

SUBJECT: Substantial compliance with agency rulemaking requirements

COMMITTEE: State Affairs — favorable, without amendment

VOTE: 14 ayes — Wolens, S. Turner, Alvarado, Bailey, Brimer, Counts, Craddick, Danburg, Hilbert, Hunter, D. Jones, Longoria, Marchant, McCall, Merritt

0 nays

1 absent — Marchant

SENATE VOTE: On final passage, February 24 — voice vote

WITNESSES: For — Gregory Ellis

Against — None

On — Jim Phillips, Texas Natural Resource Conservation Commission

BACKGROUND: When agencies adopt rules, they must provide notice and opportunity for public comments on the proposed rule. An order adopting a rule must include a reasoned justification of the rule, under sec. 2001.033 of the Government Code. A court may invalidate a rule for failure substantially to follow the procedures of the Administrative Procedure Act, Chap. 2001 of Government Code, related to rule adoption.

DIGEST: SB 382 would permit a state agency to be substantially in compliance with the reasoned justification requirement for agency rulemaking of sec. 2001.033 of the Government Code if that justification demonstrated in a relatively clear and logical fashion that the rule was a reasonable means to a legitimate objective. An agency would not be required to prepare an additional analysis of alternatives not adopted by the agency. Under the bill, a mere technical defect that did not alter the result, or prejudice a person's rights or privileges, would not be grounds for the invalidation of a rule.

The agency order adopting a rule would have to include a summary rather than a restatement of the factual basis behind the rule and would be required

to demonstrate a rational connection between those facts and the rule as adopted.

A court that found that an agency had not substantially complied with the procedural requirements of the Government Code could remand the rule to the agency and provide the agency a reasonable time to revise or readopt the rule. During the time a rule is on remand, the original rule would remain in effect.

SB 382 would add sec. 2001.0225, requiring regulatory analysis of major environmental rules, to the procedures with which adopted rules would have to comply substantially and to the two-year time limit for challenging a rule for failure to comply with procedural requirements. The bill also would clarify that rules failing to conform with section 2001.024, providing for the content of notice, would not automatically invalidate the rule.

SB 382 would take effect September 1, 1999 and apply to rules adopted by a state agency after January 1, 1998.

**SUPPORTERS
SAY:**

Current law allows state agency rules to be invalidated by a court for minor errors in procedure committed when they were adopted. Almost any rules that a person disagrees with can be challenged on grounds that its adoption did not follow the details of required procedures, including the reasoned justification requirement. That requirement is so broad that it basically opens the door to the invalidation of any rule a judge wishes to void.

SB 382 would provide clarifications to allow a rule to remain in effect when the only error in its adoption was a technical defect that could easily be corrected. This remand procedure would allow state agencies to correct minor defects in rules without having to go through the entire rulemaking process again from scratch. It also would clarify the reasonable justification requirement and limit that statement to a demonstration of a rational connection between the factual need for the particular rule and the rule itself.

**OPPONENTS
SAY:**

The reasoned justification requirement has been a long standing rule of Texas administrative procedure. That requirement was reiterated under SB 1715 by Patterson, enacted in 1997, which stated that a rule not in compliance with notice publication requirements would be null and void, which this bill would repeal. The reasoned justification provision helps to ensure that the public is

fully informed of proposed rules. This legislation would represent a shift away from judicial review of such rules and would favor agencies in disputes.