

The Texas Commission on Environmental Quality (TCEQ or commission) proposes to amend §293.94.

Background and Summary of the Factual Basis for the Proposed Rule

Section 293.94 allows a district to file an annual financial report with the executive director in lieu of an audit if: 1) the district had no bonds or other long-term (more than one year) liabilities outstanding during the fiscal period; 2) the district did not have gross receipts from operations, loans, taxes, or contributions in excess of \$100,000 during the fiscal period; and, 3) the district's cash and temporary investments were not in excess of \$100,000 at any time during the fiscal period.

During the 82nd Legislature, 2011, House Bill (HB) 2694, HB 3002, and Senate Bill (SB) 1361 were passed that affected the audit report exemption thresholds in Texas Water Code (TWC), §49.198(a). These bills increased the dollar amount of the exemption which allows districts to file an annual financial report in lieu of an annual audit. None of the bills referenced each other. HB 2694, §4.23, did not amend one of the two dollar amounts in the exemption thresholds. Pursuant to Texas Government Code, §311.025(b), the three bills were harmonized based upon the fact that two of the three bills raised both dollar amount thresholds and that the third bill raised one dollar amount threshold to the same level as the other two bills. This harmonization leads to a just and reasonable result, compliant with Texas Government Code, §311.021(3).

Therefore, the commission proposes to amend §293.94(e) to increase the audit report exemption thresholds from \$100,000 to \$250,000 to ensure consistency with HB 2694, §4.23; HB 3002; and SB 1361.

Section 293.94 indicates that there are two manuals, "Water District Accounting Manual" and "Annual Audit Report Requirements," governing the accounting and auditing of water districts. The commission maintains the "Water District Financial Management Guide" as the only manual currently in use for the accounting and auditing of water districts. Therefore, the commission proposes to amend §293.94(b) to reflect that the "Water District Financial Management Guide" is the only manual currently in use for the accounting and auditing of water districts. The commission proposes this amendment to ensure that the regulated community complies with the appropriate manual.

The commission also proposes to amend §293.94(j) to correct a misspelling.

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission also proposes revisions to 30 TAC Chapter 291, Utility Regulations, and 30 TAC Chapter 297, Water Rights, Substantive.

Section Discussion

§293.94, Annual Financial Reporting Requirements

The commission proposes to amend §293.94(b) to reflect that the "Water District Financial Management Guide" is the only manual currently in use for the accounting and auditing of water districts. The amendment is proposed to ensure that the regulated community complies with the appropriate manual.

The commission proposes to amend §293.94(e)(1)(B) to reflect that if a district is to be considered exempt from filing an annual audit report required under TWC, §49.198, a district must not have had gross receipts from operations, loans, taxes, or contributions in excess of \$250,000 during the fiscal period. The commission also proposes to amend §293.94(e)(1)(C) to reflect that if a district is to be considered exempt from filing an annual audit report required under TWC, §49.198, a district's cash and temporary investments must not have been in excess of \$250,000 at any time during the fiscal period. The commission proposes to amend §293.94(e)(1)(B) and (C) to implement TWC, §49.198, as amended by §4.23 of HB 2694; HB 3002; and SB 1361, to remain consistent with the amended statute.

The commission proposes to amend §293.94(j)(2) to correct the spelling of the word "willfully."

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule. Small water districts could see a decrease in audit costs as a result of the proposed rule. Other state agencies or units of local government are not expected to be impacted by the proposed rule.

The proposed rule implements HB 3002 and would exempt certain water districts from the requirement to file an annual audit report with the agency. The proposed rule would increase the current thresholds (in excess of \$100,000) for certain gross receipts and cash and temporary investments to thresholds in excess of \$250,000 when applying the criteria to determine when a water district is required to file an audit report. Instead of filing an audit report, water districts would be allowed to file annual financial reports if they do not exceed the proposed thresholds and do not have bonds or other long term liabilities. The proposed rule also makes minor administrative changes to correct rule terminology and eliminate inaccuracies.

