

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENT.

The TWDB proposes amendments to Subchapters C, D, and E, 31 TAC Chapter 356, containing the agency's rules related to Groundwater Management. The TWDB proposes to amend the rules to implement relevant provisions of House Bill 2078, 89th Regular Session (HB 2078) and Senate Bill 1583, 89th Regular Session (SB 1583). TWDB is proposing this rulemaking primarily to modernize, update, and clarify rule language to facilitate groundwater management in the state and to clarify requirements for groundwater conservation districts.

HB 2078 amended Chapter 36 of the Water Code by requiring groundwater conservation district representatives within a groundwater management area to review each district's management plan at least once during each five-year planning period. In reviewing management plans, districts in the groundwater management area must consider the degree to which each district is achieving desired future conditions through the implementation of its management plan and rules. Additionally, the districts and district representatives within a groundwater management area are required to adopt and identify interim values for the desired future conditions for each 50-year planning period. This proposed rulemaking implements HB 2078's additional responsibilities of the groundwater conservation district representatives.

HB 2078 amended Chapter 36 of the Water Code by adding additional information that groundwater conservation districts must include in a groundwater management plan. The groundwater management plan must include an explanation in plain language of how the district monitors and tracks desired future conditions and how the district has performed in achieving the desired future conditions of the preceding five-year joint planning period. SB 1583 amended Chapter 36 of the Water Code by requiring groundwater conservation districts to include the most recently approved desired future conditions in the groundwater management plan. This proposed rulemaking implements HB 2078's and SB 1583's additional groundwater management plan requirements.

SB 1583 amended Chapter 36 of the Water Code by clarifying which desired future condition and modeled available groundwater amounts a groundwater conservation district must include in its management plan in the event a petition is filed challenging the reasonableness of a groundwater conservation district's desired future condition. The groundwater conservation district management plan is considered administratively complete by the TWDB Executive Administrator if the plan includes, in addition to the information required by Section 36.1071(a) and (e), the most recently approved desired future conditions, the amount of modeled available groundwater corresponding to those desired future conditions, and a statement on the status of the petition. This applies until a final order is issued or the desired future condition is found to be unreasonable, requiring a newly adopted desired future condition. This proposed rulemaking implements SB 1583's clarification for which desired future condition and modeled available groundwater amounts should be included for an administratively complete groundwater conservation district management plan in the event there is a contested desired future condition.

SB 1583 amended Chapter 36 of the Water Code by requiring a groundwater conservation district to amend the management plan prior to the second anniversary of adopting new desired future conditions. This proposed rulemaking implements

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 356. GROUNDWATER MANAGEMENT

The Texas Water Development Board (TWDB) proposes amendments to 31 Texas Administrative Code (TAC) Subchapters C, D, and E, more specifically §§356.32, 356.42, 356.52, and 356.54.

SB 1583's required approval for a groundwater conservation district management plan.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Section 356.32. Desired Future Conditions Package.

The amendment proposes to add §356.32(b) to implement HB 2078's additional responsibilities of the groundwater conservation district representatives in adopting desired future conditions. An amendment is also proposed to rename §356.32 to §356.32(a) for clarification.

Section 356.42. Petition: Mediation of Issues.

The amendment proposes adding §356.42(e) to implement SB 1583's clarification of management plan requirements for administrative completeness in the event that a desired future condition is challenged for reasonableness.

The amendment proposes adding 356.42(f) to implement SB 1583, which establishes application of the management review process when a desired future condition is challenged.

Section 356.52. Required Content of Management Plan.

The amendment proposes to add §356.52(a)(8) to implement SB 1583's most recently approved desired future conditions requirement for a groundwater conservation district's groundwater management plan. The amendment proposes to add §356.52(a)(9) to implement HB 2078's additional groundwater management plan requirements. Amendments are also proposed for §356.52(a)(6)(A) to account for the addition of proposed criterion and for §356.52(c) to correct an error.

Section 356.54. Approval.

The amendment proposes §356.54(a) to implement SB 1583's requirements for an administratively complete groundwater conservation district management plan, including management plans with petitions challenging the reasonableness of a desired future condition.

