The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §§293.1, 293.12, 293.41, 293.44, 293.51, 293.54, 293.63, 293.81, 293.94, and 293.171. Sections 293.1, 293.12, 293.54, 293.63, 293.81, 293.94, and 293.171 are adopted *without changes* to the proposed text as published in the May 30, 2014, issue of the *Texas Register* (39 TexReg 4143), and therefore, will not be republished. Sections 293.41, 293.44, and 293.51 are adopted *with changes* to the proposed text and will be republished.

Background and Summary of the Factual Basis for the Adopted Rules

In 2013, the 83rd Legislature passed House Bill (HB) 738, HB 1050, HB 2704, and Senate Bill (SB) 902. The purpose of this adopted rulemaking is to amend Chapter 293 to reflect the legislative changes to Texas Water Code (TWC), §§49.154, 49.181, 49.194, 49.212, 49.273, 49.462, 49.4641, 49.4645, 54.0161, and 54.236.

HB 738 amends TWC, §54.0161, to specify that the commissioners court of a county in which a proposed municipal utility district (MUD) is located may review the petition and provide comment to the commission on the creation of a MUD located entirely outside the corporate limits of a municipality. HB 738 requires the commission to promptly notify a commissioners court of a MUD creation petition. Under prior law, a county could provide comments to the commission only if any portion of a proposed MUD was located outside the extraterritorial jurisdiction (ETJ) of a municipality. HB 738 expands the opportunity

for review and comment by the county commissioners court on a proposed MUD outside the corporate limits (within or outside the ETJ) of a municipality. As a result, the commission adopts an amendment to §293.12 to reflect the required notification process only for MUD creations.

HB 1050 and HB 2704 amend TWC, §49.273(i), to specify that a change order can be approved by a district's governing board, or by an official or employee responsible for purchasing or for administering a contract that is given authority by the district's governing board, so long as the aggregate of the change orders does not increase the original contract amount by more than 25%, instead of by 10% as allowed under prior statute. The commission adopts an amendment to §293.81 to reflect this increase.

SB 902, §13, specifies that bond anticipation notes (BANs) may be issued for any purpose for which bonds of the district may be issued. Prior statutory language stated that BANs may be issued for any purpose for which bonds of the district may have been previously voted, which is reflected in the existing Chapter 293 rules. Therefore, the commission adopts an amendment to §293.54 to reflect that a BAN may be issued for any purpose for which bonds of the district may be issued.

SB 902, §14, specifies that a district may not issue bonds to finance a project for which the commission has adopted rules requiring review and approval unless the commission

determines that the project is feasible and issues an order approving the issuance of the bonds. Prior statutory language stated that a district may not issue bonds (no distinguishing type) to finance a project for which the commission has adopted rules requiring review and approval unless the commission determines that the project is feasible and issues an order approving the issuance of the bonds, which is reflected in the existing Chapter 293 rule. Therefore, the commission adopts an amendment to §293.41 to reflect that the commission's review of a district's bond issue is limited to bonds to finance a project for which the commission has adopted rules requiring review and approval.

SB 902, §15, specifies that a special water authority shall submit a copy of an audit report to the commission not later than 160 days after the special water authority's fiscal year end. Prior statutory language allowed for an audit report from any type of water district or authority to be filed within 135 days after the close of the district's fiscal year end, which is reflected in the existing Chapter 293 rule. Therefore, the commission adopts an amendment to §293.94 to reflect that a special water authority shall submit a copy of an audit report and related filing affidavit to the commission not later than 160 days after the special water authority's fiscal year end.

Prior statutory language allowed for a determination that a fee charged by a district for certain facilities such as water, sanitary sewer, or drainage facilities was not an impact fee. SB 902, §16, added storm water detention or retention facilities and related storm water

conveyances to the list of facilities that may be exempt from the impact fee designation. SB 902, §16, also allowed for the determination of actual costs of facilities to include certain non-construction costs such as design, permitting, financing, construction, and interest. The existing Chapter 293 rule for impact fees mirrored the previous statutory language. Therefore, the commission adopts an amendment to §293.171 to reflect the addition of storm water detention or retention facilities to the list of facilities that may be exempt from the impact fee designation and the definition of actual costs.

Prior statutory language specified that a district shall advertise and publish notice for district contracts over $50,000. SB 902, §19, increased the contract amount for which a district must advertise and publish notice from $50,000 to $75,000. Additionally, prior statutory language specified that a district shall solicit bids when a district contract is over $25,000 but not more than $50,000. SB 902, §19, increased the maximum amount for which a district shall solicit bids from $50,000 to $75,000. The existing Chapter 293 rule for advertising and soliciting bids for contracts mirrored the prior statutory language. Therefore, the commission adopts an amendment to §293.63 to reflect these increases.

Prior statutory language defined a recreational facility as parks, landscaping, parkways, greenbelts, sidewalks, trails, public right-of-way beautification projects, and recreational equipment and facilities. SB 902, §21, specified that the definition of a "recreational facility" does not include a minor improvement or beautification project to land acquired

or to be acquired solely as part of a district's water, wastewater, or drainage facilities. The existing Chapter 293 rule defining recreational facilities mirrored the prior statutory language. Therefore, the commission adopts an amendment to §293.1 to reflect the revised definition of a recreational facility.

SB 902, §22, allows districts to fund the full costs of sites acquired for developing water, wastewater, or drainage facilities that also have a recreational facility component by specifying that a district would not be required to prorate the costs of the site between the utility and recreational purposes. SB 902, §22, requires a licensed professional engineer to certify that such a site is reasonably sized for the utility purpose, and gives guidance for what should be considered in order to determine if the site is reasonably sized for the utility purpose. SB 902, §22, provided guidance for the factors the engineer may consider when determining the reasonableness of the site. The existing Chapter 293 rule regarding the proration of these types of facilities does not reflect the statutory changes of SB 902. Therefore, the commission adopts amendments to §293.44 and §293.51 to reflect the district's ability to finance the full cost associated with site acquisition.

Prior statutory language set the limitation for the total amount of bonds outstanding and proposed to be issued for recreational facilities at 1% of a district's total assessed valuation. SB 902, §23, added that this 1% limitation also applied to bonds supported by a contract tax and was based on the taxable value of property in the district making payments under

the contract. SB 902, §23, further specified that an estimate of value provided by the central appraisal district may be used to establish the value of taxable property within a district for the issuance of recreational facilities bonds. The existing Chapter 293 rule for the 1% limitation and appraisal district certification mirrored the prior statutory language. Therefore, the commission adopts an amendment to §293.41 to reflect these changes.

SB 902, §29, added that a MUD may issue bonds supported by ad valorem taxes to pay for the purchase, installation, and maintenance of street or security lighting under a MUD's authorization to acquire road facilities or as a recreational facility. The existing Chapter 293 rule regarding street lighting stipulates that a district may not fund these facilities. Therefore, the commission adopts an amendment to §293.41 to allow MUDs to fund street lighting facilities in compliance with SB 902.

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission also adopts revisions to 30 TAC Chapter 290, Public Drinking Water, and 30 TAC Chapter 291, Utility Regulations.

Section by Section Discussion

In addition to implementation of the state laws discussed previously, the commission adopts administrative changes throughout the adopted rules to update citations and terminology and conform with *Texas Register* requirements.

§293.1, Objective and Scope of Rules; Meaning of Certain Words

The commission adopts an amendment to §293.1(c) to specify that the definition of a recreational facility does not include a minor improvement or beautification project to land acquired or to be acquired solely as part of a district's water, wastewater, or drainage facilities. The adopted amendment implements TWC, §49.462(1), as amended by SB 902, §21, to remain consistent with the amended statute.

§293.12, Creation Notice Actions and Requirements

The commission adds §293.12(h) to specify that upon receipt of a petition to create a district under TWC, Chapter 54, all of which is to be located outside the corporate limits of a municipality, the executive director shall notify the commissioners court of any county in which the proposed district is to be located that the petition has been filed. The adopted addition implements TWC, §54.0161, as amended by HB 738, to remain consistent with the amended statute.

§293.41, Approval of Projects and Issuance of Bonds

The commission adds §293.41(a)(6) to specify that the commission's review of district bond issues is limited to bonds to finance a project for which the commission has adopted rules requiring review and approval. The adopted addition implements TWC, §49.181(a), as amended by SB 902, §14, to remain consistent with the amended statute. The

commission adopts an amendment to §293.41(e)(3)(H) to specify that a MUD may issue bonds supported by ad valorem taxes to pay for the purchase, installation, and maintenance of street or security lighting under a MUD's authorization to acquire road facilities or as a recreational facility. The adopted amendment to §293.41(e)(3)(H) implements TWC, §54.236, as amended by SB 902, §29, to remain consistent with the amended statute. The commission further adopts an amendment to §293.41(e)(4) to specify that the district's outstanding principal debt (bonds, notes, and other obligations), supported by ad valorem taxes, for recreational facilities may not exceed 1% of the taxable value of property in the district and that the aforementioned 1% limitation also applies for bonds supported by a contract tax, and is based on the taxable value of property in the district(s) making payments under the contract. The commission adopts an amendment to §293.41(e)(4) to specify that an estimate of value provided by the central appraisal district may be used to establish the value of taxable property within the district(s) for the issuance of bonds for recreational facilities. In response to comment, the commission has revised §293.41(e)(4) by replacing the word "must" with "may" to accurately reflect the statute specifying that a district's outstanding principal debt (bonds, notes, and other obligations), supported by ad valorem taxes, for recreational facilities may not exceed 1% of the taxable value of the property in the district. The adopted amendment to §293.41(e)(4) implements TWC, §49.4645(a), as amended by SB 902, §23, to remain consistent with the amended statute.

