

BILL ANALYSIS

Senate Research Center

S.B. 764
By: Ratliff
Natural Resources
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As Filed

DIGEST

Currently, Texas law provides for formal evidentiary hearings under the contested-case provisions of the Administrative Procedure Act prior to environmental permit decisions by the Texas Natural Resource Conservation Commission. Texas is one of very few states providing for formal hearings prior to permit decisions and there are concerns that the trial-like process of a formal hearing is no longer appropriate given the superior technical review processes that are in place today. There are also concerns that the current process limits public participation and is abused by permit opponents, who draw out the permit process and delay projects.

S.B. 764 provides for informal hearing procedures to resolve all factual, legal and policy issues associated with permit applications. The informal hearing procedures are modeled after the permitting procedures of the U.S. Environmental Protection Agency and those of many other states.

PURPOSE

As proposed, S.B. 764 sets forth informal hearing procedures for the Texas Natural Resource Conservation Commission regarding an application to issue, amend, or renew certain environmental permits.

RULEMAKING AUTHORITY

Rulemaking authority is granted to the Texas Natural Resource Conservation Commission under SECTION 1 (Sections 5.371(b), (c), and (d), and Section 5.374(d), Water Code) in this bill.

SECTION BY SECTION ANALYSIS

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

SUBCHAPTER J. ENVIRONMENTAL PERMITTING PROCEDURES

Sec. 5.371. GENERAL PERMITTING PROCEDURES. (a) Provides that this subchapter applies to Texas Natural Resource Conservation Commission (commission) procedures for an application to issue, amend, or renew a permit for which public notice and an opportunity for public hearing is required by Chapter 26 or 27 of this code or Chapter 361 or 382, Health and Safety Code.

(b) Requires the commission to provide for permits-by-rule under the chapters listed in Subsection (a) to the greatest extent practicable and consistent with the requirements of the United States Environmental Protection Agency (EPA) authorization of a state permit program.

(c) Authorizes the commission, by rule, to identify categories of applications related to permits for which notice or opportunity for public hearing is not required. Requires the commission to exempt certain applications from notice and public hearing requirements.

(d) Authorizes the commission, by rule, for an application described by Subsection (c), to provide for the action on the application to be taken by the executive director.

Sec. 5.372. INITIAL DETERMINATION BY EXECUTIVE DIRECTOR. Requires the executive director, after an application related to a permit is administratively and technically complete, to prepare and issue a draft permit or a notice of intent to deny. Requires the executive director to include a record of proposed decision prepared in accordance with Section 5.373 with a draft permit or notice of intent to deny. Requires the commission to send a copy of the record of the proposed decision to the applicant; a state or federal agency, as required or as appropriate; and any other person on request of that person. Authorizes an applicant to give public notice of the application before the initial determination of the executive director is completed, unless precluded by a requirement of EPA related to state program authorization. Sets forth provisions applicable if all requests for a public hearing the commissioner receives are unreasonable or the commission receives no requests. Requires a notice of intent to deny to state the executive director's reasons for the intended denial. Sets forth the requirements for a draft permit.

Sec. 5.373. RECORD OF PROPOSED DECISION FOR DRAFT PERMIT. Sets forth requirements regarding a record of proposed decision prepared for a draft permit. Sets forth requirements regarding the record of proposed decision. Requires the commission to make the record of proposed decision available when the public notice is published.

Sec. 5.374. NOTICE OF INITIAL DETERMINATION; COMMENTS AND REQUESTS FOR HEARING. (a) Requires the executive director to give public notice that a draft permit or notice of intent to deny has been prepared. Requires the executive director to provide for a 30-day period for public review, comments, and requests for public hearing. Requires the period for public review and comments to be extended until the close of the public hearing, if one is held.

(b) Requires all persons, including applicants, who believe that any condition of a draft permit is inappropriate or that the executive director's tentative decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate to raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period. Requires additional time to be granted to the extent that a commenter who requests additional time demonstrates the need for such time.

(c) Sets forth a provision regarding notice under this section.

(d) Authorizes the commission, by rule, to require additional public notice necessary to satisfy requirements of the EPA for state permit program authorization.

(e) Sets forth requirements for the executive director applicable if the commission receives a timely written notice of opposition to a draft permit issued by the executive director and a request for a public hearing on the draft permit.