The amendment proposes to add §356.54(d) to implement SB 1583's required amended management plan prior to the second anniversary of the adoption of desired future conditions.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS (Texas Government Code §2001.024(a)(4))

Ms. Georgia Sanchez, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments from the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration.

These rules are not expected to result in reductions in costs to either state or local governments and there is no change in costs with the proposed amendments to the rule because the proposed rule revisions are to modernize and clarify existing rule language. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code, §2001.0045 to repeal a rule does not apply. Furthermore, the requirement in §2001.0045 does not apply because these rules

are necessary for groundwater management resources of this state as authorized by the Texas Water Code and are necessary to implement legislation.

The TWDB invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS (Texas Government Code §2001.024(a)(5))

Ms. Georgia Sanchez also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as the rules are necessary for groundwater management resources of this state. Ms. Georgia Sanchez also has determined that for each year of the first five years the proposed rulemaking is in effect, the rules will not impose an economic cost on persons required to comply with the proposed rule as these requirements are imposed by statute and clarify rule language to facilitate groundwater management in the state.

ECONOMIC AND LOCAL EMPLOYMENT IMPACT STATEMENT (Texas Government Code §§2001.022, 2006.002); REGULATORY FLEXIBILITY ANALYSIS (Texas Government Code §2006.002)

The TWDB has 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 because it will impose no new requirements on local economies. The TWDB also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of enforcing this rulemaking. The TWDB also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION (Texas Government Code §2001.0225)

The TWDB 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 Texas Government Code §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or 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 intent of the rulemaking is to implement legislation.

Even if the proposed rule were a major environmental rule, Texas Government Code §2001.0225 still would not apply to this rulemaking because Texas Government Code §2001.0225 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. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any federal law; (2) does not exceed an express requirement of state law; (3) 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; and (4) is not proposed solely under the general powers of the agency, but rather Texas Water Code §§15.001, 16.012, 36.101, 36.1071, 36.1072, 36.1073, 36.108, 36.1083 and 36.1085. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

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

TAKINGS IMPACT ASSESSMENT (Texas Government Code §2007.043)

The TWDB evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to update and clarify existing rules that are necessary for groundwater management in the state and certain requirements for groundwater conservation districts. The proposed rule would substantially advance this stated purpose by aligning definitions with agency and industry practice and providing greater detail for desired future conditions packages and required elements of groundwater management plans.

The TWDB's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code §2007.003(b)(4). The TWDB is the agency that reviewed groundwater conservation management plans for the applicable financial assistance programs.

Nevertheless, the TWDB further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, this rule updates the state's existing rules that facilitate groundwater management without burdening or restricting or limiting the owner's right to property and reducing its value by 25% or more. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT (Texas Government Code §2001.0221)

The TWDB reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rule would be in effect, the proposed rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an

increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy.

SUBMISSION OF COMMENTS (Texas Government Code §2001.024(a)(7))

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov, or by fax to (512) 475-2053. If sent via email, all public comments should be sent directly to rulescomments@twdb.texas.gov. Please do not submit comments through any third-party forms or websites. Receipt of third-party submissions cannot be guaranteed. Comments will be accepted until 5:00 p.m. of the 31st day following publication in the *Texas Register*. Include "Chapter 356." in the subject line of any comments submitted.

SUBCHAPTER C. SUBMISSION OF DESIRED FUTURE CONDITIONS

31 TAC §356.32

STATUTORY AUTHORITY (Texas Government Code §2001.024(a)(3))

The amendment is proposed under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code Sections 15.001, 16.012, 36.101, 36.1071, 36.1072, 36.1073, 36.108, 36.1083 and 36.1085.

Additionally, this rulemaking is proposed under the authority of Texas Water Code Chapters 15 and 16.

This rulemaking affects Water Code, Chapters 15, 16, and 36.