§293.44, Special Considerations

The commission adopts an amendment to §293.44(a)(12) to specify that a district is not required to prorate the land costs of a combined lake and detention site between the primary drainage purpose and any secondary recreational facilities purpose if a licensed professional engineer certifies that the site is reasonably sized for the primary drainage purpose. In response to comment, the commission has removed the word "land" from the phrase "land costs" in §293.44(a)(12) to clarify that the adopted rule would apply to all eligible costs associated with sites as provided for in the amended statute. In response to comment, the commission also removed the proposed statement in §293.44(a)(12) that would have required sites to be prorated if the licensed professional engineer certified that the site was reasonably sized for the primary purpose as the amended statute did not mandate proration of these sites if said certificate was not provided. The adopted amendment implements the addition of TWC, §49.4641, as added by SB 902, §22, to remain consistent with the amended statute.

§293.51, Land and Easement Acquisition

The commission adds §293.51(j) to specify that a district is not required to prorate the land costs of a combined lake and detention site between the primary water, wastewater, or drainage purpose and any secondary recreational facilities purpose if a licensed professional engineer certifies that the site is reasonably sized for the primary purpose. In response to comment, the commission removed the proposed statement in §293.51(j) that

would have required sites to be prorated if the licensed professional engineer certified that the site was reasonably sized for the primary purpose as the amended statute did not mandate proration of these sites if said certificate was not provided. The adopted amendment implements the addition of TWC, §49.4641, as added by SB 902, §22, to remain consistent with the amended statute.

§293.54, Bond Anticipation Notes (BAN)

The commission adopts an amendment to §293.54 to reflect that BANs may be issued for any purpose for which bonds of the district may be issued, in lieu of the prior statutory requirement that BANs may be issued for any purpose for which bonds of the district may have been previously voted. The adopted amendment implements TWC, §49.154(c), as amended by SB 902, §13, to remain consistent with the amended statute.

§293.63, Contract Documents for Water District Projects

The commission adopts an amendment to §293.63(8) to increase the amount of a contract for which a district's governing board of directors is required to advertise the project from $50,000 to $75,000. The commission also adopts an amendment to §293.63(8) to increase the amount of a contract for which a district's governing board is required to solicit written competitive bids on the project from $50,000 to $75,000. The adopted amendment implements TWC, §49.273(d) and (e), as amended by SB 902, §19, to remain consistent with the amended statute.

§293.81, Change Orders

The commission adopts an amendment to §293.81(1)(A) to specify that a district may issue a change order so long as the aggregate of the change orders does not increase the original contract amount by more than 25%, instead of by 10% as allowed under the existing rule. The adopted amendment implements TWC, §49.273(i), as amended by HB 1050 and HB 2704, to remain consistent with the amended statute.

§293.94, Annual Financial Reporting Requirements

The commission adopts an amendment to §293.94(h)(1)(A) to specify that a special water authority, as defined in TWC, §49.001(8), shall submit a copy of an audit report and accompanying annual filing affidavit to the commission not later than 160 days after the special water authority's fiscal year end, in lieu of the prior statutory language's 135-day time period which was applicable to all districts and authorities subject to TWC, Chapter 49. The adopted amendment implements TWC, §49.194(h), as amended by SB 902, §15, to remain consistent with the amended statute.

§293.171, Definitions of Terms

The commission adopts an amendment to §293.171 and its subdivisions to specify that actual costs, as it relates to impact fees, may include non-construction expenses attributable to the design, permitting, financing, and construction of those facilities, and

reasonable interest on those costs calculated at a rate not to exceed the net effective interest rate on any district bonds issued to finance the facilities. The commission also adopts an amendment to §293.171 to add storm water detention or retention facilities, or capacity in such facilities and related storm water conveyances, to the list of facilities that may be exempt from the impact fee designation. The adopted amendment implements TWC, §49.212(d), as amended by SB 902, §16, to remain consistent with the amended statute.

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative Procedure Act. A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not the specific intent of the rule to protect the environment or reduce risks to

human health from environmental exposure. The primary purpose of the adopted rulemaking is to implement legislative changes enacted by HB 738, HB 1050, HB 2704, and SB 902 relating to the creation, regulation, powers, and operation of water districts. The adopted rules would substantially advance this purpose by amending the existing Chapter 293 rules to incorporate the new statutory requirements.

In addition, the rulemaking does not meet the statutory definition of a "major environmental rule" because the adopted rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The cost of complying with the adopted rules is not expected to be significant with respect to the economy.

Furthermore, the adopted rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). There are no federal standards governing the areas of contracts, projects, and authority with respect to water districts. Second, the adopted rulemaking does not exceed an express requirement of state law. Third, the adopted rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Finally, the adopted rulemaking will be adopted pursuant to the commission's specific authority in TWC, §12.081, which allows the commission to issue

rules necessary to supervise districts and authorities. Therefore, the rules are not adopted solely under the commission's general powers.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated the adopted rules and performed an assessment of whether the adopted rules constitute a taking under Texas Government Code, Chapter 2007. The primary purpose of the adopted rulemaking is to implement legislative changes enacted by HB 738, HB 1050, HB 2704, and SB 902 relating to the creation, regulation, powers, and operation of water districts. The adopted rules would substantially advance this purpose by amending the existing Chapter 293 rules to incorporate the new statutory requirements.

Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. The adopted rules do not affect a landowner's rights in private real property because this rulemaking does not relate to or have any impact on an owner's rights to property. This adopted rulemaking will primarily affect districts, especially in the areas of contracts, projects, and authority; this would not be an effect on private real property. Therefore, the adopted rulemaking would not

constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Texas Coastal Management Program (CMP), and will, therefore, require that goals and policies of the Texas CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the consistency of this rulemaking with the CMP.

Public Comment

The commission held a public hearing on June 26, 2014. The comment period closed on

June 30, 2014. Comments were received from the Honorable Hugh Coleman of Denton County; Allen Boone Humphries Robinson, L.L.P. (ABHR); County Judges and Commissioners Association of Texas; Muller Law Group, P.L.L.C. (Muller); and Schwartz, Page & Harding, L.L.P. (SPH).

ABHR and SPH offered comments to add clarification language to rules as proposed. County Commissioner Coleman provided comment detailing his understanding of the intent of HB 738. Muller requested the commission add new rule language clarifying the definition of an impact fee.

Response to Comments

County Commissioner Coleman and the County Judges and Commissioners Association of Texas recommended revised rule language for proposed §293.12(h) which would require the TCEQ's Chief Clerk's Office to: 1) send a copy of the complete petition to the commissioners court, and 2) provide the commissioners court with the criteria applicable and used by the TCEQ in its review of the petition.

The commissions' rule regarding application materials required to be filed with a petition requesting creation of a MUD is publicly available and can be found under §293.11. A county in which a proposed MUD is to be located is provided a copy of the notice of petition to create a MUD from the TCEQ. If

the county commissioners court requires additional information, TWC, §54.0161(a - 2), requires the petitioner(s) provide the information to the commissioners court by specifying that "{*p}etitioners for the creation of a district shall submit to the county commissioners court any relevant information requested by the commissioners court.*" Therefore, no change has been made in response to these comments.

ABHR and SPH commented that §293.41(e)(3)(H) should read "*street lighting, except as authorized by TWC, §54.236, as amended.*" Instead, the commission's proposed language was "*street lighting, except for a district operating under TWC, Chapter 54, pursuant to TWC, §54.236, as amended.*"

The commission responds that the proposed language sufficiently reflects the language from SB 902, §29. No change has been made in response to these comments.

SPH commented that §293.41(e)(4) should read, "{*a} district's outstanding principal debt (bonds, notes, and other obligations) supported by ad valorem taxes for recreational facilities may not exceed 1%...*" Instead, the commission's proposed language was "{*a} district's outstanding principal debt (bonds, notes, and other obligations), supported by ad valorem taxes, for recreational facilities must not exceed 1%...*"

The commission concurs and in response has amended §293.41(e)(4) by changing to the word "must" to "may" to accurately reflect the statute.

SPH commented that commission's proposed change to §293.44(a)(12) should read "{*p}ursuant to the provisions of TWC, §49.4641, as amended, a district … is not required to prorate the costs of a site between the primary drainage purpose and any secondary recreational facilities purpose if a licensed professional engineer certifies that the site is reasonably sized for the primary drainage purpose.*" Instead, the commission's proposed language was "{*p}ursuant to the provisions of TWC, §49.4641, as amended, a district is not required to prorate the land costs of a combined lake and detention site between the primary drainage purpose and any secondary recreational facilities purpose if a licensed professional engineer certifies that the site is reasonably sized for the primary drainage purpose; however, the site shall be prorated if a licensed professional engineer does not certify that the site is reasonably sized for the primary purpose.*"

The commission concurs and in response to this comment has removed the word "land" from phrase "land costs" in §293.44(a)(12). Additionally, the reference in §293.44(a)(12) to prorating a site not certified by a licensed professional engineer, beginning at "; however,…" has also been removed in response to this comment to accurately reflect the wording and intent of the

amended statute. However, the commenter's requested deletion of the phrase "combined lake and detention" has not been acted upon as the provisions of adopted §293.44(a)(12) would apply only to combined lake and detention facilities and would not apply to other facility types.

ABHR and SPH commented that §293.51(j) should read, "{*n}otwithstanding subsections (d) and (i), a district is not required to prorate the costs of a site between the primary water, wastewater, or drainage purpose and any secondary recreational facilities purpose if a licensed professional engineer certifies that the site is reasonably sized for the primary water, wastewater, or drainage purpose pursuant to the provisions of TWC, §49.4641, as amended*." Instead, the commission's proposed language was "{*n}otwithstanding subsections (d) and (i), a district is not required to prorate the land costs of site between the primary water, wastewater, or drainage purpose and any secondary recreational facilities purpose if a licensed professional engineer certifies that the site is reasonably sized for the primary water, wastewater, or drainage purpose pursuant to the provisions of TWC, §49.4641, as amended. However, the site shall be prorated if a licensed professional engineer does not certify that the site is reasonably sized for the primary purpose*."

