

TO: Board Members

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

FROM: Kendal Payne, Assistant General Counsel
Tom Entsminger, State Programs Coordinator

DATE: August 12, 2015

SUBJECT: Execution of Memorandum of Understanding between the Texas Department of Agriculture, Office of Rural Affairs and the Texas Water Development Board and publication of the Memorandum of Understanding at 31 Tex. Admin. Code § 354.4

ACTION REQUESTED

Consider authorizing the Executive Administrator to execute a Memorandum of Understanding with the Texas Department of Agriculture, Office of Rural Affairs, and publish proposed amendments to 31 Tex. Admin. Code § 354.4, relating to the executed Memorandum of Understanding. (Kendal Payne)

BACKGROUND

The Texas Water Development Board (TWDB) and Texas Department of Agriculture (TDA) are required by the General Appropriations Act to adopt a Memorandum of Understanding (MOU) relating to the Economically Distressed Areas Program (EDAP) and to TDA’s Colonia Fund. The purpose of the MOU is to “maximize delivery of funds and minimize administrative delay in their expenditure.” It is generally reauthorized each biennium to conform to the specific riders in the General Appropriations Act.

The TWDB is required by Water Code § 6.104 to “adopt by rule any memorandum of understanding between the board and any other state agency.”

KEY ISSUES

None. These actions are required by law.

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This recommendation has been reviewed by legal counsel and the action requested herein complies with applicable statutes and TWDB rules.

Attachments:

1. Amended MOU
2. Redlined MOU showing changes
3. Proposed Rulemaking

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE TEXAS DEPARTMENT OF AGRICULTURE,
OFFICE OF RURAL AFFAIRS
AND
THE TEXAS WATER DEVELOPMENT BOARD

SECTION I. RECITALS.

WHEREAS, pursuant to the General Appropriations Act, H.B. 1, 84th Leg., R.S., Rider 8, page VI-58 of the Texas Water Development Board's (TWDB) appropriation, and Rider 20, page VI-7 of the Texas Department of Agriculture's (TDA) appropriation, TWDB and TDA are required to enter into this Memorandum of Understanding (MOU);

WHEREAS, the TDA administers the Colonia Set-Aside Program described in the General Appropriations Act, H.B. 1, 84th Leg., R.S., Rider 21, page VI-8 of the TDA budget;

WHEREAS, the TDA and the TWDB are required to continue to coordinate funds as outlined in this MOU to ensure that none of the funds appropriated therein are expended in a manner that aids the proliferation of colonias or are otherwise used in a manner inconsistent with the intent of the Economically Distressed Areas Program (EDAP) administered by the TWDB, and maximize delivery of the funds and minimize administrative delay in their expenditure.

NOW THEREFORE, the TDA and the TWDB hereby enter into this MOU for the purposes set forth herein.

SECTION II. PARTIES.

This MOU is made and entered into between the TDA, an agency of the State of Texas, and the TWDB, also an agency of the State of Texas.

SECTION III. PURPOSE.

The purpose of this MOU is to ensure that none of the funds appropriated under the Colonia Fund are expended in a manner that aids the proliferation of colonias or are otherwise used in a manner inconsistent with the intent of the EDAP operated by the TWDB and to use the Colonia Set Aside program for residential service lines, hookups and plumbing improvements, so as to maximize delivery of the funds and minimize administrative delay in their expenditure.

SECTION IV. PERIOD OF PERFORMANCE.

The obligations under this MOU shall be in force beginning on September 1, 2015, and terminating on August 31, 2017.

SECTION V. PERFORMANCE.

Each party to this MOU shall coordinate with the other in delivering water and sewer service lines, hook-ups, and plumbing improvements to residents of selected colonias in order to connect those residents' housing units to EDAP-funded water and sewer systems.

(A) TDA RESPONSIBILITIES.

The TDA shall be responsible for the following functions:

- a. develop an application process for projects submitted by eligible units of local government;
- b. determine whether projects meet applicable federal requirements;
- c. select projects to receive funding and make Colonia Economically Distressed Areas Program (CEDAP) grant awards from the Colonia Fund for selected projects on an as-needed basis;
- d. prepare and execute contracts with units of general local government (Contractor localities);
- e. provide oversight and guidance to Contractor localities regarding applicable federal and state laws and program regulations (environmental, labor, acquisition of real property, relocation, procurement, financial management, fair housing, equal employment opportunity, etc.);
- f. review, approve, process, and honor valid reimbursement requests from Contractor localities;
- g. monitor each project prior to contract completion to ensure compliance with applicable federal and state laws and program regulations; and
- h. consult with the TWDB regarding specific projects on an as-needed basis.

(B) TWDB RESPONSIBILITIES.

