

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §§293.17, 293.20, 293.22, and 293.23 *without change* to the proposed text as published in the November 20, 2015, issue of the *Texas Register* (40 TexReg 8172), and therefore, these amendments will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

In 2015, the 84th Texas Legislature passed House Bill (HB or bill) 2767, relating to the powers, duties, and administration of groundwater conservation districts (GCDs) and amending provisions that authorize fees. HB 2767 makes non-substantive, conforming, or clarification language changes throughout Texas Water Code (TWC), Chapter 36. Some of the changes made by HB 2767 do not affect the agency's rules. However, the commission has chosen to include all of the changes made by the bill in the Background and Summary of the Factual Basis for the Adopted Rules section of this preamble to provide context to the changes that HB 2767 does require.

Specifically, HB 2767 adds a definition to TWC, §36.001, for "operating permit" to mean any type of GCD permit for operation of or production from a water well including a permit to drill or complete a water well if a district does not require a separate permit for those actions. The bill adds a provision in TWC, §36.058, for GCD directors to be subject to Local Government Code, Chapter 176, relating to disclosure of conflicts. HB 2767 strikes language in TWC, §36.061, related to audit reporting standards and adds language in TWC, §36.153, consistent with TWC, Chapter 49, audit requirements and reporting standards.

The bill amends TWC, §36.157(a), to add that a county or counties where the district is to be located may pay all costs and expenses incurred in the creation and organization of the district. HB 2767 also amends TWC, §36.251, by providing that only a GCD, an applicant, and parties to a contested case may participate in an appeal that was the subject of the contested case. The commission does not have rules governing the items listed in this paragraph; therefore, there are no changes for the commission to make to its rules to accommodate these amendments made by the bill.

Additionally, HB 2767 repeals TWC, §36.1082, Petition for Inquiry, and moves the repealed language to amended TWC, §36.3011, Commission Inquiry and Action Regarding District Duties. This move also included amendments to the newly placed language. The commission has rules governing these items; therefore, the commission amended the rule language in 30 TAC Chapter 293, Water Districts, to ensure the TWC citations included in the chapter are current and conform language to the TWC as amended.

HB 2767 closely follows bill language that was developed by the Texas Water Conservation Association over the interim. HB 2767 was authored by Representative Jim Keffer, sponsored by Senator Charles Perry, and became effective June 10, 2015.

Section by Section Discussion

§293.17, Purpose

The commission adopts the amendment to §293.17(3) by adding the word "and" to

introduce the §293.17(4) provision. The commission adopts the amendment to §293.17(4) by inserting language to note that HB 2767 moved the petitions for inquiry to TWC, Chapter 36, Subchapter I. Additionally, the commission adopts the deletion of §293.17(5) because the rule language is not needed for commission inquiry or action regarding GCD duties. These changes are required by the amendments HB 2767 made to TWC, §36.3011.

§293.20, Records and Reporting

The commission adopts the amendment to §293.20(d) by changing the TWC citation from §36.1082 to §36.3011. HB 2767 repealed TWC, §36.1082, and moved the repealed language to amended TWC, §36.3011. This change brings the citations within the agency's rules into agreement with the TWC.

§293.22, Noncompliance Review and Commission Action

The commission adopts the amendment to §293.22(a)(5) and (e) by changing the TWC citation from §36.1082 to §36.3011. HB 2767 repealed TWC, §36.1082, and moved the repealed language to amended TWC, §36.3011. These changes bring the citations within the agency's rules into agreement with the TWC.

§293.23, Petition Requesting Commission Inquiry

The commission adopts the amendment to §293.23(a) by changing the definition of "affected person" to match the definition of "affected person" as defined in TWC, §36.3011, added by the bill. Additionally, the commission adopts removing the citation to TWC,

§36.1082 that was repealed. These changes bring the agency's rules into agreement with the TWC.

The commission adopts the amendment to §293.23(b) by editing paragraphs (4) - (7) to include conforming changes made to TWC, §36.3011(b).

The commission adopts the amendment to §293.23(g)(4) by changing the TWC citation from §36.1082 to §36.3011. HB 2767 repealed TWC, §36.1082, and moved the repealed language to amended TWC, §36.3011. This change brings the citations within the agency's rules into agreement with the TWC.

Final Regulatory Impact 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, 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 the specific intent of the rule is not to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the adopted rulemaking is to implement legislative changes enacted by HB 2767. HB 2767 repeals TWC, §36.1082, and moves the repealed language to amended TWC, §36.3011.

