Texas Water Development Board

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TO: Board Members

THROUGH: Kevin Patteson, Executive Administrator
Les Trobman, General Counsel
Jeff Walker, Deputy Executive Administrator, Water Supply & Infrastructure

FROM: Todd Chenoweth, Senior Advisor

DATE: May 29, 2015

SUBJECT: Proposed Rulemaking
31 TAC §§357.10, 357.50, 357.51, 357.62, 358.3, Interregional Conflicts

ACTION REQUESTED

Authorize publication of proposed amendments to 31 Texas Administrative Code (TAC) Chapter 357 relating to Regional Water Planning, 31 TAC §357.10, relating to Definitions and Acronyms, 31 TAC §357.50, relating to Adoption, Submittal, and Approval of Regional Water Plans, 31 TAC §357.51, relating to Amendments to Regional Water Plans, and 31 TAC §357.62, relating to Interregional Conflicts, along with the proposed amendment to 31 TAC §358.3, relating to Guidance Principles.

BACKGROUND

The Executive Administrator (EA) recommends proposal of these rules to improve the identification and resolution of interregional conflicts in light of the agency's experience in dealing with an interregional conflict in the last round of regional water plans. In the case *Texas Water Development Board v. Ward Timber, LTD, et.al., 411 S.W.3rd 554 (Tex. App.-Eastland 2013),* the Texas Water Development Board had expressed concern that if its existing definition of interregional conflict was rejected by the Court, the agency would be mired down with many small conflicts. The Court suggested that the problem could be solved by amending the definition of interregional conflict in the rule to also include the fact situation of that case. The recommended proposed rule would accomplish that amendment to the rules. The proposed rule also takes the opportunity to improve the procedure for resolution of interregional conflicts by requiring the regions with potential conflicts to engage with each other and the Board earlier in the process of development of the final adopted regional water plans.

Our Mission

To provide leadership, information, education, and support for planning, financial assistance, and outreach for the conservation and responsible development of water for Texas

Board Members

Carlos Rubinstein, Chairman | Bech Bruun, Member | Kathleen Jackson, Member

Kevin Patteson, Executive Administrator

KEY ISSUES

The proposed rule expands the definition of interregional conflict to include the situation where a recommended water management strategy is located in another region; and that region has studied the impacts of the water management strategy on its economic, agricultural and natural resources. The proposed rule would also require the Board to review the information provided and decide if the issue rises to the level of having a potential for a substantial adverse effect on the region.

The proposed rule would require a regional water planning group to send a copy of their initially prepared plan (IPP) to other regions that contain a location or site of one of the recommended water management strategies.

The proposed rule would clarify that a regional water planning group that wishes to object to a water management strategy from another region must notify the EA and provide information on the impacts of that strategy on the economic, agricultural or natural resources.

Finally the proposed rules would set out a procedure where interregional conflicts are attempted to be resolved after IPPs are submitted to the EA in time for the resolution of the conflict to be incorporated into the revised and adopted regional water plans. The proposed rules also set out a mechanism for handling the situation where an interregional conflict is not resolved before the statutory deadline for submittal of the final adopted regional water plans.

RECOMMENDATION

Authorize publication of proposed amendments to 31 Texas Administrative Code (TAC) Chapter 357 relating to Regional Water Planning, 31 TAC §357.10, relating to Definitions and Acronyms, 31 TAC §357.50, relating to Adoption, Submittal, and Approval of Regional Water Plans, 31 TAC §357.51, relating to Amendments to Regional Water Plans, and 31 TAC §357.62, relating to Interregional Conflicts, along with the proposed amendment to 31 TAC §358.3, relating to Guidance Principles.

This recommendation has been reviewed by legal counsel and the action requested is within the authority of the Board.

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Les Trobman
General Counsel

Attachment: Proposed rule for publication in the Texas Register.

CHAPTER 357. REGIONAL WATER PLANNING

The Texas Water Development Board (board) proposes amendments to 31 TAC §§357.10, 357.50, 357.51, and 357.62 of Chapter 357, relating to Regional Water Planning.

