

BILL ANALYSIS

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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The Open Beaches Act (Chapter 61, Natural Resources Code) and the Dune Protection Act (Chapter 63, Natural Resources Code) authorize the commissioner of the General Land Office (commissioner) to enforce these Acts. Under the Open Beaches Act, the commissioner is tasked to protect the public's common-law beach easement from the line of vegetation seaward to the line of mean water. The Dune Protection Act authorizes the General Land Office (GLO) and coastal local governments to regulate and prohibit activities that would adversely affect dunes and dune vegetation seaward of the local government's established dune protection. Furthermore, current law encourages local governments to use historical erosion data to prepare a plan for reducing public expenditures for erosion and storm damage losses to public and private property, including beaches, by establishing and implementing a building set-back line that will accommodate a shoreline retreat. Current law provides that Chapter 2007 (Private Real Property Rights Preservation Act), Government Code, does not apply to the implementation of beach access plans adopted by local governments under the Open Beaches Act on or before September 1, 1995.

The Texas coast is a fragile, dynamic environment that is constantly changing in reaction to human and natural influences. Many Gulf of Mexico (Gulf) coast beaches, in particular, have suffered substantial coastal erosion over the past 15 years that show no signs of abating. The extent and location of the worst erosion has led to the difficult problem of structures legally built behind the line of vegetation ending up on the public beach. The fact that erosion and storm events have caused structures to lie on the public beach has created a situation where the interests of the property owners conflict with the public's right to access and use the beach. Furthermore, the rush to develop areas near the Gulf on barrier islands has challenged the resources of GLO and local governments to adequately protect dunes and dune vegetation. Vegetated dunes are vital to the protection of landward development from storm surges and flooding during storm events. These dunes absorb much of the force of coastal storms, and thus protect life and property. In addition, tremendous development pressures on the Texas coast are straining the capacity of local governments to properly administer their dune protection and beach access plans and straining the capacity of GLO to handle the large volume of permits in a manner consistent with state law. Coastal local governments are currently amending their plans with greater frequency because of the strong interest in development.

There is a need for the Dune Protection Act and the Open Beaches Act to be updated to take into account current conditions, including the need for adequate review of permits and for plan amendments, and to provide the commissioner with additional tools to preserve the public beach easement while recognizing the interests of property owners and to improve enforcement of the Dune Protection Act while permitting development that restores damage to dunes and dune vegetation. Also, there is a need to authorize local governments subject to the Open Beaches Act and the Dune Protection Act to establish and implement a building set-back line.

As proposed, S.B. 1789 updates the Dune Protection Act, the Open Beaches Act, and related provisions to protect coastal resources under current changes in conditions. This bill also enhances the commissioner's authority to preserve and protect Texas' coastal natural resources. Furthermore, this bill enhances the authority of local governments to develop building set-back lines on the coast to reduce the costs associated with coastal erosion and storm damage.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the commissioner of the General Land Office in SECTION 3 (Section 33.607, Natural Resources Code), SECTION 10 (Section 61.0184, Natural Resources Code), and SECTION 18 (Section 63.1814, Natural Resources Code) of this bill.

Rulemaking authority previously granted to the commissioner of the General Land Office is modified in SECTION 7 (Section 61.011, Natural Resources Code) and SECTION 16 (Section 63.121, Natural Resources Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 33.605(b), Natural Resources Code, as follows:

(b) Requires the commissioner of the General Land Office (commissioner), in determining whether to approve an expenditure for a study or project, to consider the building set-back line established by the local government under Section 33.607 if the site to be studied or project to be conducted will be located within the jurisdiction of a local government subject to Chapter 61 (Use and Maintenance of Public Beaches) or Chapter 63 (Dunes). Makes nonsubstantive changes.

SECTION 2. Amends the heading to Section 33.607, Natural Resources Code, to read as follows:

Sec. 33.607. COASTAL EROSION PUBLIC AWARENESS AND EDUCATION;
LOCAL GOVERNMENT PLANNING AND REGULATION.