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

Furthermore, the adopted rulemaking does not meet the statutory definition of a "major environmental rule" because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) 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; or 4)

adopt a rule solely under the general powers of the agency instead of under a specific state law. The adopted rulemaking does not meet the four applicability requirements, because the adopted amendments: 1) do not exceed a standard set by federal law; 2) do not exceed an express requirement of state law; 3) do not exceed a requirement of federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program as no such federal delegation agreement exists with regard to the adopted rules; and 4) are not an adoption of a rule solely under the general powers of the commission as the adopted rules are required by HB 2767.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. The commission did not receive any comments regarding this section of the preamble.

Takings Impact Assessment

The commission evaluated this adopted rulemaking and performed an assessment of whether the adopted rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission adopted this rulemaking for the specific purpose of implementing legislation enacted by the 84th Texas Legislature in 2015. The commission's analysis revealed that the rulemaking would achieve consistency with TWC, §36.3011, as amended by HB 2767. The adopted rulemaking amends the rule sections to ensure the TWC citations included in Chapter 293 are current and conform to the language as

amended by HB 2767.

A "taking" under Texas Government Code, Chapter 2007, means a governmental action that affects private real property in a manner that requires compensation to the owner under the United States or Texas Constitution, or a governmental action that affects real private property in a manner that restricts or limits the owner's right to the property and reduces the market value of affected real property by at least 25%. Because no taking of private real property would occur by ensuring the TWC citations included within Chapter 293 are current and conform to the language as amended, the commission has determined that promulgation and enforcement of this adopted rulemaking is neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rules because the adopted rulemaking neither relates to, nor has any impact on, the use or enjoyment of private real property, and there would be no reduction in real property value as a result of the rulemaking. Therefore, the adopted rulemaking does 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 adopted rulemaking is 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, therefore, requires that goals and policies of the 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 administrative in nature and does not have a 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. The commission did not receive any comments on the CMP section of the preamble.

Public Comment

The commission held a public hearing on December 15, 2015. The comment period closed on January 4, 2016. The commission received comments from the High Plains Underground Water Conservation District (High Plains UWCD). High Plains UWCD suggested changes to the proposed rule as discussed in the Response to Comments section of this preamble.

Response to Comments

Comment

High Plains UWCD commented that the acronym GCD was misspelled in §293.23(a)(2). High Plains UWCD also commented that using the term "GDC district" in §293.23(a)(2) is duplicative and unnecessary since the term district includes a groundwater conservation

district under §293.17. High Plains UWCD recommends striking GCD from the proposed rules.

Response

The commission acknowledges this comment. The proposed version of the rule published on November 20, 2015, in the *Texas Register* (40 TexReg 8172) does not contain a misspelled acronym or include the duplicative term of "GCD district" in §293.23(a)(2). The proposed rule language published in the *Texas Register* states "a GCD or subsidence district in or adjacent to the management area." No changes were made in response to this comment.

SUBCHAPTER C: SPECIAL REQUIREMENTS FOR GROUNDWATER

CONSERVATION DISTRICTS

§§293.17, 293.20, 293.22, 293.23

Statutory Authority

These amendments are adopted under Texas Water Code (TWC), §5.102, General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, Rules, which establishes the commission's general authority to adopt rules; TWC §5.105, General Policy, which establishes the commission's authority to set policy by rule; and TWC, §36.3011, Commission Inquiry and Action Regarding District Duties, which allows an affected person to file a petition for inquiry.

The adopted amendments implement House Bill 2767.

§293.17. Purpose.

The purpose of this subchapter is to provide the processes and requirements related to Texas Water Code (TWC), Chapter 36, Groundwater Conservation Districts. The use of the term "district" in this subchapter means groundwater conservation district (GCD) unless the context clearly indicates otherwise. This subchapter provides:

(1) procedures for commission certification of landowner petitions for the creation of GCDs filed under TWC, §36.013;

(2) procedures for the commission, on its own motion, to create GCDs under TWC, §36.0151, in priority groundwater management areas (PGMAs) designated after September 1, 2001;

(3) procedures for the commission, on its own motion, to create GCDs in PGMAs designated before September 1, 2001; and

(4) procedures for commission review of GCD management plan noncompliance and petitions for inquiry under TWC, Chapter 36, Subchapter I.[: and]

[(5) procedures for GCD joint-planning peer review within a groundwater management area.]

§293.20. Records and Reporting.

(a) Each groundwater conservation district created according to Texas Water Code (TWC), Chapter 36 shall comply with the statute. Districts created by special acts of the Texas Legislature must comply with all statutory requirements contained in the special act and with the provisions of TWC, Chapter 36 that do not conflict with the special act.