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

The purpose of the amendments is to change the definitions of interregional and intraregional conflicts and to modify the procedure for resolving those conflicts. The specific provisions being amended and the reasons for the amendments are addressed in more detail below.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

The proposed amendment to §357.10 (relating to Definitions and Acronyms) would add to the existing definition of an interregional conflict. In *Texas Water Development Board v. Ward Timber, LTD, et. al., 411 S.W.3rd 554 (Tex. App.-Eastland 2013),* hereinafter *Ward Timber*, the agency had expressed concern that if its existing definition of interregional conflict was rejected, the agency would be mired down with many small conflicts. The Court suggested that the problem could be solved by amending the board's definition of interregional conflict to also include the fact situation of the *Ward Timber* case. That is what the board is intending to do with the proposed rule.

The board is including in the proposed definition the requirement that the regional water planning group that is intending to raise an interregional conflict must demonstrate to the board that there is at least a potential for a substantial adverse effect on the region. The board's purpose here is to prevent the board and others from devoting valuable and limited resources to attending to numerous conflicts that are *de minimus* in nature or where the protesting region is allowed to raise a conflict without serious consideration of the impacts to their region, or where the impacts, if any, are insubstantial.

The proposed rule would also amend the definition of intraregional conflict. The proposed change is to cover the situation where there are three or more recommended water management strategies and there is only enough water for any two of the strategies. The board notes that this situation of conflicts caused by at least three recommended water management strategies is already covered in the definition of interregional conflicts.

The proposed amendment to §357.50 (relating to Adoption, Submittal, and Approval of Regional Water Plans) proposes numerous changes to this section to shift the resolution

of interregional conflicts to the time between when regional water planning groups submit their initially prepared plans (IPPs) and when they submit their final adopted regional water plans.

Subsection 357.50(b) proposes the addition of a requirement that regional water planning groups that have a recommended water management strategy that is located in another region must provide a copy of their IPP to the other regional water planning group when they submit the IPP to the EA. This is to allow the region where the water management strategy is located notice of the water management strategy in order for the regional water planning group to have time to study the strategy and identify any potential interregional conflict they wish to raise to the EA.

Subsection 357.50(d) encompasses the requirement of existing subsection (f) but also proposes that regional water planning groups that object to water management strategies located in their area have a duty to timely raise the objection with the EA. This proposal is to allow the EA and the board to focus on those potential conflicts that the regional water planning groups have self-identified as potential conflicts. This is in keeping with the *Ward Timber* Court's note that each region is tasked to identify interregional conflicts or potential conflicts. The board notes that the regional water planning group that developed the recommended water management strategy has the burden to produce all the required information in the regional water plan and meeting related thresholds, including the requirement to provide the board with quantified reporting of the net quality, reliability and cost of water, environmental factors, and impacts to agricultural resources, §357.34(d)(3), so the burden to produce an analysis of the impacts of the recommended water management strategy is not solely the responsibility of the region that objects to the strategy.

Subsection 357.50(e) is based on the current subsection (h).

Subsection 357.50(f)(1)-(3) is from the current subsection (d). Subsection 357.50(f)(4) is based on the current subsection (g), but it is reordered here so that interregional conflicts are resolved between the time that IPPs are delivered to the EA and adoption of the regional water plan. The board is of the opinion that this timing of events is consistent with sequence of events laid out in Water Code §16.053(h). Subsection 357.50(f)(5) is proposed to provide a procedure in situations where an interregional conflict has not been resolved by negotiation or board resolution by the time of the statutory deadline for submittal of adopted regional water plans of Water Code §16.053(i). In those situations the regional water planning groups may exclude the relevant recommended water management strategy and all language about the conflict and the board may approve the regional water plan without those portions of the plan that are relevant to the conflict. The interregional conflict will proceed to be resolved by

the parties via either negotiation or resolution by the board. The board may then require the regional water plans to be revised or amended to incorporate the resolution.

Proposed subsection 357.50(g) is the current (e) simply reordered in the proposed rule.

Subsection 357.50(h) is based on the current subsection (j), however paragraph (2) has been revised because all conflicts should be resolved, or the portions relevant to an interregional conflict would have been excluded from the plans, at the point where the board is approving the regional water plans.

Proposed subsection 357.50(j) is the current subsection (k) reordered in the proposed rule.

The proposed amendment to §357.51 (relating to Amendments to Regional Water Plans) is proposed to provide a procedure for situations where an interregional conflict does not appear until a regional water planning group proposes an amendment of a water management strategy under §357.51(a)-(d) or a substitution of a water management strategy under §357.51(e). In those cases the proposed amendment would have the parties follow the same procedures for dealing with potential interregional conflicts as at the IPP stage.