The TWDB shall be responsible for the following functions:

- a. at the beginning of each fiscal year, or quarterly upon request, provide the TDA with descriptions of and schedules for EDAP-funded projects that need Colonia Fund assistance to provide connections and plumbing improvements;
- b. provide a list of projects for the TDA's eligibility review for joint funding; and
- c. provide assistance with technical project-related concerns brought forward by Contractor localities or the TDA during the course of the project.

SECTION VI. LIMITATIONS.

Eligible applicants shall be those counties eligible under both the TDA's CEDAP and TWDB's EDAP. Non-entitlement cities located within eligible counties are also eligible applicants. Eligible projects shall be located in unincorporated colonias identified by the TWDB and ineligible cities that annexed the colonia where improvements are to be made within five years after the effective date of the annexation, or are in the process of annexing the colonia where improvements are to be made. Eligibility shall be denied to any project in a county that has not adopted or is not enforcing the Model Subdivision Rules established pursuant to §16.343 of the Texas Water Code. If there are an insufficient number of TWDB EDAP projects ready for CEDAP funding, the CEDAP funds may be transferred at the TDA's discretion as stated within the current Community Development Block Grant action plan.

SECTION VII. REPORTING REQUIREMENTS.

No later than September 15, 2016, the parties to this MOU agree to submit a joint report to the Legislative Budget Board describing and analyzing the effectiveness of projects funded as a result of coordinated CEDAP/EDAP efforts, including an estimate of savings gained from reducing duplicative efforts for each party.

SECTION VIII. TERMINATION.

This MOU shall terminate upon ten (10) days written notice by either party to the other party in this MOU.

Kevin Patteson
Executive Administrator
Texas Water Development Board

Jason Fearneyhough
Deputy Commissioner
Texas Department of Agriculture

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE TEXAS DEPARTMENT OF AGRICULTURE,
OFFICE OF RURAL AFFAIRS
AND
THE TEXAS WATER DEVELOPMENT BOARD

SECTION I. RECITALS.

WHEREAS, pursuant to the General Appropriations Act, SBH.B. 1, 83-184th Leg., R.S., Rider 8, page VI-~~56,58~~ of the Texas Water Development Board's (TWDB) appropriation, and Rider ~~2620~~, page VI-~~107~~ of the Texas Department of Agriculture's (TDA) appropriation, TWDB ~~is and TDA are~~ required to enter into this Memorandum of Understanding (MOU) ~~with TDA;~~;

WHEREAS, the TDA administers the Colonia Set-Aside Program described in the General Appropriations Act, SBH.B. 1, 83-184th Leg., R.S., Rider ~~2721~~, page VI-~~108~~ of the TDA budget;

WHEREAS, the TDA and the TWDB are required to continue to coordinate funds as outlined in this MOU to ensure that none of the funds appropriated therein are expended in a manner that aids the proliferation of colonias or are otherwise used in a manner inconsistent with the intent of the Economically Distressed Areas Program (EDAP) administered by the TWDB, and maximize delivery of the funds and minimize administrative delay in their expenditure.

NOW THEREFORE, the TDA and the TWDB hereby enter into this MOU for the purposes set forth herein.

SECTION II. PARTIES.

This MOU is made and entered into between the TDA, an agency of the State of Texas, and the TWDB, also an agency of the State of Texas.

SECTION III. PURPOSE.

The purpose of this MOU is to ensure that none of the funds appropriated under the Colonia Fund are expended in a manner that aids the proliferation of colonias or are otherwise used in a manner inconsistent with the intent of the EDAP operated by the TWDB and to use the Colonia Set Aside program for residential service lines, hookups and plumbing improvements, so as to maximize delivery of the funds and minimize administrative delay in their expenditure.

SECTION IV. PERIOD OF PERFORMANCE.

The obligations under this MOU shall be in force beginning on September 1, 201~~3~~⁵, and terminating on August 31, 201~~5~~⁷.

SECTION V. PERFORMANCE.

Each party to this MOU shall coordinate with the other in delivering water and sewer service lines, hook-ups, and plumbing improvements to residents of selected colonias in order to connect those residents' housing units to EDAP-funded water and sewer systems.

(A) TDA RESPONSIBILITIES.

- a. The TDA shall be responsible for the following functions: develop an application process for projects submitted by eligible units of local government;
- b. determine whether projects meet applicable federal requirements;
- c. select projects to receive funding and make Colonia Economically Distressed Areas Program (CEDAP) grant awards from the Colonia Fund for selected projects on an as-needed basis;
- d. prepare and execute contracts with units of general local government (Contractor localities);
- e. provide oversight and guidance to Contractor localities regarding applicable federal and state laws and program regulations (environmental, labor, acquisition of real property, relocation, procurement, financial management, fair housing, equal employment opportunity, etc.);
- f. review, approve, process, and honor valid reimbursement requests from Contractor localities;
- g. monitor each project prior to contract completion to ensure compliance with applicable federal and state laws and program regulations; and
- h. consult with the TWDB regarding specific projects on an as-needed basis.