(b) Districts are required to submit to the executive director the following documents:

(1) a certified copy of the legislative act creating the district within 60 days after the district is created;

(2) a certified copy of the order of the district's board of directors canvassing the confirmation election and declaring the confirmation election results according to TWC, §36.017(e);

(3) a certified copy of the order of the district's board of directors changing the boundaries of the district, a metes and bounds description of the boundary change, and a detailed map showing the boundary change within 60 days after the date of any boundary change; and

(4) a written notification to the executive director of the name, mailing address, and date of expiration of term of office of any elected or appointed director within 30 days after the date of the election or appointment according to TWC, §36.054(e).

(c) A district is required under TWC, §36.1071 to adopt a management plan and adopt rules that are necessary to implement the management plan. In accordance with

TWC, §36.1072, the management plan must be adopted by the district and submitted to the executive administrator of the Texas Water Development Board within three years of either the effective date of creation of the district or the date the district was confirmed by election if an election was required. The management plan is subject to approval by the executive administrator of the Texas Water Development Board or the Texas Water Development Board upon appeal. After approval, each district must readopt and resubmit the management plan to the executive administrator of the Texas Water Development Board at least once every five years.

(1) Within 60 days of approval of its management plan, a district must send a copy of its approved management plan to the regional water planning group or groups for the planning region or regions in which the district is located. The district shall maintain records of the correspondence.

(2) Within 60 days of approval of its management plan, a district must forward a copy of its approved management plan to the other districts wholly or partially located in the same groundwater management area or areas. The district shall maintain records of the correspondence.

(d) Each district shall provide copies of district documentation or records upon request of the executive director to determine compliance with statutory provisions related to noncompliance review under TWC, Chapter 36, Subchapter I and §293.22 of this title

(relating to Noncompliance Review and Commission Action), and TWC, §36.3011 [§36.1082], and §293.23 of this title (relating to Petition Requesting Commission Inquiry).

(e) Each district shall provide copies of district documentation or records upon request of the executive director to determine compliance with statutory provisions.

§293.22. Noncompliance Review and Commission Action.

(a) Purpose. The purpose of this section is to set out procedures for commission review of groundwater conservation district (GCD) noncompliance with requirements of Texas Water Code (TWC), Chapter 36. This section provides a process for a GCD to achieve compliance, enforcement procedures if compliance is not achieved, and commission enforcement actions. Management plan noncompliance review and commission action are required under TWC as the result of a GCD's failure to:

(1) adopt a management plan in accordance with TWC, §36.1071 and §36.1072 and submit the plan for review and approval to the executive administrator of the Texas Water Development Board within three years of either the effective date of creation of the district or the date the district was confirmed by election if an election was required;

(2) receive within 60 days of submittal, written approval from the executive administrator of the Texas Water Development Board for a management plan, an amended

management plan, or a readopted management plan as provided by TWC, §36.1072 and §36.1073;

(3) readopt and resubmit the management plan for review and approval to the executive administrator of the Texas Water Development Board at least once every five years after the date of the most recent management plan approval;

(4) be actively engaged and operational in achieving the objectives of its groundwater management plan based on the State Auditor's Office review of the district's performance as provided by TWC, §36.302; or

(5) adopt, implement, or enforce district management plans and rules to protect groundwater as evidenced in a report prepared by a commission-appointed review panel as provided by TWC, §36.3011 [§36.1082] and §293.23 of this title (relating to Petition Requesting Commission Inquiry).

(b) Noncompliance review. The executive director shall investigate the facts and circumstances of any violations of this chapter or order of the commission under this chapter or provisions of TWC, §§36.301, 36.3011, and 36.302.

(1) The executive director shall notify the district and may attempt to resolve any noncompliance set out in subsection (a) of this section with the district.

(2) After review of the facts and identification of noncompliance issues, the executive director shall submit a compliance agreement to the district. The compliance agreement must clearly identify the noncompliance issue(s) and provide district actions and a schedule for the district to achieve compliance.

(3) The district shall be provided a specified time frame not to exceed 60 days after the date of receipt of the compliance agreement, to consider and agree to the terms of the compliance agreement and schedule. If the district wants to amend the compliance agreement schedule, it must contact the executive director within 30 days of receipt of the compliance agreement so that the compliance agreement can be considered and signed by the district and its board of directors within the 60-day time frame.

