

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: September 29, 2015

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

ACTION REQUESTED

Adopt and authorize publication of 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 amendment to 31 TAC §358.3, relating to Guidance Principles.

BACKGROUND

The Executive Administrator (EA) recommends adoption 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 final rule would accomplish that amendment to the rules. The 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.

<p style="text-align: center;">Our Mission</p> <p>To provide leadership, information, education, and support for planning, financial assistance, and outreach for the conservation and responsible development of water for Texas</p>	<p>⋮</p> <p>⋮</p> <p>⋮</p> <p>⋮</p> <p>⋮</p> <p>⋮</p>	<p style="text-align: center;">Board Members</p> <p>Bech Bruun, Chairman Kathleen Jackson, Member</p> <p>Kevin Patteson, Executive Administrator</p>
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KEY ISSUES

The recommended final 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 final 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 recommended final 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, or send a letter with information about the proposed water management strategy and an internet link to the IPP.

The recommended final 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 any relevant information, and state why it considers there to be an interregional conflict.

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 adoption and publication of 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 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.

Les Trobman
General Counsel

Attachment: Rule for publication in the Texas Register.

The Texas Water Development Board (TWDB or board) adopts amendments to 31 TAC §§357.10, 357.50, 357.51, and 357.62 of Chapter 357, relating to Regional Water Planning. Proposed rules §357.10, and §357.50, are adopted with changes as published in the July 3, 2015 issue of the *Texas Register* (40 TexReg 4308). Proposed rules §357.51, and §357.62 are adopted without changes to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED 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 discussed in more detail below.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

The amendment to §357.10 (relating to Definitions and Acronyms) adds 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 the agency would be mired down with many small conflicts, if its existing definition of interregional conflict was rejected. The Court suggested that the problem could be solved by amending the board's definition of interregional conflict, which currently only covers over-allocation of the source of supply, to also include the fact situation of the *Ward Timber* case. That is what the board has done with this rule.

The board also included in the proposed definition the requirement that the Regional Water Planning Group (RWPG) 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 speculative or *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 adopted rule also amends the definition of intraregional conflict. The adopted rule covers the situation where there are two or more recommended water management strategies within a particular regional water planning area, and there is not enough water for all of the strategies. The board notes that this situation of conflicts caused by multiple recommended water management strategies is already covered in the definition of interregional conflicts.

The adopted amendment to §357.50 (relating to Adoption, Submittal, and Approval of Regional Water Plans) makes 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) adopts 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, or notice of the water management strategy and an internet link to

their IPP, to the other regional water planning group when they submit the IPP to the Executive Administrator (EA). This is to provide 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 what was previously identified as subsection (f) but also requires regional water planning groups that object to water management strategies located in their area 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 interregional conflicts. The board notes that the regional water planning group that developed the recommended water management strategy has the duty to produce all the required information in the Regional Water Plan, 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).

Subsection 357.50(e) is based on what was previously identified as subsection (h).

Subsection 357.50(f)(1) - (3) is from the previous subsection (d). Subsection 357.50(f)(4) is based on the previous subsection (g), but it is reordered here so that interregional conflicts are resolved, if possible, between the time that IPPs are delivered to the EA and adoption of the regional water plans. The board is of the opinion that this timing of events is consistent with the sequence of events laid out in Water Code §16.053(h). Subsection 357.50(f)(5) is amended 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 under Water Code §16.053(i). In those situations, the regional water planning groups will 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 to incorporate the resolution.

In the adopted subsection 357.50(f)(4) the word, “modify” has been replaced by a synonym, “revise,” to use the language of Water Code §16.053(h)(6).

Adopted subsection 357.50(g) is the previous (e) simply reordered in the adopted rule.

Subsection 357.50(h) is based on the previous (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.

Adopted subsection 357.50(j) is the previous subsection (k) reordered in the adopted rule.

The amendment to §357.51 (relating to Amendments to Regional Water Plans) is adopted to provide a procedure for situations where an interregional conflict does not appear until a regional water planning group proposes an amendment to a regional water plan by adding 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 adopted rule will have the parties follow the same procedures for dealing with potential interregional conflicts as at the IPP stage.

The adopted 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 adopted amendment also clarifies the role of regional water planning groups in resolving any potential conflict.

REGULATORY ANALYSIS

The board has reviewed the adopted rulemaking pursuant to Texas Government Code §2001.0225, which requires a regulatory analysis of major environmental rules. 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 board is required to conduct a regulatory impacts analysis of a major environmental rule when the result of the adopted rulemaking is to exceed a standard set by federal law, unless the adopted rulemaking is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government implementing a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law. 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. The board has determined that the adopted rulemaking does not meet the definition of "major environmental rule" under that section; therefore, no regulatory impacts analysis of the adopted rulemaking is required. No comments were received by the board on the draft regulatory impacts analysis.

TAKINGS IMPACT ASSESSMENT

The board has determined that the promulgation and enforcement of this adopted rule constitutes neither a statutory nor a constitutional taking of private real property. The adopted rule does not adversely affect a landowner's rights in private real property, in whole or in part, because the adopted rule does not burden or restrict or limit the owner's right to or use of property. 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 adopted rule substantially advances 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. Therefore, the rulemaking does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

PUBLIC COMMENT

A public hearing was held on July 23, 2015 at 1:30 pm in Room 170 of the Stephen F. Austin Building, 1700 North Congress Ave., Austin, Texas. Five individuals and organizations made oral comments at the public hearing.