§356.32. *Desired Future Conditions Package.*

(a) A designated representative of the groundwater management area must provide the following to the executive administrator no later than 60 days following the date on which the district representatives in the groundwater management area adopted the desired future condition(s):

(1) a copy of the desired future conditions explanatory report addressing the information required by Texas Water Code §36.108(d-3) and the criteria in Texas Water Code §36.108(d);

(2) non-relevant aquifer documentation required by §356.31(c) of this subchapter (relating to Desired Future Condition Package Submission Date);

(3) a copy of the resolution of the groundwater management area adopting the desired future conditions as required by Texas Water Code §36.108(d-3);

(4) a copy of the notice that was posted for the joint planning meeting at which the districts collectively adopted the desired future condition(s) as required by Texas Water Code §36.108(e) and §36.108(e-2);

(5) the name of a designated representative of the groundwater management area;

(6) any groundwater availability model files or aquifer assessments acceptable to the executive administrator used in developing

the adopted desired future condition with documentation sufficient to replicate the work; and

(7) any other information the executive administrator may require to be able to estimate the modeled available groundwater.

(b) The district representatives shall:

(1) adopt desired future conditions under Texas Water Code §36.108 for each approximately 50-year planning period identified by the executive administrator for the preparation of state and regional water plans; and

(2) identify interim values for the desired future conditions adopted under Texas Water Code §36.108 for time periods not to exceed 10 years solely to assist the districts in monitoring interim progress in achieving the desired future conditions adopted for the approximately 50-year planning period.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Texas Water Development Board

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For further information, please call: (512) 475-1673



SUBCHAPTER D. APPEALING ADOPTION OF DESIRED FUTURE CONDITIONS

31 TAC §356.42

STATUTORY AUTHORITY (Texas Government Code §2001.024(a)(3))

The amendment is proposed under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code Sections 15.001, 16.012, 36.101, 36.1071, 36.1072, 36.1073, 36.108, 36.1083 and 36.1085.

Additionally, this rulemaking is proposed under the authority of Texas Water Code Chapters 15 and 16.

This rulemaking affects Water Code, Chapters 15, 16, and 36.

§356.42. *Petition: Mediation of Issues.*

(a) In accordance with Texas Water Code §36.1083(j), a district may seek assistance of the agency in mediating the issues raised in the petition.

(b) If the agency's assistance is sought by the district, the executive administrator or his designee shall hold at least one meeting with the district and the affected person and shall establish procedures to mediate the issues raised in the petition.

(c) Depending on the details and technical complexity of issues in the petition, the executive administrator may direct agency staff to mediate the issues raised in the petition or contract with an independent mediator.

(d) The executive administrator will notify the Office if the petition issues are resolved or not resolved as a result of mediation.

(e) If a petition challenging the reasonableness of a desired future condition is filed under Texas Water Code §36.1083(b) and until the district issues a final order under Texas Water Code §36.1083(n) or, if the desired future condition is found to be unreasonable in the final order, a new desired future condition is adopted under Texas Water Code §36.108 or §36.1083 (p), the executive administrator shall consider the management plan administratively complete if the district includes:

(1) the most recently approved desired future conditions adopted under Texas Water Code §36.108;

(2) the amount of modeled available groundwater corresponding to those desired future conditions;

(3) a statement of the status of the petition challenging the reasonableness of a desired future condition; and

(4) the information required by §356.52 of this chapter (relating to Required Content of Management Plan).

(f) Subsection (e) of this section applies until either:

(1) the district issues a final order under Texas Water Code §36.1083(n); or

(2) if a desired future condition is found to be unreasonable in the final order, a new desired future condition is adopted pursuant to Texas Water Code §36.108 or §36.1083(p).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER E. GROUNDWATER MANAGEMENT PLAN APPROVAL

31 TAC §356.52, §356.54

STATUTORY AUTHORITY (Texas Government Code §2001.024(a)(3))

The amendment is proposed under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code Sections 15.001, 16.012, 36.101, 36.1071, 36.1072, 36.1073, 36.108, 36.1083 and 36.1085.

Additionally, this rulemaking is proposed under the authority of Texas Water Code Chapters 15 and 16.

This rulemaking affects Water Code, Chapters 15, 16, and 36.