The commission responds that the word "land" from the phrase "land costs" and the second sentence which had required proration if a licensed

professional engineer's certification was not provided has been removed from adopted §293.51(j) in response to these comments to accurately reflect the wording and intent of the amended statute.

ABHR and SPH commented that the second sentence of §293.81(1)(A) should read "{*c}hange orders increasing the original contract price more than 25% may be issued only in response to* ..."; instead, the commission's proposed language was "{*c}hange orders above 25% may be issued only in response to* ..."

The commission responds that the proposed language sufficiently reflects the statute as written in HB 1050 and HB 2704. No change has been made in response to these comments.

ABHR and SPH commented that the second sentence of §293.94(h)(1)(A) should read, "{*a}udit reports and the annual filing affidavits that must accompany those reports shall be submitted as prescribed by paragraph (2) of this subsection within 135 days after the close of the district's fiscal year, except that audit reports and the accompanying annual filing affidavits submitted by a special water authority, as defined in TWC, §49.001(8), shall be submitted as prescribed by paragraph (2) of this subsection within 160 days after the close of the special water authority's fiscal year*." Instead, the commission's proposed language was "{*a}udit reports and the annual filing affidavits that must accompany those*

reports shall be submitted as prescribed by paragraph (2) of this subsection within 135 days after the close of the district's fiscal year. A special water authority's audit report and the annual filing affidavits that must accompany those reports shall be submitted as prescribed by paragraph (2) of this subsection within 160 days after the close of the special water authority's fiscal year."

The commission responds that the proposed language sufficiently reflects SB 902, §15. No change has been made in response to these comments.

SPH commented that the commission's proposed language to amend §293.171(1) and (1)(B) should reflect the removal of the words "*sanitary sewer, or*" and "*if*." SPH also commented that language in §293.171(1)(B) should remove of the word "*it*."

The commission responds that the rule language, as proposed, reflects the changes suggested by the commenter; therefore, no additional changes are necessary to the aforementioned section in response to this comment.

Muller requested the commission add §293.171(1)(D) to reflect that a payment made pursuant to a contract as provided in §293.44(b)(3) is not an impact fee to clarify "*long-standing confusion*" on the difference between impact fees and contractual purchase agreements imposed by one entity onto another.

The commission responds that the recommended rule language proposed by the commenter is outside the scope of this rulemaking as this rulemaking does not address contracts between entities with respect to the definition of an impact fee. No change has been made in response to this comment.

SUBCHAPTER A: GENERAL PROVISIONS

§293.1

Statutory Authority

The amendment is adopted under the Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; and TWC, §5.103, which establishes the commission's general authority to adopt rules. In addition, TWC, §12.081, provides the commission authority to issue rules necessary to supervise districts and authorities created under Article 3, §52, and Article 16, §59, of the *Texas Constitution*.

The adopted amendment implements the language set forth in Senate Bill 902, which will primarily affect districts, especially in the areas of contracts, projects, and their authority. Therefore, the TWC authorizes rulemaking that amends §293.1, which relates to districts.

§293.1. Objective and Scope of Rules; Meaning of Certain Words.

(a) The commission has the statutory duty and responsibility to create, supervise, and dissolve certain water and water related districts and to approve the issuance and sale of bonds for district improvements in accordance with the Texas Water Code (TWC). This chapter, adopted under TWC, §§5.103, 5.105, and 5.701, shall govern the creation,

supervision, and dissolution of all general and special law districts subject to and within the applicable limits of the jurisdiction of the commission.

(b) This chapter shall govern the conversion of districts into municipal utility districts as provided in TWC, §§54.030 - 54.036.

(c) The term "recreational facilities" means parks, landscaping, parkways, greenbelts, sidewalks, trails, public right-of-way beautification projects, and recreational equipment and facilities. The term includes associated street and security lighting. <u>The term does not include a minor improvement or beautification project to land acquired or to be acquired as part of a district's water, wastewater, or drainage facilities.</u>

SUBCHAPTER B: CREATION OF WATER DISTRICTS

§293.12

Statutory Authority

The amendment is adopted under the Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; and TWC, §5.103, which establishes the commission's general authority to adopt rules. In addition, TWC, §12.081, provides the commission authority to issue rules necessary to supervise districts and authorities created under Article 3, §52, and Article 16, §59, of the *Texas Constitution*.

The adopted amendment implements the language set forth in House Bill 738, which will primarily affect districts, especially in the areas of contracts, projects, and their authority. Therefore, the TWC authorizes rulemaking that amends §293.12, which relates to districts.

§293.12. Creation Notice Actions and Requirements.

(a) On receipt by the executive director of all required documentation associated with an application for creation of a district by the commission in accordance with Texas Water Code (TWC), Chapter 51, multi-county Water Control <u>and</u> [&] Improvement Districts or <u>single-county</u> [single county] Water Control and Improvement Districts

requesting additional powers; Chapter 54, Municipal Utility Districts; Chapter 55, Water Improvement Districts; Chapter 58, multi-county Irrigation Districts; Chapter 59, Regional Districts; Chapter 65, Special Utility Districts; and Chapter 66, Stormwater [Storm Water] Control Districts, the executive director shall notify the chief clerk that the application is administratively complete.

(b) For those applications described in subsection (a) of this section, the chief clerk shall send a copy of a notice to the applicant indicating that an application has been received and notifying interested persons of the procedures for requesting a public hearing. The applicant shall cause the notice to be published as follows:

(1) notice must be published once a week for two consecutive weeks in a newspaper regularly published or circulated in the county or counties where the district is proposed to be located with the last publication not later than the 30th day before the date on which the commission may act on the application; [,] and

(2) not later than the 30th day before the date on which the commission may act on the application, the notice must be posted on the bulletin board used for posting legal notices in each county in which all or part of the proposed district is to be located.

(c) For those applications described in subsection (a) of this section, the commission may act on an application without holding a public hearing if a public hearing is not requested by the commission, the executive director, or an affected person in the manner prescribed by commission rule during the 30 days following the final publication of notice under this section. If the commission determines that a public hearing is necessary, the chief clerk shall advise all parties of the time and place of the hearing. The commission is not required to provide public notice of a hearing under this subsection.

(d) For a petition for the creation of a Special Utility District in accordance with TWC, Chapter 65, which includes transfer of the certificate of public convenience and necessity, the applicant shall also, unless waived by executive director, mail copies of the notice to customers of the water supply corporation and other affected parties at least 120 days prior to approval. Such notice shall include the following:

(1) name and business address of the district;

(2) a description of the service area involved;

(3) the anticipated effect of the conversion on the operation or the rates and services provided to customers; and

(4) a statement that if a hearing is granted, persons may attend the hearing and participate in the process.

(e) If a petition for the creation of a Special Utility District in accordance with TWC, Chapter 65, contains a request for approval of an impact fee, the applicant shall comply with the notice provisions of §293.173 of this title (relating to Impact Fee Notice Actions and Requirements).

(f) Regardless of whether a public hearing is held or not, for an application for creation of a Special Utility District [special utility district] in accordance with TWC, Chapter 65, the commission may only consider a purpose for which the district is being created that is specified in the resolution.

(g) The hearing action and notice requirements for Local Government Code, Chapter 375, Municipal Management Districts In General, are as follows.

(1) The chief clerk shall send a copy of the notice of hearing to all counties in which the proposed district is located and all municipalities which have extraterritorial jurisdiction in the county or counties in which the proposed district is located and which have formally requested notice of creation of all districts in their county or counties. The

chief clerk shall prepare a certificate indicating that notice was properly mailed to any such counties and/or municipalities.

(2) The chief clerk shall send a copy of the notice of hearing to the petitioners, or their agents, who shall:

(A) cause the notice to be published in a newspaper with general circulation in the municipality in which the proposed district is located once a week for two consecutive weeks with the first publication being at least 31 days prior to the date of the commission hearing;

(B) send the notice of the hearing by certified mail, return receipt requested, to all property owners within the district at least 30 days before the hearing.

(h) Upon receipt of a petition to create a district under TWC, Chapter 54, all of which is to be located outside the corporate limits of a municipality, the executive director shall notify the commissioners court of any county in which the proposed district is to be located that the petition has been filed.

SUBCHAPTER E: ISSUANCE OF BONDS

§§293.41, 293.44, 293.51, 293.54

Statutory Authority

These amendments are adopted under the Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; and TWC, §5.103, which establishes the commission's general authority to adopt rules. In addition, TWC, §12.081, provides the commission authority to issue rules necessary to supervise districts and authorities created under Article 3, §52, and Article 16, §59, of the *Texas Constitution*.

The adopted amendments implement the language set forth in Senate Bill 902, which will primarily affect districts, especially in the areas of contracts, projects, and their authority. Therefore, the TWC authorizes rulemaking that amends §§293.41, 293.44, 293.51, and 293.54, which relate to districts.

§293.41. Approval of Projects and Issuance of Bonds.

(a) Bonds, as referred to in this subchapter, include any bonds authorized to be issued by the Texas Water Code (TWC) or special statute, and are represented by an instrument issued in bearer or registered form. This section does not apply to:

(1) refunding bonds, if the commission issued an order approving the issuance of the bonds or notes that originally financed the project;

(2) refunding bonds that are issued by a district under an agreement between the district and a municipality allowing the issuance of the district's bonds to refund bonds issued by the municipality to pay the cost of financing facilities;

(3) bonds issued to and approved by the Farmers Home Administration, the United States Department of Agriculture, the North American Development Bank, or the Texas Water Development Board, or successor agencies;

(4) refunding bonds issued to refund bonds described by paragraph (3) of this subsection; [or]

(5) bonds issued by a public utility agency created under Local Government Code, Chapter 572, any of the public entities participating in which are districts, if at least one of those districts is a district described by subsection (d)(1)(E) of this section; or [.]

(6) bonds issued by a district to finance a project for which the commission has not adopted rules requiring review and approval.

(b) This subchapter does apply to revenue notes to the extent described in §293.80(d) of this title (relating to Revenue Notes) and contract tax obligations to the extent described in §293.89 of this title (relating to Contract Tax Obligations).