The proposed amendment to §357.62 (relating to Interregional Conflicts) provides for recognition that potential interregional conflicts between IPPs may be raised by affected regional water planning groups. The proposed amendment also clarifies the role of regional water planning groups in resolving any potential conflict.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Mr. Christopher Hayden, Director of Budget, has determined that there will be no fiscal implications for state or local governments as a result of 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. There is no change in costs because there are no direct costs associated with the proposed amendments. 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.

PUBLIC BENEFITS AND COSTS

Mr. Hayden also has determined that for each year of the first five years the proposed rulemaking is in effect, there will be no impact to the public.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board 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 board also has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking. The board 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

The board 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 define the term “interregional conflict,” and provide a procedure for resolving interregional conflicts in the regional water planning process.

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 standard set by a 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 it is also proposed under authority of Water Code §16.053(f). Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The board 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

The board 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 define the term "interregional conflict," and provide a procedure for resolving interregional conflicts in the regional water planning process. The proposed rule would substantially advance this stated purpose by proposing a definition of interregional conflict and amending the process for resolving interregional conflicts to allow for identification of potential interregional conflicts, and the resolution of those conflicts starting shortly after submission of IPPs.

The board'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 board is the agency that is mandated to facilitate coordination of interregional conflicts and resolve those conflicts if not resolved by the relevant regional water planning groups, *see* Water Code §16.053(h)(6).

Nevertheless, the board 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 nor 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 requires the resolution of interregional conflicts without specifically requiring, burdening or restricting or limiting an 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.

ANNOUNCEMENT OF HEARING

The board will hold a public hearing on this proposal on July 23, 2015 at 9:30 am at the Stephen F. Austin Bldg., 1700 North Congress Ave, Austin, Texas as an agenda item at its regularly scheduled board meeting. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon. Open discussion and questions to the board will not be permitted during the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Merry Klonower at (512) 463-8165 as far in advance as possible, and no later than five (5) work days prior to the hearing, so that appropriate arrangements can be made.

SUBMISSION OF COMMENTS

Comments on the proposed rulemaking will be accepted until August 4, 2015 and may be submitted to the Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by e-mail to rulescomments@twdb.texas.gov, or by fax at (512) 475-2053.

STATUTORY AUTHORITY

The amendments are proposed under the authority of Texas Water Code §16.053(f), which authorizes the TWDB to provide for procedures for adoption of regional water plans by regional water planning groups and for approval of regional water plans by the board, and Texas Water Code §6.101, which authorizes the TWDB to adopt rules necessary to carry out the powers and duties of the TWDB.

The amendments affect Texas Water Code, Chapter 16.

31 TAC §357.10 Definitions and Acronyms

The following words, used in this chapter, have the following meanings.

(1)-(14) No change.

(15) Interregional conflict—An interregional conflict exists when:
(A) more than one regional water plan includes the same source of water supply for identified and quantified recommended water management strategies and there is insufficient water available to implement such water management strategies; or
(B) in the instance of a recommended water management strategy proposed to be supplied from a different regional water planning area, the RWPG with the location of the strategy has studied the impacts of the recommended water management strategy on its economic, agricultural, and

natural resources, and demonstrates to the satisfaction of the Board as the sole decision-maker, that there is a potential for a substantial adverse effect on the region as a result of those impacts.

~~more than one regional water plan relies upon the same water source, so that there is not sufficient water available to fully implement both plans and would create an over-allocation of that source.~~

(16) Intraregional conflict--A conflict between two or more identified, quantified, and recommended water management strategies in the same initially prepared plan ~~adopted regional water plan~~ that rely upon the same water source, so that there is not sufficient water available to fully implement all ~~both~~ water management strategies and thereby creating an over-allocation of that source.

(17)-(30) No change.

31 TAC §357.50 Adoption, Submittal, and Approval of Regional Water Plans

(a) No change.

(b) Prior to the adoption of the RWP, the RWPGs shall submit concurrently to the EA and the public an IPP. The IPP submitted to the EA must be in the electronic and paper format specified by the EA. Each RWPG must certify that the IPP is complete and adopted by the RWPG. In the instance of a recommended water management strategy proposed to be supplied from a different regional water planning area, the RWPG recommending such strategy shall submit, concurrently with the submission of the IPP to the EA, a copy of the IPP to the RWPG associated with the location of such strategy.