SECTION 3. Amends Section 33.607, Natural Resources Code, by amending Subsection (e) and adding Subsections (f), (g), and (h), as follows:

(e) Authorizes, rather than encourages, a local government subject to Chapter 61 or 63 to use historical erosion data to prepare a plan for reducing public expenditures for erosion and storm damage losses to public and private property, including public beaches, by establishing and implementing a building set-back line that will accommodate a shoreline retreat.

(f) Authorizes certain information and provisions to be included in a plan for reducing public expenditures for erosion and storm damage losses to public and private property that includes the establishment and implementation of a building set-back line under this section.

(g) Authorizes the commissioner to adopt rules for the establishment and implementation of a building set-back line under this section.

(h) Provides that Chapter 2007 (Governmental Action Affecting Private Property Rights), Government Code, does not apply to a rule or government order or ordinance authorized by this section.

SECTION 4. Amends Section 33.651(4), Natural Resources Code, to redefine "coastal improvement project."

SECTION 5. Amends Section 33.656, Natural Resources Code, as follows:

Sec. 33.656. PROJECTS THAT QUALIFY FOR FUNDING. Provides an exception for a project that implements a building set-back line established under Section 33.607 to the applicability of the provision requiring a project to require more than \$5 million to complete, as estimated by the General Land Office, to qualify for funding under this subchapter (Coastal Protection and Improvement).

SECTION 6. Amends Section 33.659(a), Natural Resources Code, to provide that a coastal county has the rights, powers, privileges, authority, and functions that are necessary or convenient to the establishment and implementation of a building set-back line under Section 33.607.

SECTION 7. Amends Section 61.011(d), Natural Resources Code, to include certain additional matters that the commissioner is required to promulgate rules for, consistent with the policies established in this section.

SECTION 8. Amends Sections 61.015(b) and (c), Natural Resources Code, as follows:

(b) Requires the commissioner to act on a local government's proposed beach access and use plan within 90, rather than 60, days of submission by either approving the plan or denying certification.

(c) Requires the local government to forward a development plan for small-sale construction activity that includes 5,000 square feet or less or habitable structures two stories or less in height to the commissioner no less than 10 working days prior to acting on the development plan. Requires the local government to forward a development plan for large-scale construction activity that includes more than 5,000 square feet or habitable structures more than two stories in height to the commissioner no less than 30 working days prior to acting on the development plan.

SECTION 9. Amends Sections 61.018(b) and (c), Natural Resources Code, as follows:

(b) Authorizes the attorney general, the commissioner, county attorney, district attorney, or criminal district attorney, in the same suit, to recover penalties and the costs of removing any improvement, obstruction, barrier, or other encroachment if it is removed by public authorities pursuant to a removal order issued by the commissioner as provided by Section 61.0183.

(c) Provides that a person who violates this chapter or a removal order issued by the commissioner as provided by Section 61.0183 is liable for a civil penalty of not less than \$50 nor more than \$2,000, rather than \$1,000.

SECTION 10. Amends Subchapter B, Chapter 61, Natural Resources Code, by adding Sections 61.0181-61.0184, as follows:

Sec. 61.0181. ADMINISTRATIVE PENALTY. Authorizes the commission [sic] to assess an administrative penalty against a person who violates this chapter or a rule adopted under this chapter in the amount provided by Section 61.018(c) for a civil penalty. Requires the commissioner to consider certain factors in determining the amount of the penalty.

Sec. 61.0182. ENFORCEMENT PROVISIONS CUMULATIVE. Establishes that this subchapter is cumulative of all other applicable penalties, remedies, and enforcement and liability provisions.

Sec. 61.0183. REMOVAL OF CERTAIN STRUCTURES, IMPROVEMENTS, OBSTRUCTIONS, BARRIERS, AND HAZARDS OF PUBLIC BEACH. (a) Authorizes the commissioner to order the removal of a structure, improvement, obstruction, barrier, or hazard from a public beach under certain circumstances.

(b) Provides that the decision to remove a structure, improvement, obstruction, barrier, or hazard under this section is discretionary with the commissioner. Provides that this section does not impose a duty on the state to remove a structure, improvement, obstruction, barrier, or hazard or to remedy or warn of a hazardous condition to the public beach.