(c) The commission has the statutory responsibility to approve projects relating to the issuance and sale of bonds for districts as defined in TWC, §49.001(1), and other districts where specifically required by law.

(d) This subchapter does not apply to:

(1) a district if:

(A) the boundaries include one entire county;

(B) the district was created by a special act of the legislature; and

(i) the district is located entirely within one county and entirely within one or more home-rule municipalities;

(ii) the total taxable value of the real property and improvements to the real property, zoned by one or more home-rule municipalities for residential purposes and located within the district, does not exceed 25% of the total taxable value of all taxable property in the district, as shown by the most recent certified appraisal tax roll prepared by the appraisal district for the county; and

(iii) the district was not required by law to obtain commission approval of its bonds before September 1, 1995;

(C) the district is a special water authority as defined by TWC, §49.001(8);

(D) the district is governed by a board of directors appointed in whole or part by the governor, a state agency, or the governing body or chief elected official of a municipality or county and does not provide, or propose to provide, water, wastewater, drainage, reclamation, or flood control services to residential retail or commercial customers as its principal function; or

(E) the district:

(i) is a municipal utility district operating under TWC, Chapter 54, that includes territory in only two counties;

(ii) has outstanding long-term indebtedness that is rated BBB or better by a nationally recognized rating agency for municipal securities; and

(iii) has at least 5,000 active water connections; or

(F) the district:

(i) is a conservation and reclamation district created under the *Texas Constitution*, Article 16, §59, that includes territory in at least three counties; and

(ii) has the rights, privileges, and functions applicable to a river authority under TWC, Chapter 30; or

(2) a public utility agency created under Local Government Code, Chapter 572, any of the public entities participating in which are districts, if at least one of those districts is a district described by paragraph (1)(E) of this subsection.

(e) A district located within Bastrop, Bexar, Brazoria, Fort Bend, Galveston, Harris, Montgomery (except for a district all or part of which is located in Montgomery County and includes land within a planned community of at least 15,000 acres, of which a majority of the developed acreage is subject to restrictive covenants containing ad valorem assessments), Travis, Waller, or Williamson Counties may submit bond applications, which include recreational facilities that are supported by taxes, in accordance with TWC, §49.4645.

(1) Bond applications submitted under this subsection must include a copy of a district's park plan as required under TWC, §49.4645(b), in addition to other application requirements under §293.43 of this title (relating to Application Requirements). The park plan is to be signed and sealed by a registered landscape architect, a <u>licensed</u> [registered] professional engineer, or any other design professional allowed by law to engage in landscape architecture.

(2) Bond applications submitted under this subsection may include:

(A) forests, greenbelts, open spaces, and native habitat;

(B) sidewalks, trails, paths, boardwalks, and fitness trail equipment, subject to the following restrictions:

(i) the sidewalks, trails, paths, boardwalks, and fitness trail equipment unrelated to golf courses;

(ii) the sidewalks, trails, paths, boardwalks, and fitness trail equipment located outside of the right-of-way required by applicable government agencies for streets, unless a district has completed and financed at least 90% of its projected water, wastewater, and drainage facilities to serve residential development within the district; and

(iii) if a district has completed and financed at least 90% of its projected water, wastewater, and drainage facilities to serve residential development within the district prior to the annexation of land, the location restriction in clause (ii) of this subparagraph only applies to annexed land;

(C) pedestrian bridges and underpasses that are less than 200 feet in length and not related to golf courses;

(D) outdoor ballfields, including, but not limited to, soccer, football, baseball, softball, and lacrosse, outdoor skate/roller blade facilities, associated scoreboards, and bleachers designed for less than 500 people per field or per skate/roller blade facility;

(E) parks (outdoor playground facilities and associated ground surface material, picnic tables, benches, barbeque grills, fire pits, fireplaces, trash receptacles, drinking water fountains, open-air pavilions/gazebos, open-air amphitheaters/assembly facilities designed for less than 500 people, open-air shade structures, restrooms and changing rooms, concession stands, water playgrounds, recreational equipment storage facilities, and emergency call boxes);

(F) amenity lakes, and associated water features, docks, piers, overlooks, and non-motorized boat launches subject to §293.44(a)(24) of this title (relating to Special Considerations);

(G) amenity/recreation centers, outdoor tennis courts, and outdoor basketball courts if the district has funded water, wastewater, and drainage facilities to serve at least 90% of the residential development within the district;

(H) fences no higher than eight feet that are located within public right-of-way or district sites/easements and are along streets if the district has funded water, wastewater, and drainage facilities to serve at least 90% of the residential development within the district; and

(I) landscaping (including, but not limited to, trees, shrubs, and berms) and associated irrigation, fences, information signs/kiosks, lighting (except street lighting), and parking related to items listed in subparagraphs (A) through (G) of this paragraph.

(3) Bond applications submitted under this subsection shall not include:

(A) indoor or outdoor swimming pools, pool decks, and associated equipment or storage facilities;

(B) golf courses, clubhouses, and related structures or facilities;

(C) air conditioned buildings, gymnasiums, spas, fitness centers, and habitable structures, except as allowed in paragraph (2) of this subsection;

(D) sound barrier walls;

(E) retaining walls used for roadway purposes;

(F) fences, such as for subdivisions and lots, which are not related to district facilities, except as allowed in paragraph (2) of this subsection;

(G) signs and monuments, such as for subdivisions and developments, which are not related to district facilities; and

(H) street lighting, except for a district operating under TWC, Chapter 54, pursuant to TWC, §54.236, as amended.

(4) A district's outstanding principal debt (bonds, notes, and other obligations), supported by ad valorem taxes, [payable from any source,] for recreational facilities may ~~must~~ not exceed 1% of the taxable value of property in the district, as supported by a certificate from the central appraisal district, at the time of issuance of the debt or exceed the estimated cost provided in the park plan required under TWC, §49.4645(b), whichever is smaller. If supported by contract taxes under TWC, §49.108, the outstanding principal debt (bonds, notes, and other obligations) may not exceed an amount equal to 1% of the value of the taxable property in the district or districts making payments under the contract. An estimate of the value provided by the central appraisal district may be used to establish the value of the taxable property in the district or districts.

(5) A district may submit a bond application that proposes to fund recreational facilities only after or at the same time a district has funded water, wastewater, and/or drainage facilities, depending on a district's authorized functions, to serve the

section that includes the recreational facilities or to serve areas along roads that are either adjacent to the recreational facilities or are necessary to provide access to the recreational facilities.

(6) Plans and specifications for recreational facilities must be signed and sealed by a registered landscape architect, a licensed [registered] professional engineer, or any other design professional allowed by law to engage in landscape architecture.

§293.44. Special Considerations.

(a) Developer projects. The following provisions shall apply unless the commission, in its discretion, determines that application to a particular situation renders an inequitable result.

(1) A developer project is a district project that provides water, wastewater, drainage, or recreational facility service for property owned by a developer of property in the district, as defined by Texas Water Code (TWC), §49.052(d).

(2) Except as permitted under paragraph (8) of this subsection, the costs of joint facilities that benefit the district and others should be shared on the basis of benefits received. Generally, the benefits are the design capacities in the joint facilities for each

participant. Proposed cost sharing for conveyance facilities should account for both flow and inflow locations.

(3) The cost of clearing and grubbing of district facilities' easements that will also be used for other facilities that are not eligible for district expenditures, such as roads, gas lines, telephone lines, etc., should be shared equally by the district and the developer, except where unusually wide road or street rights-of-way or other unusual circumstances are present, as determined by the commission. The district's share of such costs is further subject to any required developer contribution under §293.47 of this title (relating to Thirty Percent of District Construction Costs to be Paid by Developer). The applicability of the competitive bidding statutes and/or regulations for clearing and grubbing contracts let and awarded in the developer's name shall not apply when the amount of the estimated district share, including any required developer contribution does not exceed 50% of the total construction contract costs.

(4) A district may finance the cost of spreading and compacting of fill in areas that require the fill for development purposes, such as in abandoned ditches or floodplain areas, only to the extent necessary to dispose of the spoil material (fill) generated by other projects of the district.

(5) The cost of any clearing and grubbing in areas where fill is to be placed should not be paid by the district, unless the district can demonstrate a net savings in the costs of disposal of excavated materials when compared to the estimated costs of disposal off site.

(6) When a developer changes the plan of development requiring the abandonment or relocation of existing facilities, the district may pay the cost of either the abandoned facilities or the cost of replacement facilities, but not both.

(7) When a developer changes the plan of development requiring the redesign of facilities that have been designed, but not constructed, the district may pay the cost of the original design or the cost of the redesign, but not both.

(8) A district shall not finance the pro rata share of oversized water, wastewater, or drainage facilities to serve areas outside the district unless:

(A) such oversizing:

(i) is required by or represents the minimum approvable design sizes prescribed by local governments or other regulatory agencies for such applications;

(ii) does not benefit out-of-district land owned by the developer;

(iii) does not benefit out-of-district land currently being developed by others; and

(iv) the district agrees to use its best efforts to recover such costs if a future user outside the district desires to use such capacity; or

(B) the district has entered into an agreement with the party being served by such oversized capacity that provides adequate payment to the district to pay the cost of financing, operating, and maintaining such oversized capacity; or

(C) the district has entered into an agreement with the party to be served or benefitted in the future by such oversized capacity, which provides for contemporaneous payment by such future user of the incremental increase in construction and engineering costs attributable to such oversizing and which, until the costs of financing, construction, operation, and maintenance of such oversized facilities are prorated according to paragraph (2) of this subsection, provides that:

(i) the capacity or usage rights of such future user shall be restricted to the design flow or capacity of such oversized facilities multiplied by the fractional engineering and construction costs contemporaneously paid by such future user; and

(ii) such future user shall pay directly allocable operation and maintenance costs proportionate to such restricted capacity or usage rights; or

(D) the district or a developer in the district has entered into an agreement with a municipality or regional water or wastewater provider regarding the oversized facilities and such oversizing is more cost-effective than alternative facilities to serve the district only. For the purposes of this subparagraph, regional water or wastewater provider means a provider that serves land in more than one county. An applicant requesting approval under this subparagraph must provide:

(i) bid documents or an engineer's sealed estimate of probable costs of alternatives that meet minimum acceptable standards based on costs prevailing at the time the facilities were constructed; or

(ii) an engineering feasibility analysis outlining the service alternatives considered at the time the decision to participate in the oversizing was made; or

(iii) any other information requested by the executive director.