(c) No change.

(d) Within 30 days of the submission of IPPs to the EA, the RWPGs shall submit to the EA, and the other affected RWPG, in writing, the identification of potential interregional conflicts by: identifying the specific recommended water management strategy from another RWPG's IPP; providing specific information on the impacts of the strategy on economic, agricultural, or natural resources; and providing a statement of why the RWPG considers there to be an interregional conflict.

~~(d) The RWPGs shall solicit, and consider the following comments when adopting a RWP:~~
~~(1) the EA's written comments, which shall be provided to the RWPG within 120 days of receipt of the IPP;~~
~~(2) written comments received from any federal agency or Texas state agency, which the RWPGs shall accept after the first public hearing notice is published pursuant to §357.21(d) of this title until at least 90 days after the public hearing is held pursuant to §357.21(d) of this title; and~~
~~(3) any written or oral comments received from the public after the first public hearing notice is published pursuant to §357.21(d) of this title until at least 60 days after the public hearing is held pursuant to §357.21(d) of this title.~~

(e) The RWPGs shall seek to resolve conflicts with other RWPGs and shall promptly and actively participate in any Board sponsored efforts to resolve interregional conflicts.

~~(e) Submittal of RWPs. RWPGs shall submit the IPP and the adopted RWPs and amendments to approved RWPs to the EA in conformance with this section.~~
~~(1) RWPs shall include:~~
~~(A) The technical report and data prepared in accordance with this chapter and the EA's specifications;~~
~~(B) An executive summary that documents key RWP findings and recommendations; and~~
~~(C) Summaries of all written and oral comments received pursuant to subsection (d) of this section, with a response by the RWPG explaining how the plan was revised or why changes were not warranted in response to written comments received under subsection (d) of this section.~~
~~(2) RWPGs shall submit regional plans to the EA according to the following schedule:~~
~~(A) Initially prepared plans are due every five years on a date disseminated by the EA unless an extension is approved, in writing, by the EA.~~
~~(B) Prior to submission of the IPP, the RWPGs shall upload the data, metadata and all other relevant digital information supporting the plan to the Board's planning database system. All changes and corrections to this information must be entered into the Board's database prior to submittal of an adopted plan.~~
~~(C) The RWPG will transfer copies of all data, models, and reports generated by the planning process and used in developing the RWP to the EA. To the maximum extent possible, data shall be transferred in digital form according to specifications provided by the EA. One copy of all reports prepared by the RWPG shall be provided in digital format according to specifications provided by the EA. All digital mapping shall use a geographic information system according to specifications provided by the EA. The EA shall seek the input from the State Geographic Information Officer regarding specifications mentioned in this section.~~
~~(D) Adopted RWPs are due to the EA every five years on a date disseminated by the EA unless, at the discretion of the EA, a time extension is granted consistent with the timelines in Texas Water Code §16.053(i).~~
~~(E) Once approved by the Board, RWPs will be made available on the Board website.~~

(f) The RWPGs shall solicit, and consider the following comments when adopting a RWP:
(1) the EA's written comments, which shall be provided to the RWPG within 120 days of receipt of the IPP;
(2) written comments received from any federal agency or Texas state agency, which the RWPGs shall accept after the first public hearing notice is published pursuant to §357.21(d) of this title until at least 90 days after the public hearing is held pursuant to §357.21(d) of this title; and
(3) any written or oral comments received from the public after the first public hearing notice is published pursuant to §357.21(d) of this title until at least 60 days after the public hearing is held pursuant to §357.21(d) of this title.
(4) The RWPGs shall modify their IPPs to incorporate negotiated resolutions or Board resolutions of any interregional conflicts into their final adopted RWPs.
(5) In the event that the Board has not resolved an interregional conflict sufficiently early to allow an involved RWPG to modify and adopt its final RWP by the statutory deadline, all

RWPGs involved in the conflict shall proceed with adoption of their RWP by excluding the relevant recommended water management strategy and all language relevant to the conflict and include language in the RWP explaining the unresolved interregional conflict and acknowledging that the RWPG may be required to revise or amend its RWP in accordance with a negotiated or Board resolution of an interregional conflict.