(c) Authorizes the commissioner to contract for the removal and disposal of a structure, improvement, obstruction, barrier, or hazard under this section and to pay the costs of removal from money appropriated by the legislature.

Sec. 61.0184. NOTICE REQUIREMENTS; ORDERS AND HEARINGS. (a) Requires the commissioner to make a determination that a structure is located on the public beach, assess an administrative penalty, and pursue the removal of a structure, improvement, obstruction, barrier, or hazard from a public beach in accordance with this section.

(b) Requires the commissioner, before the commissioner is authorized to notify the Texas Windstorm Insurance Association (association) as provided by 2210.004 (Definition of Insurable Property), Insurance Code, regarding the status of property, to give written notice and an opportunity for a hearing to a person who is constructing, maintains, controls, owns, or possesses the structure, improvement, obstruction, barrier, or hazard on the public beach. Requires the notice to state certain information.

(c) Requires the commissioner, before the commissioner is authorized to order the removal of a structure, improvement, obstruction, barrier, or hazard to provide written notice to the person who is constructing, maintains, controls, owns, or possesses the structure, improvement, obstruction, barrier, or hazard on the public beach. Requires the notice to state certain information.

(d) Provides that a person is considered to be the person who owns, maintains, controls, or possesses an improvement, obstruction, barrier, or other encroachment on the public beach for purposes of this section if the person is the person who most recently owned, maintained, controlled, or possessed the improvement, obstruction, barrier, or other encroachment on the public beach.

(e) Requires the notice required by Subsection (b) to be given by service in person, by registered or certified mail, return receipt requested, or by priority mail; or if personal service cannot be obtained or the address of the person responsible is unknown, by posting a copy of the notice on the structure, improvement, obstruction, barrier, or hazard and by publishing notice in a newspaper with general circulation in the county in which the structure, improvement, obstruction, barrier, or hazard is located at least two times within 10 consecutive days.

(f) Authorizes the commissioner by rule to adopt procedures for a hearing under this section.

(g) Requires the commissioner to grant a hearing before an administrative law judge employed by the State Office of Administrative Hearings (SOAH) if a hearing is requested. Provides that a person who does not request a hearing within 60 days after the date on which the notice is served waives all rights to judicial review of the commissioner's findings or orders and is required to immediately remove the structure, improvement, obstruction, barrier, or hazard and pay any penalty assessed. Authorizes the commissioner, if a hearing is held, to issue a final order approving the proposal for decision submitted by the administrative law judge concerning a determination regarding whether a structure is not insurable property for purposes of Section 2210.004, Insurance Code, because of the factors listed in Subsection (h) of that section or concerning removal of the structure, improvement, obstruction, barrier, or hazard and payment of a penalty. Authorizes the commissioner to change a finding of fact or conclusion of law made by the administrative law judge or vacate or modify an order issued by the administrative judge in accordance with Section 2001.058 (Hearing Conducted by State Office of Administrative Hearings), Government Code.

(h) Requires the trial courts of this state to give preference to an appeal from a final order of the commissioner under this section as provided by Section 23.101(a) (regarding primary priorities), Government Code.

(i) Authorizes the commissioner to take certain actions if the person who is constructing, maintains, controls, owns, or possesses the structure, improvement, obstruction, barrier, or hazard does not pay assessed penalties, removal costs, and other assessed fees and expenses on or before the 60th day after the date of entry of a final order assessing the penalties, costs, and expenses.

SECTION 11. Amends Section 61.020, Natural Resources Code, as follows:

Sec. 61.020. PRIMA FACIE EVIDENCE. (a) Creates this subsection from existing text. Provides that a showing that the area in question is located in the area from mean low tide to the line of vegetation is certain prima facie evidence in an administrative proceeding brought or defended under this subchapter (Access to Public Beaches) or whose determination is affected by this subchapter.

(b) Provides that the determination of the location of the line of vegetation by the commissioner as provided by Section 61.016 (Boundaries for Areas With No Marked Vegetation Line) and Section 61.017 (Line of Vegetation Unaffected by Certain Conditions) constitutes prima facie evidence of the landward boundary of the area subject to the public easement until a court adjudication establishes the line in another place.