(4) If the district agrees with and signs the compliance agreement, the executive director shall monitor the district's implementation of the agreement terms. If the district accomplishes compliance within the agreed schedule, the executive director shall notify the district that it has achieved compliance and is no longer under review by the commission.

(c) Executive director recommendations filed with commission. If unable to resolve the violation under subsection (b) of this section, or if the facts of the noncompliance issue warrant, the executive director shall follow the procedures for commission enforcement

actions set out in Chapter 70, Subchapter C of this title (relating to Enforcement Referrals to SOAH). The executive director shall prepare and file a written report with the commission and the district and include any actions the executive director believes the commission should take under TWC, §36.303 and subsection (e) of this section.

(d) Notice and hearing. The commission shall provide notice in accordance with §70.104 of this title (relating to Notice of Executive Director's Preliminary Report). If the executive director's report recommends dissolution of a district or of a board of directors or referral of the matter to the Office of the Attorney General requesting the placement of a district into receivership, the commission shall hold an enforcement hearing.

(1) The commission shall publish notice once each week for two consecutive weeks before the day of the hearing to receive evidence on the dissolution of a district or of a board of directors or referral of the matter to the Office of the Attorney General requesting the placement of a district into receivership in a newspaper of general circulation in the area in which the district is located with the first publication being 30 days before the day of hearing.

(2) The commission shall give notice of the hearing by first-class mail addressed to the directors of the district according to the last record on file with the executive director.

(e) Commission enforcement actions. In accordance with TWC, [§§36.1082,] ~~§§36.301, 36.3011,~~ and 36.302, the commission, after notice and hearing, shall take all actions it considers appropriate, including:

(1) issuing an order requiring the district to take certain actions or to refrain from taking certain actions;

(2) dissolving the board in accordance with TWC, §36.305 and §36.307 and calling an election for the purpose of electing a new board;

(3) requesting the attorney general to bring suit for the appointment of a receiver to collect the assets and carry on the business of the GCD in accordance with TWC, §36.3035;

(4) dissolving the district in accordance with TWC, §§36.304, 36.305, and 36.308; or

(5) recommending to the legislature in the commission's report concerning priority groundwater management areas required by TWC, §35.018, actions the commission deems necessary to accomplish comprehensive management in the district.

(f) District dissolution. TWC, §§36.304 - 36.310 authorize the commission to dissolve any district as defined in TWC, §36.001(1), that has no outstanding bonded indebtedness.

(1) A district that is composed of territory entirely within one county may be dissolved even if it has outstanding indebtedness that matures after the year in which the district is dissolved. If a district is in more than one county, and has outstanding bond indebtedness, it may not be dissolved.

(2) Upon the dissolution of a district by the commission, all assets of the district shall be sold at public auction and the proceeds given to the county if it is a single county district. If it is a multi-county district, the proceeds shall be divided with the counties in proportion to the surface land area in each county served by the district.

(3) The commission shall file a certified copy of an order for the dissolution of a GCD in the deed records of the county or counties in which the district is located. If the district was created by a special Act of the legislature, the commission shall file a certified copy of the order of dissolution with the Secretary of State.

(g) Dissolution of board. If the commission enters an order to dissolve the board of a GCD, the commission shall notify the county commissioners court of each county which contains territory in the district. The commission shall appoint five temporary directors

under TWC, §36.016, that shall serve until an election for a new board can be held under TWC, §36.017. However, district confirmation shall not be required for continued existence of the district and shall not be an issue in the election.

(h) Receivership. If the commission enters an order to request the attorney general to bring suit for the appointment of a receiver to collect the assets and carry on the business of a district, the executive director shall forward the order and the request to the attorney general and provide any relevant commission correspondence. The executive director shall assist the attorney general as requested and shall continue to track the status of attorney general actions.

(i) Appeals. Appeals from any commission order issued under this section shall be filed and heard in the district court of any of the counties in which the district is located.

§293.23. Petition Requesting Commission Inquiry.

(a) Purpose and applicability. This section provides procedures for commission review of a petition filed by an affected person requesting an inquiry into a groundwater conservation district's (GCD) activities regarding management planning or rules; commission appointment of the review panel; review panel actions; and executive director actions under Texas Water Code (TWC), [§36.1082 and] §36.3011. An affected person means, with respect to a management area: [An affected person is a landowner, water well

owner, or other user of groundwater in the groundwater management area (GMA), a GCD in or adjacent to the GMA, a regional water planning group with a water management strategy in the GMA, a person who holds or is applying for a permit from a GCD in the GMA, or a person who has groundwater rights in the GMA. Such petitions must be filed following the procedures prescribed by this section.]

