) and SECTION 18 (Section 401.056, Health and Safety Code) of this bill.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Chapter 5, Water Code, by adding Subchapter L, as follows:

#### **SUBCHAPTER L. EMERGENCY AND TEMPORARY ORDERS**

Sec. 5.501. EMERGENCY AND TEMPORARY ORDER AND PERMIT; TEMPORARY SUSPENSION OR AMENDMENT OF PERMIT CONDITION. (a) Authorizes, for the purposes and in the manner provided by this subchapter, the Texas Natural Resource Conservation Commission (commission) to issue a temporary order or emergency mandatory, permissive, or prohibitory order, and issue a temporary permit or temporarily suspend or amend a permit condition by temporary or emergency order, for the purposes and in the manner provided by this subchapter. Sets forth provisions regarding the issuance of an emergency or temporary order issued under this subchapter.

Sec. 5.502. APPLICATION FOR EMERGENCY OR TEMPORARY ORDER. Requires

a person other than the executive director or the executive director's representative who desires an emergency or temporary order under this subchapter to submit a sworn application to the commission. Sets forth certain requirements regarding the application.

Sec. 5.503. NOTICE OF ISSUANCE. Requires notice of the issuance of an emergency order to be provided in accordance with commission rules.

Sec. 5.504. HEARING TO AFFIRM, MODIFY, OR SET ASIDE ORDER. Sets forth provisions applicable if the commission, executive director, or the executive director's representative issues an emergency order under this subchapter without a hearing. Sets forth requirements regarding a hearing under Subsection (a). Sets forth provisions regarding commission rules concerning a certain hearing.

Sec. 5.505. TERM OF ORDER. Requires an emergency or temporary order issued under this subchapter to be limited to a reasonable time specified by the order. Prohibits, except as otherwise provided by this subchapter, the term of an emergency order from exceeding 180 days. Authorizes an emergency order to be renewed once for a period not to exceed 180 days.

Sec. 5.506. EMERGENCY PERMIT TO DIVERT AND USE WATER; AMENDMENT TO WATER RIGHT. Authorizes the commission, except as provided by Section 5.508 and after notification to the governor, by emergency order to divert and use water or amend an existing permit, certified filing, or certificate of adjudication for an initial period not to exceed 120 days if the commission makes certain findings. Authorizes the executive director to issue an emergency order under certain conditions. Sets forth provisions applicable if the executive director issues an emergency order under this subsection. Provides that the notice requirements of Section 11.132 relating to the time for notice, newspaper notice, and method of giving a person notice do not apply to a hearing held on an application for an emergency order under this section. Requires the commission to give the general notice of the hearing that the commission considers practicable under the circumstances.

Sec. 5.507. EMERGENCY ORDER FOR TEMPORARY TRANSFER OF USE OF WATER RIGHT. Authorizes the commission by emergency order to grant the temporary transfer and use of all or part of a water right permit, certified filing, or certificate or adjudication for other than domestic or municipal use to a retail or wholesale water supplier for public health and safety purposes. Authorizes the commission to direct the applicant to timely pay the amounts for which the applicant may be potentially liable under this section and to fully indemnify and hold harmless the state, the executive director, and the commission from any and all liability for the order sought. Authorizes the commission to order bond or other surety in a form acceptable to the commission as a condition for an emergency order under this section. Prohibits the commission from granting an emergency authorization under this section that would cause a violation of a federal regulation. Sets forth provisions regarding liability and complaints.

Sec. 5.508. EMERGENCY SUSPENSION OF PERMIT CONDITION RELATING TO BENEFICIAL INFLOWS TO AFFECTED BAYS AND ESTUARIES AND INSTREAM USES. Authorizes the commission by emergency or temporary order to suspend a permit condition relating to beneficial inflows to affected bays and estuaries and instream uses under certain conditions. Sets forth requirements for the commission regarding notice and suspensions of a permit condition.

Sec. 5.509. EMERGENCY WORKS SAFETY ORDER. Authorizes the commission to issue an emergency order, either mandatory or prohibitory in nature, directing the owner of a dam, levee, or other water-storage or flood-control work to repair, modify, maintain, dewater, or remove a work under certain conditions.

Sec. 5.510. EMERGENCY ORDER TO COMPEL WATER OR SEWER SERVICE. Authorizes the commission to issue an emergency order for certain purposes.

Sec. 5.511. EMERGENCY ORDER FOR OPERATION OF UTILITY THAT DISCONTINUES OPERATION OR IS REFERRED FOR APPOINTMENT OF RECEIVER. Authorizes the commission to issue an emergency order appointing a willing person to temporarily manage and operate a utility under Section 11.4132, and provides that notice of the action is adequate under certain conditions.