(B) TWDB RESPONSIBILITIES.

The TWDB shall be responsible for the following functions:

- a. at the beginning of each fiscal year, or quarterly upon request, provide the TDA with descriptions of and schedules for EDAP-funded projects that need Colonia Fund assistance to provide connections and plumbing improvements;
- b. provide a list of projects for the TDA's eligibility review for joint funding; and
- c. provide assistance with technical project-related concerns brought forward by Contractor localities or the TDA during the course of the project.

SECTION VI. LIMITATIONS.

Eligible applicants shall be those counties eligible under both the TDA's CEDAP and TWDB's EDAP. Non-entitlement cities located within eligible counties are also eligible applicants. Eligible projects shall be located in unincorporated colonias identified by the TWDB and ineligible cities that annexed the colonia where improvements are to be made within five years after the effective date of the annexation, or are in the process of annexing the colonia where improvements are to be made. Eligibility shall be denied to any project in a county that has not adopted or is not enforcing the Model Subdivision Rules established pursuant to §16.343 of the Texas Water Code. If there are an insufficient number of TWDB EDAP projects ready for CEDAP funding, the CEDAP funds may be transferred at the TDA's discretion as stated within the current Community Development Block Grant action plan.

SECTION VII. REPORTING REQUIREMENTS.

No later than September 15, ~~2014~~2016, the parties to this MOU agree to submit a joint report to the Legislative Budget Board describing and analyzing the effectiveness of projects funded as a result of coordinated CEDAP/EDAP efforts, including an estimate of savings gained from reducing duplicative efforts for each party.

SECTION VIII. TERMINATION.

This MOU shall terminate upon ten (10) days written notice by either party to the other party in this MOU.

Kevin Patteson
Executive Administrator
Texas Water Development Board

Jason Fearneyhough
Deputy Commissioner
Texas Department of Agriculture

The Texas Water Development Board (TWDB) proposes amendments to Title 31, Texas Administrative Code (TAC) §354.4, to incorporate into rule an amended memorandum of understanding (MOU) between the TWDB and the Texas Department of Agriculture, Office of Rural Affairs (TDA).

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

Pursuant to the General Appropriations Act, H.B. 1, 84th Leg., R.S., Rider 8, page VI-58 of the TWDB appropriation, and Rider 20, page VI-7 of the TDA appropriation, TWDB and TDA are required to enter into a MOU. The provisions require the TWDB to coordinate funds out of the Economically Distressed Areas Program (EDAP) administered by the TWDB and the Colonia Fund administered by the TDA as outlined in an MOU to maximize delivery of the funds and minimize administrative delay in their expenditure. The proposed amendments describe the revised MOU for the period from September 1, 2015 to August 31, 2017.

DISCUSSION OF THE AMENDMENTS.

The proposed MOU is essentially the same as the current MOU; the proposed amendments are discussed as follows.

RECITALS. Citations to the General Appropriations Act (GAA) have been updated to reflect citation to the Appropriations Act relevant to this MOU.

PERIOD OF PERFORMANCE. The period of performance has been revised to reflect the biennium covered by the GAA. The period of performance is September 1, 2015 through August 31, 2017.

REPORTING REQUIREMENTS. The deadline for the report has been revised in accordance with the language in the GAA.

Other non-substantive, typographical amendments to 31 TAC §354.4 have been proposed.

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 make conforming amendments based on the General Appropriations Act to an existing MOU between the TDA and TWDB and to adopt by rule the MOU as required by Texas Water Code §6.104.

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 §6.104. 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 adopt by rule the MOU between TDA and the TWDB as required by Texas Water Code §6.104.

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). 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.

SUBMISSION OF COMMENTS.

Comments on the proposed rulemaking will be accepted until 30 days following publication in the *Texas Register* and may be submitted to Mr. Les Trobman, Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231 or rulescomments@twdb.texas.gov or by fax to (512) 475-2053.

STATUTORY AUTHORITY.

These amendments are adopted under Texas Water Code §6.104, which requires the TWDB to adopt by rule any memorandum of understanding between the TWDB and any other state agency and General Appropriations Act, SB 1, 83rd Leg., R.S., Rider 8, page VI-56 of the TWDB budget.

Cross reference to statute: Texas Water Code §6.104.

(a) SECTION I. RECITALS.