Written comments were received from: Bowie County Judge James M. Carlow; Cass County Judge Becky Wilbanks; Cass County Patriots (CCP); Dallas Water Utilities (Dallas); Farm & Ranch Freedom Alliance (FARFA); Friends United for a Safe Environment, Inc. (FUSE); International Paper Company (International Paper); League of Independent Voters of Texas (LIVT); Lone Star Chapter of the Sierra Club (Sierra Club); North Texas Municipal Water District (NTMWD); Region D Regional Water Planning Group (Region D); Tarrant Regional Water District (TRWD); Texas Forest Industries Council (TFIC); Texas Forestry Association (TFA); Trinity River Authority (TRA); Upper Trinity Regional Water District (UTRWD) and sixteen individuals. Hemphill County Underground Water Conservation District, High Plains Underground Water Conservation District, Llano Estacado Underground Water Conservation District, Mesa Underground Water Conservation District, Sandy Land Underground Water Conservation District, and South Plains Groundwater Conservation District (collectively GCDs) submitted joint comments. Ward Timber, Gary Cheatwood, Richard LeTourneau, Shirley Shumake, Blackman & Carter, the Caddo Lake Institute, Clean Water Action, Environment Texas, Environmental Stewardship, Friends of the Brazos River, the Greater Edwards Aquifer Alliance, the Texas Center for Policy Studies, the Texas Conservation Alliance, and the Texas Rivers Protection Association, (collectively, Ward Timber) submitted group comments in a joint letter.

RESPONSE TO COMMENTS

Definition of Interregional Conflict - §357.10(15)(A)

Comment

FARFA suggested that §357.10(15)(A) be amended so that it reads, “there is insufficient water available to sustainably implement such water management strategies and preserve the water resources in perpetuity.” FARFA feels that interregional water activities should prioritize sustainability and long-term preservation of water resources.

Response

Existing rules already require regional water plans and the included water management strategies to provide that sufficient water is available at a reasonable cost to satisfy a reasonable projected use of water consistent with the long-term protection of the state’s water resources. See 31 TAC §358.3(4) and (9). In this proposed rule change, the board is only considering what rule changes

are necessary for an improved process to identify and resolve interregional conflicts that are consistent with existing law. The board did not make any changes in response to this comment.

Definition of Interregional Conflict - §357.10(15)(B)

Comment

Region D, Ward Timber, Sierra Club, County Judge James M. Carlow, County Judge Becky Wilbanks, TFA and two individuals requested that §357.10(15)(B) be revised to include the criteria the board will use to decide if there is a conflict and the criteria the board will use to determine if there is, “the potential for a substantial adverse effect on the region as a result of those impacts.” Ward Timber suggested adding to the end of subsection (15)(B) the phrase, “that justify initiating the conflict resolution process under Section 16.053(h)(6), Water Code.” Ward Timber stated that they recognized the need for the board to have some discretion to set thresholds on when an interregional conflict is significant enough to trigger the conflict resolution process. Sierra Club requested that the rules should specify situations that would constitute a “substantial adverse effect.” The Sierra Club suggested that this might be in the form of a guidance document, but if it was a revision to the rules, the proposed rules should be re-noticed to give the public the opportunity to comment on the revised criteria for “substantial adverse effect.”

Dallas, NTMWD, TRA, and UTRWD also commented that the rules should make clear what constitutes a “substantial adverse effect.” NTMWD and UTRWD also wanted clarification of what would meet the threshold for a “potential” for such effects. NTMWD and UTRWD suggested language that would define a substantial adverse effect if the impacts of the water management strategy would “deviate at least 15 percent from comparative baseline conditions,” and that a “potential” would exist “when it is more likely than not that the substantial adverse effect will occur . . .”

Response

The board recognizes that a clearer definition of the phrase “potential for a substantial adverse effect on a region,” and a better explanation of what the board is trying to accomplish would assist water planning regions in preparing their IPPs and their final Regional Water Plans and would assist stakeholders and the general public in understanding the process for resolving conflicts.

However, the board cannot anticipate every type of conflict that could be raised in the context of competing views of appropriate water management strategies, and the impacts of those strategies, both beneficial and detrimental. Therefore, the board is reluctant to specify a narrow definition of the type of allegations of a conflict that it will reject as triggering an interregional conflict. For the same reason, the board rejects the suggestion of a list of examples of types of issues that will trigger the interregional conflict dispute resolution process of the Water Code.

The board intends by the final rule to allow it to judge some alleged interregional conflicts as so speculative or insubstantial in their impacts on the economic, agricultural, and natural resources

that the board will not utilize its limited resources to resolve the *de minimus* conflict. Rather than define the threshold in terms of negatives, i.e. not speculative, not insubstantial, non-*de minimus*, the board has kept the wording of “substantial” which was used by the Court in *Ward Timber*.

The board declines to add the suggested phrase, “that justify initiating the conflict resolution process under Section 16.053(h)(6), Water Code.” The board is of the opinion that this does not clarify the standard that it will use to determine which potential conflicts will justify invoking the dispute resolution process.

The board rejects defining substantial in terms of a 15 percent, or any percent, deviation from a comparative baseline. Without an appropriate definition of “comparable baseline conditions,” the suggestion is no clearer than the proposed rule. The board notes that some interregional conflicts may also arise not from a dispute over the magnitude of impacts, but over the weighing of the subject water management strategy in a balancing test of the relative importance of those impacts.