Sec. 5.512. EMERGENCY ORDER FOR RATE INCREASES IN CERTAIN SITUATIONS. Authorizes the commission, notwithstanding the requirements of Section 13.187, to authorize an emergency rate increase for a utility for which a person has been appointed under Section 5.511 or 13.4132 or for which a receiver has been appointed under Section 13.412 under certain conditions. Sets forth additional provisions regarding emergency rates under this section.

Sec. 5.513. TEMPORARY AND EMERGENCY ORDER RELATING TO DISCHARGE OF WASTE OR POLLUTANTS. Authorizes the commission to issue an emergency or a temporary order relating to the discharge of waste or pollutants into or adjacent to water in the state under certain conditions. Requires a person desiring a temporary or an emergency order under this section to submit a sworn written application to the commission under Section 5.401(d) that must also contain certain information.

Sec. 5.514. EMERGENCY ORDER CONCERNING UNDERGROUND OR ABOVEGROUND STORAGE TANKS. Authorizes the commission to issue an emergency order to the owner or operator of an underground or aboveground storage tank regulated under Chapter 26 prohibiting the owner or operator from allowing or continuing a release or threatened release and requiring the owner to take the actions necessary to eliminate the release or threatened release, if the commission makes certain findings.

Sec. 5.515. EMERGENCY ADMINISTRATIVE ORDER TO PERSON RESPONSIBLE FOR SOLID WASTE. Authorizes the commission or the executive director to issue emergency administrative orders under Section 361.272 or 361.274, Health and Safety Code, in the manner provided by this subchapter.

Sec. 5.516. EMERGENCY ORDER CONCERNING ACTIVITY OF SOLID WASTE MANAGEMENT. Authorizes the commission to issue an emergency order concerning an activity of solid waste management under the commission's jurisdiction, even if that activity is not covered by a permit, if the commission makes certain findings.

Sec. 5.517. EMERGENCY ORDER CONCERNING ON-SITE SEWAGE DISPOSAL SYSTEMS. Authorizes the commission to issue an emergency order suspending the registration of the installer of an on-site sewage disposal system, regulating an on-site sewage disposal system, or both, if the commission makes certain findings. Sets forth provisions applicable if the emergency order issued under this section is adopted without notice or hearing.

Sec. 5.518. ORDER ISSUED UNDER AIR EMERGENCY. Sets forth provisions applicable if the commission makes certain findings relating to air pollution. Sets forth provisions applicable if the commission makes certain findings relating to emissions. Sets forth additional provisions regarding air emergencies.

Sec. 5.519. EMERGENCY ORDER BECAUSE OF CATASTROPHE. Authorizes the commission to issue an emergency order authorizing immediate action for the addition, replacement, or repair of facilities or control equipment necessitated by a catastrophe occurring in this state and the emission of air contaminants during the addition, replacement, or repair of those facilities, under certain conditions. Sets forth requirements for an order under this section. Sets forth requirements for a person applying for an emergency order and related provisions. Defines "catastrophe."

Sec. 5.520. EMERGENCY ORDER UNDER SECTION 401.056, HEALTH AND SAFETY CODE. Authorizes the commission to issue an emergency order under Section

401.056, Health and Safety Code, in the manner provided by this subchapter.

Sec. 5.521. EMERGENCY ORDERS FOR CORRECTIVE ACTION AND MEASURES. Authorizes the commission to issue an emergency order under Section 401.270, Health and Safety Code, to certain persons, if it appears that there is a certain threat or danger. Authorizes an emergency order to be issued under this section for certain purposes. Sets forth requirements for an emergency order issued under this section. Sets forth provisions applicable if the order issued under this section is adopted without notice or hearing.

SECTION 2. Amends Sections 12.052(d), (e), and (f), Water Code, to authorize the commission to issue an emergency works safety order under Section 5.509. Deletes existing Subsections (d) and (e) regarding dam conditions. Makes conforming changes.

SECTION 3. Amends Section 13.041(d), Water Code, to authorize the commission to issue an order to compel water or sewer service under Section 5.510. Deletes provisions regarding emergency orders to compel a water or sewer service provider to take certain actions.

SECTION 4. Amends Section 13.235, Water Code, to authorize the commission to issue an emergency order to compel water or sewer service, with or without a hearing under Section 5.510, rather than under Section 13.041 of this code.

SECTION 5. Amends Section 13.4132(b), Water Code, to authorize the commission by emergency order issued under Section 5.511 to appoint a person under this section and to authorize an emergency rate increase under Section 5.512. Deletes text regarding the issuance of an emergency order if the notice is mailed or hand delivered to the last known address of the utility's headquarters.