The proposed rule is not expected to have a significant fiscal impact on the agency. The proposed rule would affect water districts but no other forms of local government would be impacted. Water districts that would not be required to file an audit report would

save the cost of an annual audit. Audit costs for small water districts are estimated to range from \$6,000 to \$10,000 per year. The exact amount of savings are expected to vary and would depend on a variety of factors, including the quality of each district's financial controls and records as well as the market rates for audit services in that area of the state.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule would be compliance with state law and lower administrative costs in exempted water districts.

The proposed rule would allow certain water districts to file an annual financial report instead of an annual audit report. Water districts that would not be required to file an audit under the proposed rule might save as much as \$6,000 to \$10,000 per year. The amount of cost savings would depend on a variety of factors including the quality of the district's financial controls and records as well as the market rates for audit services in that area of the state. Individuals and business customers of an exempted water district are expected to benefit from lower operating costs, but each water district is responsible for determining how to distribute any cost savings to their customers.

Certified Public Accountants (CPAs) that provide audit services to affected water districts could see a decrease in revenue as a result of the proposed rule. The fiscal impact of any decrease will depend on a variety of factors including the economic environment and client base of each CPA or CPA firm.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses that are clients of affected water districts. CPA practices that are considered to be a small business could experience a decrease in revenue as a result of the proposed rule.

Whether the fiscal impact of a revenue decrease is significant will depend on a variety of factors, including the economic environment and client base of each CPA or CPA firm.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required to comply with state law. Also, the proposed rule does not adversely affect a small or micro-business that is a customer of an affected water district in a material way for the first five years that the proposed rule is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local

employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225. "Major environmental rule" means a rule, the specific intent of which is 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.

First, the proposed rulemaking does not meet the statutory definition of a "major environmental rule" because its specific intent is not to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the proposed rulemaking is to implement legislation enacted in 2011 by the 82nd Legislature, specifically HB 2694, §4.23; HB 3002; and SB 1361. These bills increased the dollar amount of the exemption which allows districts to file an annual financial report in lieu of an annual audit. The proposed rule implements this intent.

Second, the proposed rulemaking does not meet the statutory definition of a "major environmental rule" because the proposed rule would 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. It is not anticipated that the cost of complying with the proposed rule would be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the proposed amendment would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

The commission invites public comment regarding this draft regulatory impact analysis determination. Written comments may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated this proposed rulemaking and performed an assessment of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007.

The commission proposes this rule for the specific purpose of implementing legislation enacted by the 82nd Legislature in 2011. The proposed rule amends §293.94.

The commission's analysis reveals that amending §293.94 would achieve consistency with TWC, §49.198(a), which was amended in 2011 by HB 2694. The rule is a reporting requirement that applies to districts, which are political subdivisions, rather than to private citizens. No private real property will be subject to the rule.

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 will occur by amending the definitions as proposed, the commission has determined that promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rule because the proposed rule 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 this rule. Therefore, the proposed rule would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4) relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (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 Council and determined that the rulemaking is administrative in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on March 20, 2012, at 2:00 p.m. in Building E, Room 201 S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written

comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-039-293-OW. The comment period closes March 26, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Justin Taack, Water Supply Division, at (512) 239-1122.

SUBCHAPTER H: REPORTS

§293.94

Statutory Authority

The amendment is proposed under Texas Water Code, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; and §5.105, which establishes the commission's authority to set policy by rule.

The proposed amendment implements House Bill 2694, §4.23; House Bill 3002; and Senate Bill 1361, 82nd Legislature, 2011.

§293.94. Annual Financial Reporting Requirements.

(a) Statutory provisions for fiscal accountability. All districts as defined in Texas Water Code, §49.001(a) are required to comply with the provisions of 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 [manuals]. All districts shall comply with the accounting and auditing manual [manuals] adopted by the executive director. The manual [manuals] shall consist of one [two] publication [publications], "Water District

Financial Management Guide." ["Water District Accounting Manual" and "Annual Audit Report Requirements."] The manual [manuals] 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 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 [\$100,000] during the fiscal period; and

(C) the district's cash and temporary investments were not in excess of \$250,000 [\$100,000] 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. The district's governing board 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 Texas Water Code, Chapter 49, may be subject to a civil penalty of up to \$100 per day for each day the district willfully [wilfully] 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.