The board declines to delete or modify the use of the term “potential.” The board intends that its decision on whether or not to invoke the dispute resolution process is in order to have a mechanism to quickly dispose of speculative and *de minimus* interregional conflicts. The board will initiate the facilitated coordination of the regions to resolve the conflict if the objecting region has made a preliminary case that there is a substantial interregional conflict. *See Ward Timber at 575*. The board does not intend to engage in extensive fact finding on the impacts of the disputed water management strategy except in so far as it is necessary to decide if a substantial interregional conflict exists. For those raised interregional conflicts that will go on to a negotiation between the affected regions, the board does not want to create an impression in the mind of either region as to how the board views disputed factual impacts, the relative importance that it might give to those impacts, or any impression as to how it might resolve the conflict if the regions are unable to come to a negotiated settlement. If it did so, that would likely affect the willingness of a region to negotiate a settlement of the interregional dispute. The board’s understanding of the “bottom-up” planning process and process for resolving interregional conflicts set out in the Water Code, §16.053(h), is that decisions, including resolution of interregional conflicts, should occur at the regional level. It is the board’s intent to give regions and this process an opportunity to resolve interregional conflicts. The board will only step in to resolve an interregional conflict if the facilitated coordination between the involved regions fails.

Comment

The GCDs commented that the phrase “satisfaction of” should be struck from the definition of an interregional conflict. The GCDs felt the intent of the definition could still be met without that phrase. The GCDs, International Paper, TFIC and one individual objected to the phrase, “sole discretion,” in the definition of interregional conflict. International Paper and TFIC felt that this was an attempt to circumvent or narrow judicial review of the board’s decision and that it undercut regional procedural protections for bottom-up planning. NTMWD and UTRWD commented that they did not take issue with the phrase “sole decision-maker.”

Response

As explained in the Section by Section analysis, the board intends to recognize a threshold for the types of conflicts that will trigger the interregional conflict resolution process. The board is not intending in any way to circumvent the requirements of Water Code §16.053(h). Rather the board intends to recognize in this process, as in other matters, the law does not need to deal with speculative or *de minimus* conflicts. The board does want to preserve for itself the role of gatekeeper for which conflicts will meet the threshold, and not delegate that decision to the Executive Administrator. Therefore the final rule retains the board's role in deciding if a particular situation rises to the level of an interregional conflict that requires resolution. The board agrees that the phrase, "to the satisfaction of," is unnecessary and therefore the board has deleted it in the final rule. The board has also deleted the phrase, "as sole decision-maker," as the board does not want to imply that it is attempting to control the scope of judicial review of its actions.

Comment

International Paper and TFIC commented that the definition of interregional conflict should be expanded to include alternative water management strategies proposed to be supplied from a different regional water planning area when the RWPG with the location of the strategy has objected.

Response

The board does not include alternative water management strategies in the analysis to determine if there is an over-allocation of a water supply source. Alternative water management strategies are back-up strategies that only come into consideration if a fatal flaw develops in a recommended water management strategy causing its implementation to fail. Before an alternative water management strategy is considered by the board to be "in the plan" for purposes of board funding of the strategy, the regional water plan and the state water plan must be amended to make the alternative water management strategy a recommended water management strategy. Before the board will approve such an amendment, the board performs the over-allocation analysis with the alternative, and now proposed, recommended water management strategy. The board is of the opinion that this is also the most efficient way to handle potential conflicts between regions over water management strategies that are alternative water management strategies. Only if and when a regional water plan is proposed to be amended, by changing an alternative water management strategy to a recommended water management strategy where the source of water is located in another region and that region objects to the water management strategy, will the board entertain an objection to the water management strategy. The board notes that under the final rule adopted today, §357.51, relating to Amendments to Regional Water Plans, when such an amendment is proposed, the region proposing the substitution or amendment must notify the RWPG where the strategy is located, and other provisions of the final rule governing objecting to the water management strategy, coordinated facilitated resolution by the regions, possible resolution by the board, etc., will apply.

Comment

TRWD and one individual suggested the definition of interregional conflict be changed in the final rule so that an interregional conflict would only exist where there is both an over allocation of water and a regional water plan included a preferred water management strategy located in another region which would adversely impact the economic agricultural and natural resources of the region where the state water is located. In this view the RWPG where the strategy is located must demonstrate to the satisfaction of the board in its sole discretion that the proposed development and use of state water results in substantial adverse impacts to economies, agricultural and natural resources in the local region to a greater extent that the adverse impacts to the state of Texas, if that state water is not developed; or either regional water planning group demonstrating to the satisfaction of the board that insufficient state water is available to implement both water management strategies.

Response

The board is of the opinion that the suggested revised definition is inconsistent with the Court's decision in the *Ward Timber* case. Furthermore it is not the intent of the board when it decides that an interregional conflict exists to perform a balancing of regional impacts and interests verses state impacts and interests. The board understands that the Court in *Ward Timber* suggested that the Board's definition of interregional conflict could be revised so that *either* insufficient water to satisfy all the water management strategies using the same water *or* a region that has studied the impacts and finds that there is a substantial conflict, could result in an interregional conflict. The Court's statements cannot be read as requiring both situations to be true to satisfy the definition of interregional conflict in order the reach the results in that case. As explained in earlier comments, the board at the point where it is deciding whether an interregional conflict exists does not wish to engage in resolution of disputed facts or balancing of interests so as to not appear to provide any information on how it might resolve the conflict should the regions not come to a negotiated resolution. The board has not made any changes to the rule as a result of this comment.

Minor Conflicts

Comment

International Paper and TFIC supported the intent of the proposed rule to avoid disagreements on projects with minor impacts by requiring a showing for a potential for a substantial adverse effect in order for a disagreement to rise to the level of an interregional conflict. But both International Paper and TFIC wanted the threshold that would trigger the interregional conflict resolution process clarified; (see their comment above).

Response

The board appreciates the comment. The board has not made any changes to the rule as a result of the comment.