~~(f) The RWPGs shall submit in a timely manner to the EA information on any known interregional conflict between RWPs.~~

(g) Submittal of RWPs. RWPGs shall submit the IPP and the adopted RWPs and amendments to approved RWPs to the EA in conformance with this section.

(1) RWPs shall include:

(A) The technical report and data prepared in accordance with this chapter and the EA's specifications;

(B) An executive summary that documents key RWP findings and recommendations; and

(C) Summaries of all written and oral comments received pursuant to subsection (d) of this section, with a response by the RWPG explaining how the plan was revised or why changes were not warranted in response to written comments received under subsection (d) of this section.

(2) RWPGs shall submit regional plans to the EA according to the following schedule:

(A) Initially prepared plans are due every five years on a date disseminated by the EA unless an extension is approved, in writing, by the EA.

(B) Prior to submission of the IPP, the RWPGs shall upload the data, metadata and all other relevant digital information supporting the plan to the Board's planning database system. All changes and corrections to this information must be entered into the Board's database prior to submittal of a final adopted plan.

(C) The RWPG will transfer copies of all data, models, and reports generated by the planning process and used in developing the RWP to the EA. To the maximum extent possible, data shall be transferred in digital form according to specifications provided by the EA. One copy of all reports prepared by the RWPG shall be provided in digital format according to specifications provided by the EA. All digital mapping shall use a geographic information system according to specifications provided by the EA. The EA shall seek the input from the State Geographic Information Officer regarding specifications mentioned in this section.

(D) Adopted RWPs are due to the EA every five years on a date disseminated by the EA unless, at the discretion of the EA, a time extension is granted consistent with the timelines in Texas Water Code §16.053(i).

(E) Once approved by the Board, RWPs will be made available on the Board website.

~~(g) The RWPGs shall modify the RWP to incorporate Board resolutions of interregional conflicts.~~

(h) Upon receipt of a RWP adopted by the RWPG, the Board will consider approval of such plan based on the following criteria:

(1) verified adoption of the RWP by the RWPG; and

(2) verified incorporation of any negotiated resolution or Board resolution of any interregional conflicts, or in the event that an interregional conflict is not yet resolved, verified exclusion of the relevant recommended water management strategy and all language relevant to the conflict.

~~(h) The RWPGs shall seek to resolve conflicts with other RWPGs and shall participate in any Board sponsored efforts to resolve interregional conflicts.~~

(i) No change.

(j) Board Adoption of State Water Plan. RWPs approved by the Board pursuant to this chapter shall be incorporated into the state water plan as outlined in §358.4 of this title (relating to Guidelines).

~~(j) Upon receipt of a RWP adopted by the RWPG, the Board will consider approval of such plan based on the following criteria:~~
~~(1) The Board shall verify adoption of the RWP by the RWPG.~~
~~(2) The Board shall approve the plan only after it considers any information from RWPGs of the existence of an interregional conflict and finds that no interregional conflict exists. The Board shall not consider approval of a RWP unless all RWPs which could contain conflicts have also been submitted to the Board for approval, or the Board determines that such plans are not likely to be submitted.~~

~~(k) Board Adoption of State Water Plan. RWPs approved by the Board pursuant to this chapter shall be incorporated into the state water plan as outlined in §358.4 of this title (relating to Guidelines).~~

31 TAC §357.51. Amendments to Regional Water Plans

(a) – (e) No change.

(f) In the instance of a substitution of an alternative water management strategy or a proposed amendment with a recommended water management strategy to be supplied from a different regional water planning area, the RWPG recommending such strategy shall submit, concurrently with the submission of the substitution or proposed amendment to the EA, a copy of the substitution or proposed amendment to the RWPG for the location of such strategy. The provisions of sections 357.50(d), (e), (f), and (h), and 357.62, related to Interregional Conflicts, shall apply to substitution or amendment to the RWP in the same manner as those subdivisions apply to an IPP.

~~Amending the State Water Plan. Following amendments of RWPs, including substitutions of alternative water management strategies, the Board shall make any necessary amendments to the state water plan as outlined in § 358.4 of this title (relating to Guidelines).~~

(g) Amending the State Water Plan. Following amendments of RWPs, including substitutions of alternative water management strategies, the Board shall make any necessary amendments to the state water plan as outlined in § 358.4 of this title (relating to Guidelines).