(9) Railroad, pipeline, or underground utility relocations that are needed because of road crossings should not be financed by the district; however, if such relocations result from a simultaneous district project and road crossing project, then such relocation costs should be shared equally. The district's share of such costs is further subject to any required developer contribution under §293.47 of this title.

(10) Engineering studies, such as topographic surveys, soil studies, fault studies, boundary surveys, etc., that contain information that will be used both for district purposes and for other purposes, such as roadway design, foundation design, land purchases, etc., should be shared equally by the district and the developer, unless unusual circumstances are present as determined by the commission. The district's share of such costs is further subject to any required developer contribution under §293.47 of this title.

(11) Land planning, zoning, and development planning costs should not be paid by the district, except for conceptual land-use plans required to be filed with a city as a condition for city consent to creation of the district.

(12) The cost of constructing lakes or other facilities that are part of the developer's amenities package should not typically be paid by the district; however, the costs for the portion of an amenity lake considered a recreational facility under paragraph (24) of this subsection may be funded by the district. The cost of combined lake and detention facilities should be shared with the developer on the basis of the volume attributable to each use, and land costs should be shared on the same basis, unless the district can demonstrate a net savings in the cost of securing fill and construction materials from such lake or detention facilities, when compared to the costs of securing such fill or construction materials off site for another eligible project. Pursuant to the provisions of TWC, §49.4641, as amended, a district is not required to prorate the ~~land~~ costs of a combined lake and detention site between the primary drainage purpose and any secondary recreational facilities purpose if a licensed professional engineer certifies that the site is reasonably sized for the primary drainage purpose ~~; however, the site shall be prorated if a licensed professional engineer does not certify that the site is reasonably sized for the primary purpose~~.

(13) Bridge and culvert crossings shall be financed in accordance with the following provisions.

(A) The costs of bridge and culvert crossings needed to accommodate the development's road system shall not be financed by a district, unless such crossing consists of one or more culverts with a combined cross-sectional area of not more than nine square feet. The district's share shall be subject to the developer's 30% contribution as may be required by §293.47 of this title.

(B) Districts may fund the costs of bridge and culvert crossings needed to accommodate the development's road system that are larger than those specified in subparagraph (A) of this paragraph, which cross channels other than natural waterways with defined bed and banks and are necessary as a result of required channel improvements subject to the following limitations:

(i) the drainage channel construction or renovation must benefit property within the district's boundaries;

(ii) the costs shall not exceed a pro rata share based on the percent of total drainage area of the channel crossed, measured at the point of crossing, calculated by taking the total cost of such bridge or culvert crossing multiplied by a

fraction, the numerator of which is the total drainage area located within the district upstream of the crossing, and the denominator of which is the total drainage area upstream of the crossing; and

(iii) the district shall be responsible for not more than 50% of the pro rata share as calculated under this subsection, subject to the developer's 30% contribution as may be required by §293.47 of this title.

(C) The cost of replacement of existing bridges and culverts not constructed or installed by the developer, or the cost of new bridges and culverts across existing roads not financed or constructed by the developer, may be financed by the district, except that any costs of increasing the traffic-carrying capacity of bridges or culverts shall not be financed by the district.

(14) In evaluating district construction projects, including those described in paragraphs (1) - (12) of this subsection, primary consideration shall be given to engineering feasibility and whether the project has been designed in accordance with good engineering practices, notwithstanding that other acceptable or less costly engineering alternatives may exist.

(15) Bond issue proceeds will not be used to pay or reimburse consultant fees for the following:

(A) special or investigative reports for projects which, for any reason, have not been constructed and, in all probability, will not be constructed;

(B) fees for bond issue reports for bond issues consisting primarily of developer reimbursables and approved by the commission but which are no longer proposed to be issued;

(C) fees for completed projects which are not and will not be of benefit to the district; or

(D) provided, however, that the limitations shall not apply to regional projects or special or investigative reports necessary to properly evaluate the feasibility of alternative district projects.

(16) Bond funds may be used to finance costs and expenses necessarily incurred in the organization and operation of the district during the creation and construction periods as follows.

(A) Such costs were incurred or projected to incur during creation, and/or construction periods which include periods during which the district is constructing its facilities or there is construction by third parties of aboveground improvements within the district.

(B) Construction periods do not need to be continuous; however, once reimbursement for a specific time period has occurred, expenses for a prior time period are no longer eligible. Payment of expenses during construction periods is limited to five years in any single bond issue.

(C) Any reimbursement to a developer with bond funds is restricted to actual expenses paid by the district during the same five-year period for which application is made in accordance with this subsection.

(D) The district may pay interest on the advances under this paragraph. Section 293.50 of this title (relating to Developer Interest Reimbursement) applies to interest payments for a developer and such payments are subject to a developer reimbursement audit.

(17) In instances where creation costs to be paid from bond proceeds are determined to be excessive, the executive director may request that the developer submit

invoices and cancelled checks to determine whether such creation costs were reasonable, customary, and necessary for district creation purposes. Such creation costs shall not include planning, platting, zoning, other costs prohibited by paragraphs (10) and (14) of this subsection, and other matters not directly related to the district's water, wastewater, and drainage system, even if required for city consent.

(18) The district shall not purchase, pay for, or reimburse the cost of facilities, either completed or incomplete, from which it has not and will not receive benefit, even though such facilities may have been at one time required by a city or other entity having jurisdiction.

(19) The district shall not enter into any binding contracts with a developer that compel the district to become liable for costs above those approved by the commission.

(20) A district shall not purchase more water supply or wastewater treatment capacity than is needed to meet the foreseeable capacity demands of the district, except in circumstances where:

(A) lease payments or capital contributions are required to be made to entities owning or constructing regional water supply or wastewater treatment facilities to serve the district and others;

(B) such purchases or leases are necessary to meet minimum regulatory standards; or

(C) such purchases or leases are justified by considerations of economic or engineering feasibility.

(21) The district may finance those costs, including mitigation, associated with flood plain regulation and wetlands regulation, attributable to the development of water plants, wastewater treatment plants, pump and lift stations, detention/retention facilities, drainage channels, and levees. The district's share shall not be subject to the developer's 30% contribution as may be required by §293.47 of this title.

(22) The district may finance those costs associated with endangered species permits. Such costs shall be shared between the district and the developer with the district's share not to exceed 70% of the total costs, unless unusual circumstances are present as determined by the commission. The district's share shall not be subject to the developer's 30% contribution under §293.47 of this title. For purposes of this subsection,

"endangered species permit" means a permit or other authorization issued under §7 or §10(a) of the federal Endangered Species Act of 1973, 16 United States Code, §1536 and §1539(a).

(23) The district may finance 100% of those costs associated with federal storm water permits. The district's share shall be subject to the developer's 30% contribution as may be required by §293.47 of this title. For purposes of this subsection, "federal storm water permit" means a permit for storm water discharges issued under the federal Clean Water Act, including National Pollutant Discharge Elimination System permits issued by the United States Environmental Protection Agency and Texas Pollutant Discharge Elimination System permits issued by the commission.

(24) The district may finance the portion of an amenity lake project that is considered a recreational facility.

(A) The portion considered a recreational facility must be accessible to all persons within the district and is determined as:

(i) the percentage of shoreline with at least a 30-foot wide buffer between the shoreline and private property; or

(ii) the percentage of the perimeter of a high bank of a combination detention facility and lake with at least a 30-foot wide buffer between the high bank and private property.

(B) The district's share of costs for the portion of an amenity lake project that is considered a recreational facility is not subject to the developer's 30% contribution under §293.47 of this title.

(C) The authority for districts to fund recreational amenity lake costs in accordance with this paragraph does not apply retroactively to projects included in bond issues submitted to the commission prior to the effective date of this paragraph.

(b) All projects.

(1) The purchase price for existing facilities not covered by a preconstruction agreement or otherwise not constructed by a developer in contemplation of resale to the district, or if constructed by a developer in contemplation of resale to the district and the cost of the facilities is not available after demonstrating a good faith effort to locate the cost records should be established by an independent appraisal by a licensed [registered] professional engineer hired by the district. The appraised value should reflect the cost of replacement of the facility, less repairs and depreciation, taking into account the age and

useful life of the facility and economic and functional obsolescence as evidenced by an on-site inspection.

(2) Contract revenue bonds proposed to be issued by districts for facilities providing water, wastewater, or drainage, under contracts authorized under Local Government Code, §552.014, [§402.014,] or other similar statutory authorization, will be approved by the commission only when the city's pro rata share of debt service on such bonds is sufficient to pay for the cost of the water, wastewater, or drainage facilities proposed to serve areas located outside the boundaries of the service area of the issuing district.

(3) When a district proposes to obtain capacity in or acquire facilities for water, wastewater, drainage, or other service from a municipality, district, or other political subdivision, or other utility provider, and proposes to use bond proceeds to compensate the providing entity for the water, wastewater, drainage, or other services on the basis of a capitalized unit cost, e.g., per connection, per lot, or per acre, the commission will approve the use of bond proceeds for such compensation under the following conditions:

(A) the unit cost is reasonable;

(B) the unit cost approximates the cost to the entity providing the necessary facilities, or the providing entity has adopted a uniform service plan for such water, wastewater, drainage, and other services based on engineering studies of the facilities required; and

(C) the district and the providing entity have entered into a contract that will:

(i) specifically convey either an ownership interest in or a specified contractual capacity or volume of flow into or from the system of the providing entity;

(ii) provide a method to quantify the interest or contractual capacity rights;

(iii) provide that the term for such interest or contractual capacity right is not less than the duration of the maturity schedule of the bonds; and

(iv) contain no provisions that could have the effect of subordinating the conveyed interest or contractual capacity right to a preferential use or right of any other entity.