Comment

Region D, Ward Timber, County Judge James M. Carlow, County Judge Becky Wilbanks, TFA, and one individual suggested that the rules could provide for a two tier system whereby some interregional conflicts could be classified as minor. Region D suggested that the resolution process for the minor conflicts would not require the same level of evaluation and resolution that the larger conflicts would require.

Response

The board appreciates that the comment was designed to streamline and simplify at least part of the universe of interregional conflicts. But the board is declining to make any changes as a result of this comment. The board notes that it has not proposed a rule to specify how it will “facilitate coordination between the involved regions to resolve the conflict,” in order to leave the board with maximum flexibility to deal with interregional conflicts on a case-by-case basis. The board intends to utilize the best methods that it can devise for the circumstances of each individual interregional conflict. The board may find that smaller conflicts do not require the same level of effort to facilitate their resolution that larger conflicts require. The final rule leaves the board free to use a different process for smaller conflicts than for larger conflicts, once it is determined that a situation meets the definition of interregional conflict.

Information Required of the Region Proposing a Strategy in a Different Region

Comment

Region D, Ward Timber, County Judge James M. Carlow, County Judge Becky Wilbanks, TFA and one individual commented that the rules should specify the type and extent of information that a region must provide if it proposes a strategy in another region. Region D commented that §357.50(b) should specify that a region that proposes a water management strategy within another region should provide a detailed and comprehensive analysis of any potential adverse impacts on the affected region with the source of water. Region D commented that this information should be at a minimum an identification, quantification and analysis of any potential impacts on the affected regional water planning area and the state resulting from the strategy and any mitigation that maybe required for the strategy. In Region D’s opinion, without requiring this information from the regional water planning group proposing the strategy, it would be unfair to place the whole burden of producing information on the impacts of the strategy on the region opposing the strategy. Ward Timber commented that the information on the potential impacts of the strategy include impacts on the affected region as well as impacts on the state. Ward Timber had a number of specific recommendations for triggers of what types of water management strategies would require a detailed analysis and for those strategies that met a trigger condition, the identification, quantification and analysis must be prepared and sealed by a professional qualified to evaluate the effects, and the analysis must be detailed to provide a reasonable range for the extent of potential adverse effects of the strategy and any required mitigation and the economic impact of the adverse effects.

Response

The board declines to make any changes to the proposed rule as a result of these comments. The requirements for analysis of water management strategies is contained in the current 31 TAC §357.34(d). The board notes that it has not proposed changes to that section of its rules. The current rule requires all water management strategies to include a quantitative reporting of: environmental factors including effects on environmental water needs, wildlife habitat, and cultural resources; impacts to agricultural resources; and consideration of third-party social and economic impacts resulting from voluntary redistributions of water including analysis of third-party impacts of moving water from rural and agricultural areas. The current rule does not limit that analysis to impacts solely occurring in the region of the RWPG proposing the water management strategy. The board expects that regions that propose water management strategies where the source of the water is in another region to comply with this rule in their analysis of the water management strategy.

Information Required to Object to a Strategy - §357.50(d)

Comment

Ward Timber, International Paper, TFIC, County Judge James M. Carlow, County Judge Becky Wilbanks, TFA and one individual commented that the rules should specify the type and extent of information that should be submitted in support of a claim that there is a conflict. Ward Timber suggested that to raise a claim of an interregional conflict the protesting region would need to provide a simple identification of the issues. Ward Timber also suggested the rule be changed to require the region asserting a conflict to provide identification of the types of impacts of the strategy on the economic, agricultural and natural resources. International Paper and TFIC suggested that the objecting region should identify the specific recommendation or water management strategy at issue and provide a statement of why the regional water planning group considers there to be an interregional conflict.

Response

The board agrees that proposed §357.50(d) should be revised in part. There are numerous ways that conditions can give rise to an interregional conflict. The board has decided to delete the language from the proposed rule requiring the objecting region to provide specific information on the impacts of the strategy on economic, agricultural or natural resources. However, the board notes that there may be times that the objecting region has information that may be helpful to the board such as the objecting region's analysis of the impacts on the agricultural, natural resources and economy of the objecting region. The board, therefore, asks that this relevant information be supplied to the board. The board understands that a dispute over a water management strategy's impacts alone can rise to the level of an interregional conflict. The board is retaining the requirements that objecting regions must identify the water management strategy that the region takes issue with and must provide a statement of why the RWPG considers there to be an interregional conflict. The board notes that it will be considering this information supplied by the objecting region as it decides if there is a potential for a substantial adverse effect on the region.

Burden of Proof

Comment

Region D, International Paper and TFIC commented that the burden of proof in the proposed rule should be revised. Region D suggested that the proposed rule could be changed to provide that in the case of an objecting region, an interregional conflict would exist unless there is clear and convincing documentation by the RWPG proposing the strategy that the effects are not substantial. International Paper and TFIC commented that the rule should require the benefited region to provide the analysis of impacts, the impacted region could assert an interregional conflict, and then the benefited region would bear the responsibility to demonstrate, with clear documentation, there is not a substantial adverse effect on the region where the strategy is located in order to negate the existence of an interregional conflict and avoid the need for the conflict resolution process.

Response

The board is intending to implement the suggested rule change by the Court in *Ward Timber*. The Court suggested that the board could amend its rule defining an interregional conflict to include the situation that gave rise to that case. As the Court noted, the objecting region in that case had made a “*preliminary case* that there is a *substantial* interregional conflict,” (emphasis added). See *Ward Timber* at 573 and 575. When the board is deciding if the conflict resolution process is triggered, the board does not intend to engage in an extensive fact finding or balancing of interests. At this preliminary stage the board is only intending to quickly dispose of de minimus or speculative conflicts. In deciding whether there exists the potential for a substantial adverse effect on the objecting region as a result of the impacts of the water management strategy on the economic, agricultural or natural resources, the board will consider the information from the IPPs, the letter to the Executive Administrator alleging an interregional conflict as well as any additional information provided by the involved RWPGs. Based on this record, if the board decides that there is a potential for the substantial adverse effect, the board will initiate the conflict resolution process. The rule has not been revised in this respect.