SECTION 6. Amends Section 16.236, Water Code, as follows:

Sec. 16.236. New heading: CONSTRUCTION OF LEVEE WITHOUT APPROVAL OF PLANS; LEVEE SAFETY. Requires the commission to make and enforce rules and orders and to perform all other acts necessary to provide for the safe construction, maintenance, repair, and removal of levees located in this state. Sets forth provisions applicable if the owner of a levee that is required to be constructed, reconstructed, repaired, or removed in order to comply with the rules and orders promulgated under Subsection (a) of this section wilfully fails or refuses to comply with the 30-day period following the date of the commissioner's order or if a person wilfully fails to comply with any rule or other order issued by the commission under this section within the 30-day period following the effective date of the order. Authorizes the commission to issue an emergency order under Chapter 5K of this code. Provides that nothing in this section or in rules or orders issued by the commission under this section relieves an owner or operator of a levee of a legal duty, obligation, or liability incident to ownership or operation. Deletes existing Subsections (b)-(e).

SECTION 7. Amends Section 26.0191, Water Code, as follows:

Sec. 26.0191. New heading: TEMPORARY OR EMERGENCY ORDER RELATING TO DISCHARGE OF WASTE OR POLLUTANTS. Authorizes the commission to issue a temporary or emergency order relating to the discharge of waste or pollutants under Section 5.513. Deletes text authorizing the commission to issue temporary or emergency orders relating to the discharge of waste or pollutants when this is necessary to enable certain action. Deletes existing Subsections (b)-(h) regarding discharge of waste of pollutants.

SECTION 8. Amends Section 26.021(a), Water Code, to authorize the commission to authorize the chief administrative law judge of the State Office of Administrative Hearings to call and hold hearings on any subject on which the commission may hold a hearing. Deletes an exception.

SECTION 9. Amends Section 26.022(a), Water Code, to provide that, except as otherwise provided in Sections 5.501, 5.504, 5.513, and 26.176, the provisions of this section apply to all hearings conducted in compliance with this chapter.

SECTION 10. Amends Section 26.354, Water Code, to authorize the commission to issue an emergency order to owners or operators of underground or aboveground storage tanks under Section 5.514, rather than providing that notwithstanding any other provisions of this chapter, the executive director may issue an emergency order to the person identified in Subsection (e) of this section under certain conditions. Deletes Subsections (b)-(e) regarding emergency orders issued under this section.

SECTION 11. Amends Section 361.274, Health and Safety Code, to require an emergency administrative order to be issued under Chapter 5L, Water Code.

SECTION 12. Amends Section 361.301, Health and Safety Code, to authorize the commission to issue an emergency mandatory, permissive, or prohibitory order concerning an activity of solid waste management under its jurisdiction under Section 5.516, Water Code, even if the activity is not covered by a permit. Deletes a provision regarding the determination by the commission that an emergency requiring immediate action to protect the public or environment exists. Deletes existing Subsections (b)-(d) regarding notice and hearing.

SECTION 13. Amends Section 366.016, Health and Safety Code, to authorize the commission or authorized agent to issue an emergency order concerning an on-site sewage disposal system under Section 5.517, Water Code. Deletes existing Subsections (a)-(e) regarding an emergency and endangerment of public health because of the operation of an on-site sewage disposal system.

SECTION 14. Amends Section 382.026, Health and Safety Code, to authorize the commission to issue an order under an air emergency under Section 5.518, Water Code. Deletes existing Subsections (a)-(e) regarding air pollution and emissions.

SECTION 15. Amends Section 382.030(b), Health and Safety Code, to authorize the commission, except for hearings required to be held before the commission under Section 5.504, Water Code, rather than Section 382.026, to authorize the executive director to take certain actions.

SECTION 16. Amends Section 382.031(e), Health and Safety Code, to provide that this section applies to all hearings held under this chapter except as otherwise specified by Section 382.017, rather than by Section 382.017, 382.026, or 382.063.

SECTION 17. Amends Section 382.063, Health and Safety Code, to authorize the commission to issue an emergency order because of catastrophe under Section 5.519, Water Code. Deletes existing Subsections (a)-(j) regarding emergencies relating to air contaminants.

SECTION 18. Amends Section 401.506, Health and Safety Code, by adding Subsection (g), to authorize the commission to delegate its authority under this section to its executive direction by order or rule.

SECTION 19. Amends Section 401.270, Health and Safety Code, to delete existing Subsections (b)-(d) regarding the issuance of an emergency order to a person responsible for an activity, including a past activity, that threatens or may threaten public health and safety or the environment. Authorizes the commission to issue an emergency order under this section as provided by Section 5.521, Water Code. Deletes existing Subsection (f) regarding an order issued by the commission pursuant to this section that is adopted without notice or hearing.

SECTION 20. Repealer: Sections 11.139, 11.148, 13.041(f), and 13.4133 (Emergency Permits, Emergency Suspension of Permit Conditions, Order Issued Without a Hearing - General Power, Emergency Rate Increase in Certain Circumstances; Water Code).

SECTION 21. (a) Effective date: September 1, 1997.

(b) and (c) Makes application of this Act prospective.