(4) A district may finance those costs associated with recreational facilities, as defined in §293.1(c) of this title (relating to Objective and Scope of Rules; Meaning of Certain Words) and as detailed in §293.41(e)(2) of this title (relating to Approval of Projects and Issuance of Bonds) for all affected districts that benefit and are available to all persons within the district. A district's financing, whether from tax-supported or revenue debt, of costs associated with recreational facilities is subject to §293.41(e)(1) - (6) of this title and is not subject to the developer's 30% contribution as may be required by §293.47 of this title. The automatic exemption from the developer's 30% requirement provided herein supersedes any conflicting provision in §293.47(d) of this title. In planning for and funding recreational facilities, consideration is to be given to existing and proposed municipal and/or county facilities as required by TWC, §49.465, and to the requirement that bonds supported by ad valorem taxes may not be used to finance recreational facilities, as provided by TWC, §49.464(a), except as allowed in TWC, §49.4645.

(5) The bidding requirements established in TWC, Chapter 49, Subchapter I are not applicable to contracts or services related to a district's use of temporary erosion-control devices or cleaning of silt and debris from streets and storm sewers.

(6) A district's contract for construction work may include economic incentives for early completion of the work or economic disincentives for late completion

of the work. The incentive or disincentive must be part of the proposal prepared by each bidder before the bid opening.

(7) A district may utilize proceeds from the sale and issuance of bonds, notes, or other obligations to acquire an interest in a certificate of public convenience and necessity [(CCN)], contractual rights to use capacity in facilities and to acquire facilities, with costs determined in accordance with applicable law such as paragraph (3) of this subsection and Chapter 291, Subchapter G of this title (relating to Certificates of Convenience and Necessity).

§293.51. Land and Easement Acquisition.

(a) Water, sanitary sewer, storm sewer, drainage, and recreational facilities easements. All easements required within a district's boundaries for water lines; sanitary sewer lines; storm sewer lines; sanitary control at water plants; noise and odor control at wastewater treatment plants; the right-of-way necessary for a drainage swale or ditch constructed generally along a street or road in lieu of a storm sewer; recreational facilities; and the right-of-way area required by governmental jurisdictions for streets that are used for recreational facilities, shall be dedicated to the district or the public by the developer without payment or reimbursement from the district. If any easements are required for such facilities on land not owned by a developer in the district, the district may acquire

such land at its appraised market value, and may also pay legal, engineering, surveying, or court fees and expenses incurred in acquiring such land, and §293.47 of this title (relating to Thirty Percent of District Construction Costs to be Paid by Developer) shall not apply to such acquisition.

(b) Land acquisition. A district may acquire the following in fee simple from any person, including the developer, in accordance with this section, and §293.47 of this title shall not apply to such acquisition:

(1) plant sites, including required sanitary control at water plants and noise and odor control at wastewater treatment plants;

(2) lift or pump station sites;

(3) drainage channels other than those described in subsection (a) of this section and other than those which are natural waterways with defined bed and banks;

(4) detention/retention pond sites;

(5) levees;

(6) mitigation sites for compliance with flood plain regulation and wetlands regulation or payments in lieu of mitigation;

(7) mitigation sites for compliance with endangered species permits or payments in lieu of mitigation, the cost of which shall be shared between the district and the developer as provided in §293.44(a)(22) of this title (relating to Special Considerations); or

(8) recreational facility sites that are outside of the right-of-way required by governmental jurisdictions to be dedicated for streets and roads.

(c) Price of land acquisition.

(1) If a district acquires such a site, as described in subsection (b) of this section, which is outside of the 100-year floodplain, from a developer within the district or subsequent owner of developer reimbursables, the price shall be determined by adding to the price paid by the developer for such land or easement in a bona fide transaction between unrelated parties the developer's actual taxes and interest paid to the date of acquisition by the district. The interest rate shall not exceed the net effective interest rate on the bonds sold, or the interest rate actually paid by the developer for loans obtained for this purpose, whichever is less. If a developer uses its own funds rather than borrowed

funds, the net effective interest rate on the bonds sold shall be applied. Provided, however, if the executive director determines that such price appears to exceed the fair market value of such land or easement, the executive director may require an appraisal to be obtained by the district from a qualified independent appraiser and payment to the seller may be limited to the fair market value of such land as shown by the appraisal; if the seller acquired the land after the improvements to be financed by the district were constructed, the price shall be limited to the fair market value of such land or easement established without the improvements being constructed; or if the seller acquired the land more than five years before the creation of the district and the records relating to the actual price paid and the taxes and interest costs are impossible or difficult to obtain, the district, upon executive director approval, may purchase such site at fair market value based on an appraisal prepared by a qualified, independent appraiser. If the land or easement needed by the district is being acquired based on the appraised value, the application to the commission for approval to purchase such a site must contain a request by the district to acquire the site in such manner and must explain the reason that the seller is unable to provide the price and carrying cost records.

(2) If a district acquires such a site, as described in subsection (b) of this section, which is within the 100-year floodplain, from a developer within the district or subsequent owner of developer reimbursables, the price shall be the lesser of the amount as determined by paragraph (1) [subsection (c)(1)] of this subsection [section] or fair

market value based on an appraisal prepared by a qualified, independent appraiser hired by the district's board upon their initiative.

(3) If the land or easement needed by the district is being acquired from an entity other than a developer or subsequent owner of developer reimbursables in the district, the district may pay the fair market value established by a qualified, independent appraiser, and may also pay legal, engineering, surveying, or court fees and expenses incurred in acquiring such land or easement.

(d) Joint storm water detention/water amenity facilities. If a detention or retention pond is also being used as an amenity by the developer or as a recreational facility as described in §293.44(a)(24) of this title, payment to the developer shall be limited to that cost that is associated only with the drainage or recreational function of the facility. The land costs of combined water amenity and detention facilities should be shared with the developer on the basis of the volume of water storage attributable to each use, with the water amenity portion subject to reimbursement as a recreational facility in the percentage described in §293.44(a)(24) of this title.

(e) Land or easements outside the district's boundaries. Land or easements needed for any district facilities outside the district's boundaries may be purchased by the district as part of the district project at a price not to exceed the fair market value thereof. The

district may also pay legal, engineering, surveying, or court fees and expenses spent in acquiring such land. If the land or easements are purchased from a developer who owns land within the district, the price paid by the district shall be determined in accordance with subsection (c) of this section and such purchase price shall be subject to the provisions of §293.47 of this title unless the facilities constructed in, on, or over such land, easements, or rights-of-way are exempt from such contribution or the district is exempt from such contribution under the terms of §293.47 of this title. Districts operating under Texas Water Code (TWC), Chapter 54, except one affected by House Bill 2965, 76th Legislature, 1999, are prohibited from exercising the power of eminent domain outside the district's boundaries to acquire:

(1) a site for a water treatment plant, water storage facility, wastewater treatment plant, or wastewater disposal plant;

(2) a site for a park, swimming pool, or other recreational facility, as defined by TWC, §49.462;

(3) an exclusive easement through a county regional park; or

(4) a site or easement for a road project.

(f) Shared land or easements outside the district's boundaries. If the out-of-district land or easement is required for a drainage channel downstream of the district and a portion of such land or easement is or will be needed by another district(s), whether upstream or downstream, for development, the district shall only pay for its proportionate share of the land costs based upon the acreage of the drainage area contributing drainage to such drainage channel at full development. However, in the event there is no developer in another district(s) to dedicate the district's pro rata share of the required land, the district may pay the entire cost to acquire such land, but the commission shall order the other district(s) to reimburse the district at such time as development occurs in the other district that requires such drainage right-of-way.

(g) Regional facilities. A district may use bond proceeds to acquire the entire site for any regional plant, lift or pump station, detention pond, drainage channel, levee, or recreational facility if the commission determines that regionalization will be promoted and the district will recover the appropriate pro rata share of the site costs, carrying costs, and bond issuance costs from future participants. The district may pay the fair market value based on an appraisal for such regional site and also may pay legal, engineering, surveying, or court fees and expenses incurred in acquiring such land. The commission shall, by separate order, order other districts participating in such regional facility to reimburse the acquiring district a proportionate share of such site costs, carrying costs,

and bond issuance costs at such time as development occurs in such other districts requiring such regional site.

(h) Certification by licensed [registered] professional engineer. Prior to the district purchasing or obligating district funds for the purchase of sites for water plants, wastewater plants, or lift or pump stations, the district must have a licensed [registered] professional engineer certify that the site is suitable for the purposes for which it intended and identify what areas will need to be designated as buffer zones to satisfy all entities with jurisdictional authority.

(i) Joint recreational and drainage/detention sites without a constant level lake. If a drainage/detention site will also be used for recreational facility purposes, the costs are allocated 50% to drainage/detention and 50% to recreational purposes. If the recreational facility site includes an existing drainage/detention easement, then the area used to determine the reimbursement amount for the site excludes the area of the existing easement.

(j) Notwithstanding subsections (d) and (i) of this subsection, a district is not required to prorate the ~~land~~ costs of a site between the primary water, wastewater, or drainage purpose and any secondary recreational facilities purpose if a licensed professional engineer certifies that the site is reasonably sized for the primary water,

wastewater, or drainage purpose pursuant to the provisions of TWC, §49.4641, as amended. ~~However, the site shall be prorated if a licensed professional engineer does not certify that the site is reasonably sized for the primary purpose.~~

§293.54. Bond Anticipation Notes (BANs) [(BAN)].