Comment

The Sierra Club suggested that in the case of a region objecting to a water management strategy of another region because of a substantial adverse effect on the objecting region that the rules incorporate the option for the agency to use a third-party independent and objective entity to analyze and evaluate the potential for substantial adverse effects.

Response

The board notes that nothing in the rule precludes the board from hiring a third-party to analyze and evaluate the impacts of the water management strategy on economic, agricultural and natural resources. This option remains open to the board. However, as indicated above, the board does not intend to resolve these issues at the point in the process when it is deciding whether to trigger the conflict resolution process. The board has not made any changes to the rule as a result of this comment.

Definition of Intraregional Conflict - §357.10(16)

Comment

The GCDs commented that the word “all” in the first sentence of the definition of intraregional conflict should be clarified. The GCDs felt the wording could either refer to only those water management strategies that are in conflict because they rely on the same water source, or the word could refer to all water management strategies in the IPP.

Response

“All” in the definition of intraregional conflicts is intended to refer to only those water management strategies that are in conflict because they rely on the same water source. The board is of the opinion that this is sufficiently clear in the adopted rule from the context of the sentence which concludes, “thereby creating an over-allocation of *that source*,” (emphasis added). No changes have been made to the rule as a result of the comment.

Adoption, Submittal, and Approval of Regional Water Plans - §357.50

§357.50(b)

Comment

The GCDs supported the proposed amendment to §357.50(b) requiring a RWPG that has a recommended strategy located in another region to send a copy of the IPP to other RWPG.

Response

The board appreciates the comment. No changes have been made to the rules in response to the comment.

Comment

Dallas suggested that instead of the RWPGs sending a copy of the IPP to any regions where one of their water management strategies would be located, that the region with the water management strategy could instead send a letter to the other region where the water management strategy is located to put the other region on notice of the water management strategy and include in the letter an internet link to the sending regional water planning group’s IPP.

Response

The board agrees that this alternative would be a reasonable way for a region to comply with the intent of the proposed rule. The rule has been revised accordingly. The region with the water management strategy will be responsible for sending the letter that must also include the identification of the water management strategy that is located in the other region along with the internet link to the IPP.

Comment

International Paper and TFIC suggested that the rules provide that the RWPG should communicate about significant water strategies proposed to be located in another region, “as early as reasonably possible and no later than at the time of submission of the IPP.”

Response

The board declines to make this suggested change because the objecting region has a process in the existing rule for early notice of possible contentious water management strategies and the water management strategies could change in significant ways or drop out of plans between initial concept and adoption of the IPP. As Dallas points out in its comments, there already is a mechanism for interregional communication and cooperation by the regional liaisons for adjacent regions that serve as non-voting members of the regional water planning groups. 31 TAC §357.11(e). One of the functions of the regional liaisons is to stay apprised of water management strategies that might affect their region and communicate that information back to their regional water planning group. The board does not expect that the IPP will be the first time that an objecting region hears of the water management strategy at issue. The board has not made any changes in response to this comment.

Comment

The GCDs, FARFA, LIVT, International Paper, TFIC and an individual commented that 30 days was too short of a period of time for a region to consider other regional plans, decide if there was a conflict, and prepare the necessary information to effectively notify the Executive Administrator of its assertion of a conflict. The GCDs suggested a minimum of 60 days. FARFA, LIVT suggested that objecting regions be allowed up to 120 days to provide additional information.

Response

The board has modified the rule in response to the comment, but the board declines to extend the time period to 120 days. The board has revised §357.50(d) to lessen the required materials for a region to object to a water management strategy, making it easier for a region to raise an objection. Any lengthening of the time to respond, shortens the time to resolve the issue before the statutory deadline for adoption of regional water plans. Under the final rule, the board is of the opinion that the appropriate balance is to increase the time to object by a moderate amount. The board has modified the final rule to increase the deadline to 60 days.

Comment

International Paper and TFIC suggested that the rules should more clearly set out the process for board action. They suggested that the requirement for board action to determine if the resolution process is triggered should be capable of being waived by the involved RWPGs. They also suggested that it might be more appropriate for the RWPGs to submit materials directly to the board simultaneous with submittal to the Executive Administrator.

Response

The board declines to change the rule. The board wants to preserve its gatekeeper role when it decides whether the conflict will rise to the level of an interregional conflict. The board will be funding any third-party mediator and certain related expenses of the conflict resolution, therefore the board has a duty to protect state resources and only utilize the conflict resolution process where the facts support a determination of a preliminary case for an interregional conflict. The board also wants in these matters, as in other board business, to have the benefit of the analysis and recommendation by the Executive Administrator.

Who Can Raise a Conflict

Comment

Ward Timber, Sierra Club, LIVT, County Judge James M. Carlow, County Judge Becky Wilbanks, TFA and three individuals commented that the proposed rule should be revised to allow TWDB board members, the Executive Administrator, other state agencies or members of the public to raise a claim of a conflict and trigger the resolution process.