Sec. 5.375. PUBLIC HEARINGS. Prohibits a ruling on a permit issuance or denial from being made without an opportunity for a public hearing. Authorizes a person to submit oral or written statements and data concerning the initial determination of the executive director. Authorizes the setting of reasonable limits to be set for the time allowed for oral comments, and the submission of statements in writing or under oath to be required. Requires the executive director to hold the public hearing under certain conditions. Sets forth provisions applicable when a draft permit or notice of intent is at issue. Requires the executive director to hold the public hearing under this subsection at a convenient location. Authorizes the executive director to designate a presiding officer or hearing panel to conduct the hearing. Authorizes a hearing panel to include technical experts on the staff of the executive director. Provides that Chapter 2001, Government Code, does not apply to a public hearing held under this section. Sets forth additional requirements regarding a hearing held under this section.

Sec. 5.376. COSTS FOR INFORMATION REGARDING NEW HAZARDOUS WASTE PERMIT. Requires, on request of an affected person, the applicant for a permit for a new hazardous waste management facility to furnish a bond or other financial assurance authorized

by the commission to guarantee payment of nonlegal costs of the affected person incurred in providing to the commission information related to the issuance of the permit. Sets forth requirements regarding an application for a new commercial or new noncommercial hazardous waste management facility. Requires the executive director, in determining whether the affected person is entitled to reimbursement under this section, to apply the considerations provided by Section 361.0833(e), Health and Safety Code. Provides that nonlegal costs subject to reimbursement under this section include the cost of a copy of the administrative record in the case. Prohibits the commission from awarding in a case costs to one or more persons that total an amount greater than the amount of financial assurance required by this section. Authorizes the commission, subject to the limitations of Subsection (d) and (f), to award a unit of local government legal costs in addition to other costs.

Sec. 5.377. FINAL DECISION OF EXECUTIVE DIRECTOR. Requires the executive director, for decisions on applications processed under Section 5.373 through 5.375, to consider all comments received during the public comment period and during any public hearing in making certain determinations. Authorizes the executive director, in ruling on a permit application, to deny the permit in whole or in part and to provide reasonable conditions under certain circumstances. Authorizes the executive director, in ruling on a permit application, to consider any adjudicated decision within five years before the date on which the application is filed that addressed the applicant's noncompliance with the terms of any permit or order issued by the commission. Requires the executive director to make certain determinations before denying an application under this subsection. Sets forth requirements regarding the issuance of a response when the executive director issues a final decision on an application. Requires the executive director to mail notice of the final decision on the application to the applicant and to each person who commented during the public comment period or participated in the public hearing. Sets forth requirements regarding the notice. Sets forth a provision regarding the effective date of a final decision under this section on a permit application.

Sec. 5.378. PETITION FOR COMMISSION REVIEW. Requires the commission to review the executive director's decision on a permit application as provided by this section. Authorizes certain persons to file a petition for review with the commission. Requires a petition for review to be filed on or before the 30th day after the date the executive director's notice of final decision is mailed. Provides that the filing of a petition under this section stays the effect of a permit issued by the executive director until the commission takes certain action. Sets forth requirements regarding the contents of the petition. Requires the commission to act on a petition within a certain deadline. Provides that if the commission does not act on or before that date, the petition is denied. Requires the commission to give notice to the petitioner and each person who commented during the public comment period under certain conditions. Sets forth requirements regarding the notice. Sets forth provisions applicable if a petition for review is granted. Sets forth provisions applicable if the commission modifies or rejects the executive director's decision. Sets forth provisions regarding motions to reconsider a final order of the commission.

Sec. 5.379. JUDICIAL REVIEW OF COMMISSION PERMIT DECISIONS. Authorizes a person affected by the executive director's final decision on a permit application or the commission's action on the petition that modifies or rejects the executive director's decisions to petition for judicial review. Requires the petition to be filed within a certain deadline. Provides that failure to timely petition for commission review of the executive director's decision is a bar to judicial review of the decision. Requires judicial review decisions of the commission under this subchapter to be under the substantial evidence rule as provided by Section 20001.174, Government Code. Provides that the filing of an appeal does not stay any action required by the commission's deadline. Requires the record of appeal to be limited to all written and oral substantive public comments, the transcript of the hearing, all related correspondence, all responses to comments, and all other information on which the commission relied in deciding on the executive director's decision.

SECTION 2. Chapter 2001I, Government Code, by adding Section 2001.227, as follows:

Sec. 2001.227. CERTAIN ENVIRONMENTAL PERMITS. Provides that Subchapters C through H do not apply to a permit application required to be filed with the commission for an authorization under Chapter 26 or 27, Water Code, or Chapter 361 or 382, Health and Safety Code, if the application is subject to Chapter 5J, Water Code.

SECTION 3. Emergency clause.
Effective date: upon passage.