A district may issue bond anticipation notes (BANs) for any purpose for which bonds of the district [have previously been voted or] may be issued or for the purpose of refunding previously issued BANs [bond anticipation notes]. All BANs [bond anticipation notes] issued by a district shall conform to the following requirements.

(1) A bond application containing all projects to be financed by the BAN and the principal of and interest on the BAN shall be on file with the commission.

(2) The financial advisor of the district renders a written opinion to the district to the effect that, based on the projections contained in the bond application report, the district can be reasonably expected to sell its bonds, under prevailing market conditions existing at the time of the sale of the BAN, [bond anticipation note,] in a principal amount at least sufficient to redeem and pay the principal of, and accrued interest on, the BAN on or prior to their stated maturity date.

(3) The proceeds of the BAN may be used to pay only the district's allowable share of the costs of facilities as provided in §293.47 of this title (relating to Thirty Percent of District Construction Costs to be Paid by Developer) until the commission has unconditionally determined that the district is exempt from developer participation.

(4) The interest rate on the BAN shall be limited to the maximum rate at which the district could have issued bonds on the date of issuance of the BAN pursuant to applicable statute or valid city consent.

(5) All BANs [BAN] shall be sold at par.

(6) The proceedings authorizing the issuance of the BAN shall provide that the BAN shall be redeemed at not more than its [their] par value within 30 days after receipt of proceeds from bonds issued for the purpose of redeeming the BAN.

(7) No district funds shall be used to purchase bond or BAN insurance, collateral guarantees, letters of credit, or other forms of credit enhancement.

(8) No BAN proceeds shall be used for the purpose of paying allowable developer interest, as provided in §293.50 of this title (relating to Developer Interest Reimbursement).

(9) Except as hereinafter otherwise provided, BANs [BAN] shall not be used to finance facilities unless the plans and specifications therefor have been approved by all regulatory authorities having jurisdiction thereof and such plans and specifications have been submitted to the executive director in connection with the district's pending bond application.

(10) Issuance of BANs [BAN] shall not prejudice the right of the commission to refuse to approve all or any portion of a bond application or any cost or facility contained therein.

(11) BANs [BAN] shall be payable solely from the proceeds of the district's bonds, as approved by the commission, and no other district funds shall be encumbered, pledged, committed or used for such purpose.

(12) Prior to the issuance of the BAN, the developer shall provide the district a letter of credit, irrevocable development loan commitment, or other guarantee for the applicable contribution of construction and engineering costs for each project to be financed with BAN proceeds as required by §293.47(h) of this title [(relating to Thirty Percent of District Construction Costs to be Paid by Developer)].

(13) Prior to the issuance of the BANs, the developer and district shall enter into a street and road construction agreement as required by §293.48 of this title (relating to Street and Water, Wastewater and Drainage Utility (Street and Utility) Construction by Developer), unless exempted or inapplicable pursuant to §293.59(k)(11) of this title (relating to Economic Feasibility of Project).

SUBCHAPTER F: DISTRICT ACTIONS RELATED TO CONSTRUCTION PROJECTS AND PURCHASE OF FACILITIES

§293.63

Statutory Authority

The amendment is adopted under the Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; and TWC, §5.103, which establishes the commission's general authority to adopt rules. In addition, TWC, §12.081, provides the commission authority to issue rules necessary to supervise districts and authorities created under Article 3, §52, and Article 16, §59, of the *Texas Constitution*.

The adopted amendment implements the language set forth in Senate Bill 902, which will primarily affect districts, especially in the areas of contracts, projects, and their authority. Therefore, the TWC authorizes rulemaking that amends §293.63, which relates to districts.

§293.63. Contract Documents for Water District Projects.

Contract documents for water district construction projects shall be prepared in general conformance with those adopted and recommended by the Texas Section of the

American Society of Civil Engineers (latest revision). The following specific requirements must apply, unless otherwise provided by a district's special law.

(1) All contract documents shall be prepared in such a manner as to promote competitive bidding and to ensure that all bids are prepared on a common basis.

(2) The instruction to bidders section of the contract documents shall give special attention to the following items.

(A) The basis of award shall be clearly defined. If alternate proposals are to be considered, the instructions to bidders shall clearly state in which order the alternates will be considered in determining the most advantageous bid. If two or more contracts are to be awarded, the instructions to bidders shall clearly indicate if combined bids, or tied bids, will be allowed, or if each contract will be awarded separately.

(B) The contract should clearly provide that alternate bids will not be considered, unless specifically allowed by instructions to bidders and requested in the proposal form.

(C) Specific notice shall be given that qualifying statements or accompanying qualifying letters will be cause for rejection of the bid.

(D) Provision shall be made for prospective bidders to request additional information, explanations, or interpretations regarding contract documents prior to the bid opening. All requests and answers to all such requests shall be given in writing. Answers will be in addendum form to all prospective bidders.

(3) The district shall require the bidder to whom the district proposes to award the contract to submit a statement of qualifications. The statement shall include such data as the district may reasonably require to determine whether the contractor is responsible and capable of completing the proposed project.

(4) For contracts over $50,000, [$50,000] the district shall require bidders to submit certified or cashier's checks or a bid bond issued by a surety legally authorized to do business in this state in an amount of at least 2.0% of the total amount of the bid. For a contract greater than $250,000, [$250,000] the district must accept a bid bond if it meets all requirements. If cashier's checks are required, the checks for all bidders except the three most qualified bidders shall be returned within three days of the bid opening.

(5) The district shall require that bidders submit, along with the bid, the name of the person, firm, or corporation that will execute payment and performance bonds.

(6) The district may establish criteria for acceptability of the surety company issuing payment and performance bonds including, but not limited to:

(A) authorization to do business in Texas; and

(B) authorization to issue payment and performance bonds in the amount required for the contract and:

(i) a rating of at least B from Best's Key Rating Guide; or

(ii) if the surety company does not have any such rating due to the length of time it has been a surety company, the surety company must demonstrate eligibility to participate in the surety bond guarantee program of the United States Small Business Administration and must be an approved surety company listed in the current United States Department of Treasury Circular 570. Such performance and payment bonds shall meet the criteria contained in the rules and regulations promulgated by the United States Department of Treasury with respect to performance and payment bonds for federal jobs, including specifically the rules related to the underwriting limitation. The district shall satisfy itself that such surety company and bonds meet such criteria.

(7) The district shall satisfy itself that all persons executing the bonds are duly authorized by the laws of the State of Texas and the surety company to do so.

(8) For contracts over $75,000, [$50,000,] a district's board shall advertise the project once a week for two consecutive weeks. For contracts over $25,000 but not more than $75,000, [$50,000,] a district's board shall solicit written competitive bids on the project from at least three bidders. For contracts not more than $25,000, a district's board is not required to advertise or seek competitive bids.

(9) A board of a special law district may elect to contract in accordance with the requirements in Texas Water Code, §49.273, even if those requirements conflict with provisions in the district's special law.

(10) A district with a population of more than 100,000 may utilize the design-build procedure for limited projects as provided in Local Government Code, Chapter 271, Subchapter J.

SUBCHAPTER G: OTHER ACTIONS REQUIRING COMMISSION CONSIDERATION FOR APPROVAL

§293.81

Statutory Authority

The amendment is adopted under the Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; and TWC, §5.103, which establishes the commission's general authority to adopt rules. In addition, TWC, §12.081, provides the commission authority to issue rules necessary to supervise districts and authorities created under Article 3, §52, and Article 16, §59, of the *Texas Constitution*.

The adopted amendment implements the language set forth in House Bill (HB) 1050 and HB 2704, which will primarily affect districts, especially in the areas of contracts, projects, and their authority. Therefore, the TWC authorizes rulemaking that amends §293.81, which relates to districts.

§293.81. Change Orders.

A change order is a change in plans and specifications for construction work that is under contract. For purposes of this section, a variation between estimated quantities and

actual quantities or use of supplemental items included in the bid where no change in plans and specifications has occurred is not a change order.

(1) Districts are authorized to issue change orders subject to the following conditions.

(A) Except as provided in this subparagraph, change orders, in aggregate, shall not be issued to increase the original contract price more than 25% [10%]. Change [Additional change] orders above 25% may be issued only in response to:

(i) unanticipated conditions encountered during construction;

(ii) changes in regulatory criteria; or

(iii) coordination with construction of other political subdivisions or entities.

(B) All change orders must be in writing and executed by the district and the contractor and approved by the district's engineer.

(2) No commission approval is required if the change order is $50,000 or less. If the change order is more than $50,000, the executive director or his designated representative may approve the change order. For purposes of this section, if either the total additions or total deletions contained in the change order exceed $50,000, even though the net change in the contract price will be $50,000 or less, approval by the executive director is required.

(3) If the change order is $50,000 or less, a copy of the change order signed by the contractor and an authorized representative of the district shall be submitted to the executive director within ten days of the execution date of the change order, together with any revised construction plans and specifications approved by all agencies and entities having jurisdictional responsibilities, i.e. city, county, state, other, if required.

(4) Applications for change orders requiring approval shall include:

(A) a copy of the change order signed by an authorized officer or employee of the district and the contractor, and a resolution or letter signed by the board president indicating concurrence <u>with</u> [in] the proposed change;

(B) revised construction plans and specifications approved by all agencies and entities having jurisdictional responsibilities, i.e., city, county, state, other, if required;

(C) a detailed explanation for the change;

(D) a detailed cost summary showing additions and/or deletions to the approved plans and specifications, and new contract price or cost estimate;

(E) a statement indicating amount and source of funding for the change in plans including how the available funds were generated;

(F) the number of utility connections added or deleted by the change, if any;

(G) certification as to the availability and sufficiency of water supply and wastewater treatment capacities to serve such additional connections;

(H) filing fee in the amount of $100; and

(I) other information as the executive director or the commission may require.

(5) Copies of all changes in plans, specifications and supporting documents for all water district projects will be sent directly to the appropriate commission field office, simultaneously with the submittal of the documents to the executive director.