Response

The board has not made any changes in response to this comment. Under the prior rule and practice, the EA would analyze the IPPs to determine whether or not there was an over-allocation of a water supply. In the event that there was an over-allocation, the EA would make that as a comment on the IPPs back to the RWPGs. That comment concerning over-allocation would have to be addressed in the adopted regional water plans. Water Code §16.053(h)(4) and (6). The board expects that under the rule adopted today, that same practice would continue. The board declines to further expand the universe of people and entities allowed to raise interregional conflicts. The board understands that the intent of the statute is to allow for a bottom-up planning process that works through the duly selected representatives that sit on the RWPGs and act on behalf of the public for that region. The board declines to deviate from that framework without explicit authorization from the Legislature.

§357.50(f)

Comment

One individual objected to the timeframes set out in proposed rule §357.50(f)(1)-(4).

Response

The board notes that those particular subsections are only open for comment because the proposed rule is reordering subsections of §357.50. Those particular timeframes which are the subject of the comment are in the current rule and have not proved problematic for the board nor, in general, for the regions. The board declines to change those subsections of the rule.

§357.50(f)(5)

Comment

Dallas, GCDs, NTMWD, TRWD, UTRWD and one individual objected to the wording of §357.50(f)(5).

TRWD and one individual commented that the proposed rules would allow a region to claim that a neighboring region's water management strategy would result in adverse economic agricultural or natural resource impacts within its region. Then, "absent a negotiated resolution, the proposed management strategy would be ineligible for adoption in the Regional Plan." In essence the objecting region could veto consideration of the water management strategy based on a claim of adverse impacts with no consideration of the beneficial impacts on the region that needs the additional supplies.

Dallas, NTMWD and UTRWD were concerned that the proposed rule would allow an objecting regional water planning group to force exclusion of a strategy from a regional water plan by "shear reluctance to modify the group's position after claiming the existence of a conflict."

NTMWD and UTRWD were also concerned that it is not clear how the proposed rule can satisfy Water Code §16.053(h)(7)(a). One individual commented that the proposed rules would in effect repeal Water Code §16.053(h)(7) that prohibits the board from approving a regional water plan unless all interregional conflicts involving that regional water planning area have been resolved.

TRWD, TRA and one individual commented that the final rule should require the board to resolve all interregional conflicts prior to adoption of the Regional Water Plans. FARFA and one individual expressed the need for interregional conflicts to be identified and resolved early in the process.

NTMWD and UTRWD suggested that Initially Prepared Plans be submitted early enough so that the Executive Administrator has 120 days to provide comments before the final adopted Regional Water Plan is submitted to the board for approval. They further suggest that the final rule provide that if the interregional conflict cannot be resolved within 60 days after the public hearing held under §357.21(d), the board will resolve the conflict prior to the deadline for Regional Water Plan adoption.

As an alternative, Dallas suggests that once an interregional conflict is identified and determined to exist between two regions, then the TWDB should perform its own independent analysis of the state's economic, agricultural and natural resource impacts. Using this procedure, in Dallas's opinion would have the additional benefits of considering the regional water planning groups' input relevant to the analysis, "as well as address the legal constraints of RWPGs which have no legal authority to enter into binding contracts on behalf of either their individual members in order to develop any of the strategies in the [regional water plan] or the State Water Plan."

The GCDs suggested that subsection 50(f)(5) be modified to cover the event that the interregional conflict has not been resolved by the deadline for adoption of final Regional Water Plans and the deletion of the requirement that the RWPG acknowledge that the Regional Water Plan may need to be revised or amended at a later date. The GCDs go on to recommend that a new section be added that requires the RWPG to submit documentation to the TWDB of the unresolved interregional conflict and acknowledge that the RWPG may be required to revise or amend its Regional Water Plan in accordance with a negotiated plan or board resolution of the interregional conflict. The GCDs state that incorporating their recommended changes would establish a procedure to adopt a final Regional Water Plan in the situation where an interregional conflict has not been resolved by the time of the statutory deadline for adoption of the Regional Water Plan. They also recommended that a provision be inserted in the final rule that would allow a Regional Water Plan to be adopted which contained an interregional conflict that had not been resolved by the affected regional water planning groups. In that case the regional water planning groups would submit documentation to the TWDB of the unresolved interregional conflict and acknowledge that the regional water planning group may be required to revise or amend the regional water plan in accordance with a negotiation plan or board resolution of the interregional conflict.

Response

The board understands the concern that an objecting region might try to use the statutorily prescribed interregional conflict resolution process to its advantage by delaying the process. The board's intent with the proposed rule is to eliminate that situation.

The board intends to make every effort to resolve interregional conflicts before the statutory deadline for the submission of final regional water plans. However, for those situations where this has proven to be impossible, §357.50(f)(5) provides for a procedure for adoption of the plan and compliance with Water Code §16.053(h)(7)(A). This is accomplished by each region removing any language from the plans that leads to a conflict. Thus, the conflict is removed as assuredly as if the board resolved the conflict and directed changes to the wording of the final plans. If this rule is invoked, the board intends to continue working on the underlying dispute, and if the regions cannot resolve the conflict with the board's facilitation, the board will resolve the conflict as quickly as possible. The board does not think that the delay will be for longer than a couple of months. Therefore, the board does not feel that exclusion of a water management strategy will ever result in a significant delay of a project, if the board ultimately resolves the conflict by allowing the water management strategy into an amended plan.

The board declines to allow more time in the rules for reviewing IPPs and resolving any interregional conflicts. Any additional time for resolving interregional conflicts would of necessity mean that sixteen regional water planning groups would have less time to prepare their IPPs. The board may alter the schedule in the future, but it wants to retain the flexibility that it would lose if the schedule were to be spelled out in the rules.