SECTION 12. Amends Section 61.025, Natural Resources Code, as follows:

Sec. 61.025. DISCLOSURE TO PURCHASER OF PROPERTY. (a) Provides a specific statement that is required to be substantially followed and included in any executory contract for conveyance for a person who sells or conveys an interest, other than a mineral, leasehold, or security interest, in real property located seaward of the Gulf Intracoastal Waterway to its southernmost point and then seaward of the longitudinal line also known as 97 degrees, 12', 19" which runs southerly to the international boundary from the intersection of the centerline of the Gulf Intracoastal Waterway and the Brownsville Ship Channel.

(b) Requires the statement, if there is no executory contract for conveyance, to be delivered to, and receipt thereof acknowledged by, the purchaser not later than 10 calendar days prior to closing the transaction.

(c) Provides that failure to provide the written notice to the purchaser on or before the 10th calendar day before the effective date of any conveyance or executory contract renders the conveyance or executory contract voidable and requires such to be grounds for the purchaser to terminate such contract, and upon termination any earnest money is required to be returned to the party making the deposit. Provides that failure to include the statement in an executory contract renders the conveyance or executory contract voidable.

(d) Requires failure to provide this statement on or before the 10th calendar day before the effective date of any executory contract for conveyance or to include the statement in an executory contract for conveyance, rather than failure to provide this statement prior to closing, either in the executory contract for conveyance or in a separate written statement, to constitute a deceptive act under Section 17.46 (Deceptive Trade Practices), Business & Commerce Code.

(e) Makes a nonsubstantive change.

SECTION 13. Amends Section 63.002, Natural Resources Code, by adding Subdivision (6), to define "restoration."

SECTION 14. Amends Section 63.054(c), Natural Resources Code, as follows:

(c) Requires each county or municipality administering this chapter to submit the procedures and requirements governing the review and approval of dune permits to the commissioner for certification to determine whether the procedures and requirements are in compliance with rules and policies adopted under Section 63.121. Requires the commissioner to act on a county or municipality's proposed dune protection plan not later than the 90th day after the date the plan is submitted by approving the plan or denying certification. Requires the commissioner to return the proposed plan to the originating local government with certain information if certification is denied. Requires the county or municipality to revise and resubmit the plan on receipt. Requires the commissioner to certify a county or municipality's procedures and requirements under this section in accordance with rules adopted under Section 63.121, rather than for comments.

SECTION 15. Amends Section 63.056(a), Natural Resources Code, as follows:

(a) Requires the commissioner's court or the governing body of the municipality, after receiving an application for a permit to perform any of the acts prohibited in Section 63.091 (Conduct Prohibited) in connection with small-scale construction activity that include 5,000 square feet or less or habitable structures two stories in height or less, to notify the commissioner by sending, not less than 10 working days before the date of the public hearing on the application, notice of the hearing and a copy of the application. Requires the commissioner's court or the governing body of the municipality, after receiving an application for a permit to perform any of the acts prohibited in Section 63.091 in connection with large-scale construction activity that include more than 5,000 square feet or habitable structures more than two stories in height, to notify the commissioner by sending, not less than 30 working days before the date of the public hearing on the application, notice of the hearing and a copy of the application.

SECTION 16. Amends Section 63.121, Natural Resources Code, as follows:

Sec. 63.121. New heading: IDENTIFICATION OF CRITICAL DUNE AREAS; RULES. (a) Creates this subsection from existing text.

(b) Requires the commissioner to promulgate rules for the certification of procedures and requirements governing the review and approval of dune permits by a county or municipality.

SECTION 17. Amends Section 63.181(b), Natural Resources Code, as follows:

(b) Provides that a person who violates this chapter or any rule, permit, or order under this chapter is liable for a civil penalty of not less than \$50 nor more than \$2,000, rather than \$1,000. Provides that a violation of Section 63.091 is considered to be a continuing violation from a certain date.