(1) an owner of land in the management area;

(2) a GCD or subsidence district in or adjacent to the management area;

(3) a regional water planning group with a water management strategy in the management area;

(4) a person who holds or is applying for a permit from a district in the management area; or

(5) a person with a legally defined interest in groundwater in the management area.

(b) Petition requesting commission inquiry. An affected person may file a petition with the commission to request an inquiry for any of the reasons in paragraphs (1) - (9) of this subsection:

- (1) a district fails to submit its management plan to the executive administrator of the Texas Water Development Board;
- (2) a district fails to participate in the joint planning process under TWC, §36.108;
- (3) a district fails to adopt rules;
- (4) a district fails to adopt the applicable desired future conditions adopted by the management area at a joint meeting [by resolution];
- (5) a district fails to update its management plan before the second anniversary of the adoption of desired future conditions by [for] the management area;
- (6) a district fails to update its rules to implement the applicable desired future conditions before the first anniversary of the date the district updated its management plan with the adopted [applicable] desired future conditions;
- (7) the rules adopted by a district are not designed to achieve the adopted [applicable] desired future conditions [adopted for the management area during the joint planning process];

(8) the groundwater in the management area is not adequately protected by the rules adopted by a district; or

(9) the groundwater in the management area is not adequately protected due to the failure of a district to enforce substantial compliance with its rules.

(c) The petition must include supporting documentation for each of the individual reasons the affected person identifies in subsection (b) of this section demonstrating that a commission inquiry is necessary.

(d) The petition must include a certified statement from the affected person that describes why the petitioner believes that a commission inquiry is necessary.

(e) The petitioner shall provide a copy of the filed petition to all GCDs within and adjacent to the GMA within five days of the date the petition was filed. Within 21 days of filing the petition, the petitioner shall file with the chief clerk of the commission an affidavit or other evidence, such as a return receipt for certified mail service, that a copy of the petition was mailed to each GCD within and adjacent to the petitioner's GMA.

(f) Any GCD that is within and adjacent to the GMA that is the subject matter of the petition may file a response to the validity of the specific claims raised in the petition. The

responding entity shall file its response with the chief clerk of the commission within 35 days of the date that the petition is filed, and shall also on the same day serve the petitioner, the executive director, the public interest counsel, and any other GCD in and adjacent to the GMA. The chief clerk shall accept a response that is filed after the deadline but shall not process the late documents. The chief clerk shall place the late documents in the file for the petition.

(g) Commission review of petition. The commission shall review the petition and any timely filed responses, no sooner than 35 days, but not later than 90 days after the date the petition was filed. The commission may dismiss the petition if it finds that the evidence required by subsections (c) and (d) of this section is not sufficient to show that the items contained in subsection (b)(1) - (9) of this section exist. If the commission does not dismiss the petition, it shall appoint a review panel to prepare a written report.

(1) The review panel shall consist of five members.

(A) The commission shall appoint one of the members to serve as the chairman of the review panel. The chairman shall schedule and preside over the proceedings and meetings of the panel.

(B) A director or general manager of a district that is not an affected person as defined by subsection (a) of this section and is not the subject of the petition may be appointed to the review panel.

(C) The commission may not appoint more than two members of the review panel from any one district.

(2) The commission shall appoint a disinterested person to serve as a nonvoting recording secretary for the review panel. The recording secretary may be an employee of the commission. The recording secretary shall record and document the proceedings of the review panel.

(3) The commission may direct the review panel to conduct public hearings at a location in the groundwater management area to take evidence on the petition.

(4) In accordance with TWC, §36.3011 [§36.1082], the review panel shall review the petition and any evidence relevant to the petition and consider and adopt a report to the commission.

(h) Review panel report. The review panel's report must be submitted to the executive director no later than 120 days after the review panel was appointed by the commission. The review panel's report shall include:

(1) if a public hearing is conducted, a summary of evidence taken on the petition;

(2) a list of findings and recommended actions appropriate for the commission to take under TWC, §36.303 and §293.22(e) of this title (relating to Noncompliance Review and Commission Action) and the reasons it finds those commission actions appropriate; and

(3) any other information the panel considers appropriate for commission consideration.

(i) Commission action on review panel report. The executive director or the commission shall take action to implement any or all of the review panel's recommendations if a cause contained in subsection (b)(1) - (9) of this section applies. The executive director shall, no later than 45 days after the date the review panel report was received, recommend to the commission or initiate any action considered necessary under TWC, §36.303 and §293.22(b) - (h) of this title.