The board is constrained by Water Code §16.053(h)(6)&(7). Those subsections require the board to "facilitate coordination between the involved regions to resolve the conflict," once an interregional conflict has been found to exist. Only after a failure of the regional-level facilitated

resolution process, does the board have the legal authority to resolve the conflict. In an appropriate case, the board might decide that it will use an independent analysis of the economic, agricultural, and natural resource impacts of a water management strategy, after the failure of the regional level process, to inform the board's decision of the resolution of the conflict; however, the board does not want to attempt to anticipate which situations would be appropriate for independent analysis by a rule.

The board declines to make the suggested revisions to the rule suggested by the GCDs. The board views those revisions as being alternative wording for the same results as in the board's final rule. The board has not made any changes to the rule as a result of that comment.

Comment

FUSE objected to the provision of §357.50(f)(5) that would allow resolution of an interregional conflict by the board. FUSE stated that this rule would take the ultimate power from the regional water planning group and place it in the hands of the TWDB. FUSE commented that the courts provide a fairer venue than the TWDB.

Response

The board's rules have to follow the procedure laid out in Water Code §16.053(h)(6)&(7). Those subsections provide that if the regions are not able to resolve the conflict, with the assistance of the board's facilitate coordination, then it is up to the board to resolve the conflict. The board has not made any changes to the rule as a result of this comment.

§357.50(g)

Comment

The GCDs pointed out a typographical error in §357.50(g)(1)(C). That subsection should reference subsection (f); not subsection (d).

Response

The board appreciates the comment. When the board proposed reordering the paragraphs of the current rule, the reference was not updated. The board has changed the final rule to make the reference stay as in the current rule.

§357.51 – Amendments to Regional Water Plans

Comment

The GCDs support the proposed §357.51 which requires the regional water planning groups to follow the same procedures for IPPs and interregional conflicts in the situation where the potential for interregional conflict does not arise until an amendment or substitution of a water management strategy is proposed.

Response

The board appreciates the comment. The board has not made any changes in response to this comment.

§357.62 – Interregional Conflicts

Comment

The GCDs commented that in §357.62(a)(2), the representatives of a RWPG should be authorized to attend facilitated meetings called by the board on the interregional conflict and report back to the RWPG for negotiation or action to be taken by the RWPG. The GCDs commented that the representatives of the RWPG should not be authorized to negotiate on behalf of the RWPG.

Response

The board understands that some resolutions of interregional conflicts negotiated between representatives of the RWPGs will have to be finally approved by the respective RWPGs to be effective. However, the board expects that the facilitated coordination sessions will be a true dialogue between representatives of the respective regions, with offers on the table for consideration and responses to the offers and counter-offers. The sessions will not be events where the regions can simply send note takers for reporting back to the regions. The board has not made any changes in response to this comment.

Other Comments

Comment

TRA and one individual commented that the rules should establish standards that the board will use should a negotiated settlement not be reached and the board has to ultimately resolve the interregional conflict. TRA commented that the standards should include consideration of long-term, statewide impacts. The long-term benefits could be used as an offset to any alleged adverse effects of water supply strategies in a host region. Two individuals commented that adverse impacts to regions should not be balanced against the average effects over the whole state.

Response

The board notes that the final rule that it is adopting today must be read in the context of state laws, including the Texas Constitution, the Water Code, specifically §16.051(a), and existing board rules, including 31 TAC §358.3(3),(8),(9), and (13). The board expects there to be a broad range of differing long-term and short-term impacts, both positive and adverse, in various interregional conflicts. The board does not wish to restrict its discretion by adopting a standard for the resolution of conflicts to be used when the board must act as the final arbiter of disputes by resolving the interregional conflict. The board prefers to handle the resolution on a case-by-

case basis, with due consideration for the Texas Constitution, state statutes and board rules. The board did not make any changes as a result of these comments.

Comment

TRA commented that the rules should prohibit repeated challenges to the same projects based on conflicts previously resolved by the board. TRA suggested that language be added to the final rule that the board will not reevaluate previously resolved interregional conflicts.

Response

The board must follow the procedure set forth in Water Code §16.053(h)(6) and (7). Those subsections do not provide for a different process for interregional conflicts that were essentially resolved in a prior state water plan. The water planning statutes as a whole provide for a reexamination of water management strategies on a five year cycle. The board does not see that it has the authority to oversee a process that calls for a reexamination of nearly every aspect of a prior water management strategy without also having a reexamination of the impacts of that strategy, including the possible existence and appropriate resolution of interregional conflicts. The board has not made any changes to the rule as a result of this comment.

Comment

County Judge James M. Carlow, TFA and one individual commented that the rules should apply to the next state water plan.

Response

The board appreciates the comment but notes that as the board considers the final rule, IPPs have already been submitted and final Regional Water Plans will be due to the board December 1. The rule will therefore become final in the latter stages of the regional water planning process. The board has already directed the Executive Administrator to facilitate coordination between two regions involved in an interregional conflict under current law. If that conflict is not resolved before the statutory deadline for final Regional Water Plans, then the amendments to §357.50(f) will be effective by that date.

Comment

LIVT, FUSE, CCP, and seven individuals provided comments directed to opposing specific water management strategies. For projects that they object to, CCP, FUSE organizations and four individuals suggested alternate strategies.

Response

The board appreciates the comments. The board understands that the statutory framework for regional and state water planning provides for strategies to be developed and adopted by the regional water planning groups. The board therefore encourages these commenters to stay

involved in their regional planning process, by making their views known to the regional planning groups and making comments during the process as appropriate. The rules adopted today will not decide whether specific projects are in a regional water plan or in the state water plan. The board has not made any changes to the rule as a result of these comments.

Comment

One individual commented that the evaluation and resolution process for interregional conflicts needs to address all the impacts in the affected regions, including the impacts on the economy, agricultural resources, natural resources, and local communities. This individual did not want a water management strategy in the state water plan unless those issues were fully addressed.