SECTION 18. Amends Subchapter G, Chapter 63, Natural Resources Code, by adding Sections 63.1811-63.1814, as follows:

Sec. 63.1811. ADMINISTRATIVE PENALTY. Authorizes the commissioner to assess an administrative penalty for a violation of Section 63.091 or any rule, permit, or order issued under this chapter in the amount established by Section 63.181(b) for a civil penalty. Requires the commissioner, in determining the amount of the penalty, to consider certain factors.

Sec. 63.1812. ENFORCEMENT PROVISIONS CUMULATIVE. Provides that this subchapter is cumulative of all other applicable penalties, remedies, and enforcement and liability provisions.

Sec. 63.1813. MITIGATION FOR DAMAGE, DESTRUCTION, OR REMOVAL OF DUNE OR DUNE VEGETATION WITHOUT PERMIT. (a) Authorizes the commissioner to order restoration for the damage, destruction, or removal of a sand dune or a portion of a sand dune or the killing, destruction, or removal of any vegetation

growing on a sand dune seaward of the dune protection line or within a critical dune area in violation of this chapter or any rule, permit, or order issued under this chapter.

(b) Provides that the decision to require restoration under this section is discretionary with the commissioner. Provides that this section does not impose a duty on the state to order restoration.

(c) Authorizes the commissioner to contract for the restoration required under this section and pay the costs of restoration from money appropriated by the legislature.

Sec. 63.1814. NOTICE REQUIREMENTS; ORDERS AND HEARINGS. (a) Requires the commissioner to assess an administrative penalty and pursue restoration in accordance with this section.

(b) Requires the commissioner, before the commissioner is authorized to order restoration under Section 63.1813 or assess an administrative penalty under Section 63.1811, to give written notice to a person who is taking or has taken actions that violate Section 63.091 or any rule, permit, or order issued under this chapter. Requires the notice to state certain information.

(c) Provides that a person is considered to be engaging in or to have engaged in conduct that violates Section 63.091 or any rule, permit, or order issued under this chapter for purposes of this section if the person is the person who most recently owned, maintained, controlled, or possessed the real property on which the conduct occurred.

(d) Requires the notice required by Subsection (b) to be given in a certain manner.

(e) Authorizes the commissioner by rule to adopt procedures for a hearing under this section.

(f) Requires the commissioner to grant a hearing before an administrative law judge employed by SOAH if a hearing is requested. Provides that a person who does not request a hearing within 60 days after the date on which the notice is served waives all rights to judicial review of the commissioner's findings or orders and is required to immediately initiate mitigation and pay any penalty assessed. Authorizes the commissioner, if a hearing is held, to issue a final order approving the proposal for decision submitted by the administrative law judge concerning mitigation and payment of a penalty. Authorizes the commissioner to change a finding of fact or conclusion of law made by the administrative law judge, or vacate or modify an order issued by the administrative law judge in accordance with Section 2001.058, Government Code.

(g) Requires the trial courts of this state to give preference to an appeal from a final order of the commissioner under this section as provided by Section 23.101(a), Government Code.

(h) Authorizes the commissioner to take certain actions if the person who is engaged in or has been engaged in conduct that violated Section 63.091 or any rule, permit, or order issued under this chapter does not pay assessed penalties, mitigation costs, and other assessed fees and expenses on or before the 60th day after the date of entry of a final order assessing the penalties, costs, and expenses.

SECTION 19. Amends Section 2210.004, Insurance Code, by amending Subsection (a) and adding Subsection (h), as follows:

(a) Makes a conforming change.

(h) Provides that, for purposes of this chapter (Texas Windstorm Insurance Association), a structure is not insurable property if the commissioner notifies the association of a certain determination regarding the structure.

SECTION 20. Amends Section 5.008(b), Property Code, to require a specific section that allows the seller to mark yes or no that they are aware that a property is located in an area where a beachfront construction certificate or a dune protection permit for repairs or improvements to be included within the notice required to be executed and, at a minimum, read substantially similar to a specific form by a seller of residential real property comprising not more than one dwelling unit located in this state, and to be given to the purchaser of the property.

SECTION 21. Requires the commissioner to adopt rules required by Sections 61.011 and 63.121, Natural Resources Code, as amended by this Act, not later than January 1, 2008.

SECTION 22. Effective date: September 1, 2007.