(1) WHEREAS, pursuant to the General Appropriations Act, H.B. 1, 84th Leg., R.S., Rider 8, page VI-58 [SB 1, 83 L.S., Rider 8, page VI-56], of the Texas Water Development Board's (TWDB) appropriation, and Rider 20 [26], page VI-7 [10] of the Texas Department of

Agriculture's (TDA) appropriation, TWDB and TDA are [is] required to enter into this Memorandum of Understanding (MOU) [with TDA];

(2) WHEREAS, the TDA administers the Colonia Set-Aside Program described in the General Appropriations Act, H.B. 1, 84th Leg., R.S., Rider 20, page VI-8 [SB 1, 83 L.S., Rider 27, page VI-10] of the TDA budget;

(3) WHEREAS, the TDA and the TWDB are required to continue to coordinate funds as outlined in this MOU to ensure that none of the funds appropriated therein are expended in a manner that aids the proliferation of colonias or are otherwise used in a manner inconsistent with the intent of the Economically Distressed Areas Program (EDAP) administered by the TWDB, and maximize delivery of the funds and minimize administrative delay in their expenditure.

(4) NOW THEREFORE, the TDA and the TWDB hereby enter into this MOU for the purposes set forth herein.

(b) SECTION II. PARTIES. This MOU is made and entered into between the TDA, an agency of the State of Texas, and the TWDB, also an agency of the State of Texas.

(c) SECTION III. PURPOSE. The purpose of this MOU is to ensure that none of the funds appropriated under the Colonia Fund are expended in a manner that aids the proliferation of colonias or are otherwise used in a manner inconsistent with the intent of the EDAP operated by the TWDB and to use the Colonia Set Aside program for residential service lines, hookups and plumbing improvements, so as to maximize delivery of the funds and minimize administrative delay in their expenditure.

(d) SECTION IV. PERIOD OF PERFORMANCE. The obligations under this MOU shall be in force beginning on September 1, 2015 [2013], and terminating on August 31, 2017 [2015].

(e) SECTION V. PERFORMANCE. Each party to this MOU shall coordinate with the other in delivering water and sewer service lines, hook-ups, and plumbing improvements to residents of selected colonias in order to connect those residents' housing units to EDAP-funded water and sewer systems.

(1) TDA RESPONSIBILITIES. The TDA shall be responsible for the following functions:

(A) develop an application process for projects submitted by eligible units of local government;

(B) determine whether projects meet applicable federal requirements;

(C) select projects to receive funding and make Colonia Economically Distressed Areas Program (CEDAP) grant awards from the Colonia Fund for selected projects on an as-needed basis;

(D) prepare and execute contracts with units of general local government (Contractor localities);

(E) provide oversight and guidance to Contractor localities regarding applicable federal and state laws and program regulations (environmental, labor, acquisition of real property, relocation, procurement, financial management, fair housing, equal employment opportunity, etc.);

(F) review, approve, process, and honor valid reimbursement requests from Contractor localities;

(G) monitor each project prior to contract completion to ensure compliance with applicable federal and state laws and program regulations; and

(H) consult with the TWDB regarding specific projects on an as-needed basis.

(2) TWDB RESPONSIBILITIES. The TWDB shall be responsible for the following functions:

(A) at the beginning of each fiscal year, or quarterly upon request, provide the TDA with descriptions of and schedules for EDAP-funded projects that need Colonia Fund assistance to provide connections and plumbing improvements;

(B) provide a list of projects for the TDA's eligibility review for joint funding; and

(C) provide assistance with technical project-related concerns brought forward by Contractor localities or the TDA during the course of the project.

(f) SECTION VI. LIMITATIONS. Eligible applicants shall be those counties eligible under both the TDA's CEDAP and TWDB's EDAP. Non-entitlement cities located within eligible counties are also eligible applicants. Eligible projects shall be located in unincorporated colonias identified by the TWDB and ineligible cities that annexed the colonia where improvements are to be made within five years after the effective date of the annexation, or are in the process of annexing the colonia where improvements are to be made. Eligibility shall be denied to any project in a county that has not adopted or is not enforcing the Model Subdivision Rules established pursuant to §16.343 of the Texas Water Code. If there are an insufficient number of TWDB EDAP projects ready for CEDAP funding, the CEDAP funds may be transferred at the TDA's discretion as stated within the current Community Development Block Grant action plan.

(g) SECTION VII. REPORTING REQUIREMENTS. No later than September 15, 2016 [2014], the parties to this MOU agree to submit a joint report to the Legislative Budget Board describing and analyzing the effectiveness of projects funded as a result of coordinated CEDAP/EDAP efforts, including an estimate of savings gained from reducing duplicative efforts for each party.

(h) SECTION VIII. TERMINATION. This MOU shall terminate upon ten (10) days written notice by either party to the other party in this MOU.