31 TAC §357.62 Interregional Conflicts

(a) In the event a RWPG has asserted an interregional conflict and the Board has determined that there is a potential for a substantial adverse effect on that region, or the Board finds that an interregional conflict exists between IPPs ~~adopted RWPs~~, the EA may use the following process:

(1) notify the affected RWPGs of the nature of the interregional conflict;

(2) request affected RWPGs appoint a representative or representatives authorized to negotiate on behalf of the RWPG and notify the EA in writing of the appointment; ~~assistance in resolving the conflict; and~~

(3) request affected RWPGs' assistance in resolving the conflict; and

(4) ~~(3)~~ negotiate resolutions of conflicts with RWPGs as determined by the EA.

(b) – (d) No change.

The Texas Water Development Board (board) proposes an amendment to 31 TAC §358.3, subchapter A, State Water Plan Development, relating to Guidance Principles, in order align the rule with Water Code Sec. 16.053(h)(7)(C).

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

The purpose of the amendment is to change 31 TAC §358.3, relating to Guidance Principles, subsection (4) in order align the rule with the scope of the determination required of the board in Water Code §16.053(h)(7)(C).

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

The proposed amendment to §358.3 (relating to Guidance Principles) amends principles in subsection 4. The current subsection provides in part that the regional water plans shall provide for conservation of water resources, and protection of the agricultural and natural resources *of the regional water planning area*, (emphasis added). However, the board is required by Water Code §16.053(h)(7)(C) to only approve a regional water plan after it has determined that the plan is consistent with long-term protection of the *state's* water resources, agricultural resources and natural resources (emphasis added). The proposed amendment removes the restriction and direction that the regional water plan only look to protecting the enumerated resources of the regional planning area and replaces that with state coverage.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Mr. Christopher Hayden, Director of Budget, has determined that there will be no fiscal implications for state or local governments as a result of 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. There is no change in costs because there are no direct costs associated with the proposed amendments. 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.

PUBLIC BENEFITS AND COSTS

Mr. Hayden also has determined that for each year of the first five years the proposed rulemaking is in effect, there will be no impact to the public.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board 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 board also has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking. The board 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

The board 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 align the rule with Water Code §16.053(h)(7)(C).

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 standard set by 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 it is also proposed under authority of Water Code §16.053(d) and (e). Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The board 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

The board 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 align the rule with Water Code §16.053(h)(7)(C). The proposed rule would substantially advance this stated purpose by replacing the phrase "regional water planning area" with the term "state."

The board'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 board is the agency that is mandated to approve regional water plans only after it has determined, among other things, that the plan is consistent with long-term protection of the state's water resources, agricultural resources, and natural resources.

Nevertheless, the board 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 nor restrict or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, this rule requires regional water plans to provide for the orderly development, management and conservation of water resources so that sufficient water is available at a reasonable cost to protect the agricultural and natural resources of the state. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

ANNOUNCEMENT OF HEARING

The board will hold a public hearing on this proposal on July 23, 2015 at 9:30 am at the Stephen F. Austin Bldg., 1700 North Congress Ave, Austin, Texas as an agenda item at its regularly scheduled board meeting. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon. Open discussion and questions to the board will not be permitted during the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Merry Klonower at (512) 463-8165 as far in advance as possible, and no later than five (5) work days prior to the hearing so that appropriate arrangements can be made.

SUBMISSION OF COMMENTS

Comments on the proposed rulemaking will be accepted until August 4, 2015, and may be submitted to the Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by e-mail to rulescomments@twdb.texas.gov, or by fax at (512) 475-2053.

STATUTORY AUTHORITY

The amendment is proposed under the authority of Texas Water Code §16.053(d) and (e), which authorize the TWDB to provide guidance principles to the regional water planning groups. The amendment is also proposed under the authority of Texas Water Code §6.101, which authorizes the TWDB to adopt rules necessary to carry out the powers and duties of the TWDB.

The amendments affect Texas Water Code, Chapter 16.

31 TAC §358.3 Guidance Principles

Development of the state water plan shall be guided by the following principles.

(1) – (3) No change.

(4) Regional water plans shall provide for the orderly development, management, and conservation of water resources and preparation for and response to drought conditions so that sufficient water will be available at a reasonable cost to satisfy a reasonable projected use of water to ensure public health, safety, and welfare; further economic development; and protect the agricultural and natural resources of the state ~~regional water planning area~~.

(5) – (28) No change.