§356.52. *Required Content of Management Plan.*

(a) A management plan must contain, unless explained in detail as not applicable, the following elements:

(1) Management goals:

(A) providing the most efficient use of groundwater;

(B) controlling and preventing waste of groundwater;

- (C) controlling and preventing subsidence;
 - (D) addressing conjunctive surface water management issues;
 - (E) addressing natural resource issues which impact the use and availability of groundwater, and which are impacted by the use of groundwater;
 - (F) addressing drought conditions;
 - (G) addressing conservation, recharge enhancement, rainwater harvesting, precipitation enhancement and brush control, where appropriate and cost-effective; and
 - (H) addressing the desired future conditions adopted by the district under Texas Water Code §36.108;
- (2) Management objective(s) for each management goal. Management objectives are specific, measurable, and time-based statements of future outcomes that the district will use to achieve each management goal in paragraph (1) of this subsection. Each future outcome must be the result of actions that can be taken by the district during the five years following the effective date of the adopted management plan;
- (3) Performance standard(s) for each management objective. Performance standards are indicators or measures used to evaluate the effectiveness and efficiency of district activities. Evaluation of the effectiveness of district activities measures the performance of the district. Evaluation of the efficiency of district activities measures how well district resources are used to produce an output, such as the amount of resources devoted for each management action;
- (4) Details of how the district will manage groundwater supplies in the district, including a methodology by which the district will track its progress in achieving its management goals. At least one goal must be tracked on an annual basis; however, other goals may be defined and tracked over a longer time period as appropriate;
- (5) The actions, procedures, performance, and avoidance that are or may be necessary by the district to effect the plan, including specifications and proposed rules;
- (6) Estimates of the following:
- (A) modeled available groundwater in the district as provided by the executive administrator based on the most recently approved desired future condition established under Texas Water Code §36.108;
 - (B) the amount of groundwater being used within the district on an annual basis taken from either the water use survey data provided by the executive administrator or the district's own estimate;
 - (C) the annual amount of recharge from precipitation, if any, to each aquifer within the district, as provided by the executive administrator;
 - (D) the annual volume of water that discharges from each aquifer within the district to springs and any surface water bodies, including lakes, streams, and rivers, as provided by the executive administrator;
 - (E) the annual volume of flow into and out of the district within each aquifer and between aquifers in the district, as provided by the executive administrator;
 - (F) the projected surface water supply in the district according to the most recently adopted state water plan; and
 - (G) the projected water demand for water in the district according to the most recently adopted state water plan.~~[-and]~~

- (7) Details of the district's consideration of:

(A) Water supply needs within the district according to the most recently adopted state water plan, emphasizing those needs that impact groundwater supply within the district; and

(B) Water management strategies sourced from within the district boundaries according to the most recently adopted state water plan, emphasizing strategies that are or will be impacted by district actions.

(8) The most recently approved desired future conditions adopted under Texas Water Code §36.108; and

- (9) Explanation in plain language how:

(A) the district is monitoring and tracking the achievement of the desired future conditions established under Texas Water Code §36.108; and

(B) the district has performed in achieving the desired future conditions established under Texas Water Code §36.108 over the preceding five-year joint planning period.

(b) The management goals, management objectives, and performance standards required in subsection (a)(1), (2), and (3) of this section must be consistent with the established desired future conditions of the district's groundwater management area(s).

(c) Estimates required in subsection (a)(6) ~~[(a)(5)]~~ of this section must be developed with groundwater availability modeling information provided by the executive administrator in conjunction with the district's best available site-specific information and data.

§356.54. Approval.

(a) The executive administrator will approve a plan as administratively complete when it contains the information required by Texas Water Code §36.1071(a) and (e) or, if applicable, meets the requirements of Texas Water Code §36.1071(b-2). The executive administrator will notify the district in writing of the determination.

(b) If approval is denied, the executive administrator will provide written reasons for the denial with the notice of denial. A district has 180 days from receipt of notice to submit a revised management plan for review and approval. A revised ~~[or amended]~~ management plan must comply with all requirements of this subchapter.

- (c) An approved management plan remains in effect until:

- (1) the district fails to readopt a management plan at least 90 days before the plan expires;

- (2) the district fails to submit the district's readopted management plan to the executive administrator at least 60 days before the plan expires; or

- (3) the executive administrator determines that the readopted management plan does not meet the requirements for approval and the district has exhausted all appeals to the board or court in accordance with Texas Water Code §36.1072(f).

(d) A district shall amend a management plan before the second anniversary of the adoption of desired future conditions included under Texas Water Code §36.108.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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