(6) Requirements relating to change orders shall also apply to construction carried out in accordance with §293.46 of this title (relating to Construction Prior to Commission Approval), except commission approval or disapproval will not be given. Change orders which are subject to executive director approval will be evaluated during the bond application review.

SUBCHAPTER H: REPORTS

§293.94

Statutory Authority

The amendment is adopted under the Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; and TWC, §5.103, which establishes the commission's general authority to adopt rules. In addition, TWC, §12.081, provides the commission authority to issue rules necessary to supervise districts and authorities created under Article 3, §52, and Article 16, §59, of the *Texas Constitution*.

The adopted amendment implements the language set forth in Senate Bill 902, which will primarily affect districts, especially in the areas of contracts, projects, and their authority. Therefore, the TWC authorizes rulemaking that amends §293.94, which relates to districts.

§293.94. Annual Financial Reporting Requirements.

(a) Statutory provisions for fiscal accountability. All districts as defined in Texas Water Code (TWC), §49.001(a) are required to comply with the provisions of TWC, [Texas Water Code,] §§49.191 - 49.198 requiring every district to either have performed an annual audit or to submit an annual financial dormancy affidavit or an annual financial report.

(b) Accounting and auditing manual. All districts shall comply with the accounting and auditing manual adopted by the executive director. The manual shall consist of one publication, "Water District Financial Management Guide." The manual may be revised as necessary by the executive director.

(c) Duty to audit. The governing board of each district created under the general law or by special act of the legislature shall have the district's fiscal accounts and records audited annually at the expense of the district. The person who performs the audit shall be a certified public accountant or public accountant holding a permit from the Texas State Board of Public Accountancy. Districts with limited or no financial activity may qualify to prepare an unaudited financial report, pursuant to subsection (e) of this section, or a financial dormancy affidavit, pursuant to subsection (f) of this section.

(d) Form of audit. The audit shall be performed according to generally accepted auditing standards adopted by the American Institute of Certified Public Accountants. Financial statements shall be prepared in accordance with generally accepted accounting principles as adopted by the American Institute of Certified Public Accountants.

(e) Audit report exemption.

(1) A district may elect to submit annual financial reports to the executive director in lieu of the district's compliance with TWC, [Texas Water Code,] §49.191 provided:

(A) the district had no bonds or other long-term (more than one year) liabilities outstanding during the fiscal period;

(B) the district did not have gross receipts from operations, loans, taxes, or contributions in excess of $250,000 during the fiscal period; and

(C) the district's cash and temporary investments were not in excess of $250,000 at any time during the fiscal period.

(2) The annual financial report must be accompanied by an affidavit, attesting to the accuracy and authenticity of the financial report, signed by a duly authorized representative of the district, which conforms with the format prescribed by the executive director. Financial report and filing affidavit forms may be obtained from the executive director.

(3) Districts governed by this section are subject to periodic audits by the executive director.

(f) Financially dormant districts.

(1) A district may elect to prepare a financial dormancy affidavit rather than an unaudited financial report, as prescribed by subsection (e) of this section, provided:

(A) the district had $500 or less of receipts from operations, tax assessments, loans, contributions, or any other sources during the calendar year;

(B) the district had $500 or less of disbursements of funds during the calendar year;

(C) the district had no bonds or other long-term (more than one year) liabilities outstanding during the calendar year; and

(D) the district did not have cash or investments in excess of $5,000 at any time during the calendar year.

(2) The required financial dormancy and filing affidavit shall be prepared in a format prescribed by the executive director and shall be submitted by a duly authorized

representative of the district. Financial dormancy affidavit forms may be obtained from the executive director.

(3) Districts governed by this section are subject to periodic audits by the executive director.

(g) Annual filing affidavit. Each district shall submit annually with the executive director a filing affidavit which affirms that copies of the district's audit report, financial report, or financial dormancy affidavit have been filed within the district's business office. Each district that files a financial report or a financial dormancy affidavit will find that the annual filing affidavit has been incorporated within those documents, so a separate filing affidavit form is not necessary. However, each district that submits an audit report must execute and submit, together with the audit, an annual filing affidavit when the audit is submitted with the executive director. Annual filing affidavits must conform to the format prescribed by the executive director. Filing affidavit forms may be obtained from the executive director.

(h) Submitting of audits, financial reports, and affidavits.

(1) Submittal dates.

(A) Audits. Audit reports and the annual filing affidavits that must accompany those reports shall be submitted as prescribed by paragraph (2) of this subsection within 135 days after the close of the district's fiscal year. Audit reports and the accompanying annual filing affidavits submitted by a special water authority, as defined in TWC, §49.001(8), shall be submitted as prescribed by paragraph (2) of this subsection within 160 days after the close of the special water authority's fiscal year. The [district's] governing board of the district or special water authority shall approve the audit before a copy of the report is submitted to the executive director; however, the governing board's refusal to approve the audit shall not extend the submittal deadline for the audit report. If the governing board refuses to approve the audit, the board shall submit to the executive director by the prescribed submittal date the report and a statement providing the reasons for the board's refusal to approve the report.

(B) Financial reports. Financial reports and the annual filing affidavits in a format prescribed by the executive director, must be submitted to the executive director as prescribed by paragraph (2) of this subsection within 45 days after the close of the district's fiscal year.

(C) Financial dormancy affidavits. Financial dormancy affidavits shall be submitted as prescribed by paragraph (2) of this subsection by January 31 of each year. The calendar year affidavit affirms that the district met the financial dormancy

requirements stated in subsection (f) of this section during part or all of the calendar year immediately preceding the January 31 filing date.

(2) Submittal locations. Copies of the audit, financial report, or financial dormancy affidavit described in subsections (c), (e) and (f) of this section shall be submitted annually to the executive director, and within the district's office.

(i) Review by executive director.

(1) The executive director may review the audit report of each district, and if the executive director has any objections or determines any violations of generally accepted auditing standards or accounting principles, statutes or commission rules, or if the executive director has any recommendations, he shall notify the governing board of the district.

(2) Before the audit report may be accepted by the executive director as being in compliance with the provisions of this section, the governing board and the auditor shall remedy objections and correct violations of which they have been notified by the executive director.

(3) Districts governed by this section are subject to periodic audits by the executive director. The executive director shall have access to all vouchers, receipts, district fiscal and financial records, and other district records which the executive director considers necessary for the review, analysis, and approval of an audit report, financial report, or financial dormancy affidavit.

(j) Penalties for Noncompliance.

(1) The executive director shall file with the attorney general the names of any districts that do not comply with the provisions of this subchapter.

(2) A district that fails to comply with the filing provisions of TWC, [Texas Water Code,] Chapter 49, may be subject to a civil penalty of up to $100 per day for each day the district willfully continues to violate these provisions after receipt of written notice of violation from the executive director by certified mail, return receipt requested. The state may sue to recover the penalty.

SUBCHAPTER N: PETITION FOR APPROVAL OF IMPACT FEES

§293.171

Statutory Authority

The amendment is adopted under the Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; and TWC, §5.103, which establishes the commission's general authority to adopt rules. In addition, TWC, §12.081, provides the commission authority to issue rules necessary to supervise districts and authorities created under Article 3, §52, and Article 16, §59, of the *Texas Constitution*.

The adopted amendment implements the language set forth in Senate Bill 902, which will primarily affect districts, especially in the areas of contracts, projects, and their authority. Therefore, the TWC authorizes rulemaking that amends §293.171, which relates to districts.

§293.171. Definitions of Terms.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. <u>Actual costs under paragraph (1)(A) and (B) of this section, as determined by the district's governing board of directors,</u>

may include non-construction expenses attributable to the design, permitting, financing, and construction of those facilities, and reasonable interest on those costs calculated at a rate not to exceed the net effective interest rate on any district bonds issued to finance the facilities.

(1) Impact fee--A charge or assessment imposed by a district against new development in order to generate revenue for funding or recouping the costs of capital improvements or facility expansions necessitated by and attributable to such new development. A charge or fee by a district for construction, installation, or inspection of a tap or connection to district water, wastewater, or drainage facilities, including all necessary service lines and meters, for capacity in storm water detention or retention facilities and related storm water conveyances, or for wholesale facilities that serve such water, wastewater, [sanitary sewer, or] drainage, or storm water detention or retention facilities, shall not be deemed to be an impact fee under Local Government Code, Chapter 395 if the charge or fee [if]:

(A) [it] does not exceed three times the actual and reasonable costs to the district for such tap or connection;

(B) [it] is made to a nontaxable entity for retail or wholesale service, does not exceed the actual costs to the district for such work and for all facilities that are

necessary to provide district services to such entity and that are financed or are to be financed in whole or in part by tax-supported or revenue bonds of the district; or

(C) [it] is made by a district for retail or wholesale service on land that at the time of platting was not being provided with water, [water or] wastewater, drainage, or storm water detention or retention service by the district.

(2) Capital improvement plan--Capital improvement plan means a plan which identifies capital improvements or facility expansions pursuant to which impact fees may be assessed.

(3) Capital improvements--Capital improvements means water supply, treatment, and distribution facilities, wastewater collection and treatment facilities, storm water [stormwater], and drainage, and flood control facilities, including facility expansions, whether or not located within the service area, with a life expectancy of three or more years, owned and operated by or on behalf of a district with authorization to finance and construct such facilities, but such term does not include materials and devices for making connections to or measuring services provided by such facilities to district customers.

(4) Connection--Connection means a standardized measure of consumption, use, generation, or discharge attributable to an individual unit of development calculated in accordance with generally accepted engineering or planning standards. Connections shall be described in terms of single family equivalent connections, living unit equivalents, or other generally accepted unit typically attributable to a single family household. The assumed population equivalent per service unit shall be indicated.

(5) Service area--Service area means an area within or without the boundaries of a district to be served by the capital improvements specified in the capital <u>improvement</u> [improvements] plan. The service area may include all or part of the land within a district or land outside a district served by the facilities identified in the capital <u>improvement</u> [improvements] plan.