SECTION 22. Emergency clause.

## **SUMMARY OF COMMITTEE CHANGES**

### **SECTION 1.**

Amends SECTION 1 to amend Chapter 5, by adding Subchapter L rather than Subchapter K, and amend subchapter heading accordingly.

Redesignates proposed Section 5.401, Water Code, as Section 5.501, and makes a nonsubstantive change to the section heading. Removes proposed Subsections (d)-(h). Renumbers remaining proposed sections accordingly. Makes formatting and nonsubstantive changes.

Removes proposed Section 5.402, Water Code.

Sets forth Section 5.502, Water Code, regarding application for an emergency or temporary order.

Sets forth Section 5.503, Water Code, regarding notice of issuance.

Sets forth Section 5.504, Water Code, regarding a hearing to affirm, modify, or set aside an order.

Sets forth Section 5.505, Water Code, regarding the term of an order.

Sets forth Section 5.506, Water Code, regarding an emergency permit to divert and use water and an amendment to a water right.

Sets forth Section 5.507, Water Code, regarding an emergency order for the temporary transfer of use of a water right.

Redesignates proposed Section 5.403, Water Code, as Section 5.508, and makes conforming and nonsubstantive changes.

Redesignates proposed Section 5.404, Water Code, as Section 5.509, and makes formatting, nonsubstantive, and conforming changes.

Redesignates proposed Section 5.405, Water Code, as Section 5.510, and makes nonsubstantive and conforming changes.

Redesignates proposed Section 5.406, Water Code, as Section 5.511, and makes nonsubstantive and conforming changes.

Redesignates proposed Section 5.407, Water Code, as Section 5.512, and makes nonsubstantive and conforming changes.

Redesignates proposed Section 5.408, Water Code, as Section 5.513, and amends the section heading. Sets forth new provisions regarding serious drought conditions and necessary and unforeseen repairs to a facility. Makes formatting, nonsubstantive, and conforming changes.

Redesignates proposed Section 5.409, Water Code, as Section 5.514. Includes the operator, in addition to the owner of an underground or aboveground storage tank. Makes nonsubstantive and conforming changes.

Redesignates proposed Section 5.410, Water Code, as Section 5.515, and makes conforming changes.

Redesignates proposed Section 5.411, Water Code, as Section 5.516, and makes conforming changes.

Redesignates proposed Section 5.412, Water Code, as Section 5.517, and makes nonsubstantive and conforming changes.

Redesignates proposed Section 5.413, Water Code, as Section 5.518, and makes nonsubstantive and conforming changes.

Redesignates proposed Section 5.414, Water Code, as Section 5.519. Amends the section heading. Deletes proposed Subsections (a)(1)-(a)(3).

Redesignates proposed Section 5.415, Water Code, as Section 5.520, and makes a conforming change.

Redesignates proposed Section 5.416, Water Code, as Section 5.521, and makes nonsubstantive changes.

## SECTION 2.

Amends proposed Section 12.052, Water Code, to authorize the commission to issue an emergency works safety order under Section 5.509, rather than an emergency order under Subchapter K, Chapter 5 of this code. Makes nonsubstantive changes.

## SECTION 3.

Amends proposed Section 13.041(d), Water Code, to make nonsubstantive and conforming changes.

## SECTION 4.

Amends proposed Section 13.253, Water Code, to authorize the commission to issue an emergency order to compel water or sewer service, rather than to issue an emergency order. Makes conforming changes.

## SECTION 5.

Amends proposed Section 13.4132(b), Water Code, to authorize the commission by emergency order issued under Section 5.511 to appoint a person under this section and to authorize an emergency rate increase under Section 5.512. Makes conforming changes.

## SECTION 6.

Amends proposed Section 16.326, Water Code, to make nonsubstantive changes. Deletes existing Subsections (b)-(e).

## SECTION 7.

Amends Section 26.0191, Water Code, to amend the section heading and make conforming changes.

## SECTION 8.

Amends Section 26.021(a), Water Code, to make conforming changes.

## SECTION 11.

Amends Section 361.274, Health and Safety Code, to make conforming changes.

## SECTION 12.

Amends Section 361.301, Health and Safety Code, to make conforming changes.

SECTION 13.

Amends Section 366.016, Health and Safety Code, to make nonsubstantive changes.

SECTION 14.

Amends Section 382.026, Health and Safety Code, to make conforming changes.

SECTION 15.

Amends Section 382.030(b), Health and Safety Code, to make nonsubstantive and conforming changes.

SECTION 17.

Amends Section, 382.063, Health and Safety Code, to make conforming changes.

SECTION 18.

Amends Section 401.056, Health and Safety Code, to make nonsubstantive changes.

SECTION 20.

Sets forth a new repealer, Section 13.041(f), Water Code.

SECTION 21.

Sets forth Subsections (b) and (c).