Response

Current board rules require that all water management strategies included in a regional water plan include a quantitative analysis and reporting of environmental factors, impacts to agricultural resources and consideration of third-party social and economic impacts resulting from voluntary redistributions of water. 31 TAC §357.34. The board has not made any changes in response to this comment.

Comment

FARFA, LIVT and two individuals commented that local control over water planning must be preserved.

Response

The board appreciates the comment. The board understands that the statutory framework for regional and state water planning generally provides for strategies to be developed and adopted by regional water planning groups. The board has kept the rule within that framework excepting only to allow the board to follow its statutory duty to resolve interregional conflicts if the involved regions are unable to resolve the conflict. Water Code §16.053(h)(6). The board has not made any changes to the rule as a result of these comments.

Comment

CCP and one individual commented that the proposed rules should in no way affect property rights in general and specifically water rights of rural property owners.

Response

The board appreciates the comment. The final rule approved here does not alter property rights, including water rights of any property owners. The board has not made any changes to the rule as a result of the comment.

STATUTORY AUTHORITY

The amendments are adopted 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.

§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.

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

(17) - (30) (No change.)

§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, or a letter identifying the water management strategy in the other region along with an internet link to the IPP, to the RWPG associated with the location of such strategy.

(c) (No change.)

(d) Within 60 [~~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:

(1) identifying the specific recommended water management strategy from another RWPG's IPP;

(2) providing a statement of why the RWPG considers there to be an interregional conflict; and [~~providing specific information on the impacts of the strategy on economic, agricultural, or natural resources; and~~]

(3) providing any other information available to the RWPG that is relevant to the board's decision. [~~providing a statement of why the RWPG considers there to be an interregional conflict.~~]

(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.

(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 revise [~~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.

(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 (f) ~~(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 (f) ~~(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.

(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.

(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).

§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.

(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).

§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, 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;
- (3) request affected RWPGs' assistance in resolving the conflict; and
- (4) negotiate resolutions of conflicts with RWPGs as determined by the EA.

(b) - (d) (No change.)

The Texas Water Development Board (TWDB or board) adopts an amendment to 31 TAC §358.3, Subchapter A, State Water Plan Development, relating to Guidance Principles, in order to align the rule with Water Code §16.053(h)(7)(C). The proposal is adopted with changes as published in the July 3, 2015 issue of the *Texas Register* (40 TexReg 4313).

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

The purpose of the amendment is to change 31 TAC §358.3, relating to Guidance Principles, paragraph (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 ADOPTED AMENDMENTS.

The amendment to §358.3 (relating to Guidance Principles) amends principles in paragraph 4. Prior to this adoption, the paragraph provided 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 adopted amendment retains the original wording of the rule and adds state coverage.

REGULATORY ANALYSIS

The board has reviewed the adopted rulemaking pursuant to Texas Government Code §2001.0225, which requires a regulatory analysis of major environmental rules. 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 board is required to conduct a regulatory impacts analysis of a major environmental rule when the result of the adopted rulemaking is to exceed a standard set by federal law, unless the adopted rulemaking is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government implementing a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law. The intent of the rulemaking is to align the rule with Water Code §16.053(h)(7)(C). The board has determined that the adopted rulemaking does not meet the definition of "major environmental rule" under that section; therefore, no regulatory impacts analysis of the adopted rulemaking is required. No comments were received by the board on the draft regulatory impacts analysis.

TAKINGS IMPACT ASSESSMENT

The board has determined that the promulgation and enforcement of this adopted rule constitutes neither a statutory nor a constitutional taking of private real property. The adopted rule does not adversely affect a landowner's rights in private real property, in whole or in part, because the adopted rule does not burden or restrict or limit the owner's right to or use of property. 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 adding the term “state” to the phrase “regional water planning area”. Therefore, the rulemaking does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

PUBLIC COMMENT

A public hearing was held on July 23, 2015 at 1:30 pm in Room 170 of the Stephen F. Austin Building, 1700 North Congress Ave., Austin, Texas. Five individuals and organizations made oral comments at the public hearing.

Written comments on this rule were received from: Bowie County Judge James M. Carlow; Cass County Judge Becky Wilbanks; Friends United for a Safe Environment, Inc. (FUSE); International Paper Company (International Paper); League of Independent Voters of Texas (LIVT); Lone Star Chapter of the Sierra Club (Sierra Club); Region D Regional Water Planning Group (Region D); Texas Forest Industries Council (TFIC); Texas Forestry Association (TFA); and six individuals. Ward Timber, Gary Cheatwood, Richard LeTourneau, Shirley Shumake, Blackman & Carter, the Caddo Lake Institute, Clean Water Action, Environment Texas, Environmental Stewardship, Friends of the Brazos River, the Greater Edwards Aquifer Alliance, the Texas Center for Policy Studies, the Texas Conservation Alliance, and the Texas Rivers Protection Association, (collectively, Ward Timber) also submitted comments in a joint letter.

RESPONSE TO COMMENTS

Comment

Bowie County Judge James M. Carlow, Cass County Judge Becky Wilbanks, FRFA, FUSE, International Paper, LIVT, Region D, TFIC, TFA, Ward Timber and six individuals objected to the proposal to replace the phrase “regional water planning area” with the word “state” in 31 TAC §358.3(4). International Paper, supported by TFIC and LIVT, points out that Texas Water Code §16.053(a) requires the regional water plan to, “protect the agricultural and natural resources of that particular region.” International Paper and TFIC further note that the state water plan, under Texas Water Code §16.051, is required to, “protect the agricultural and natural resources of the entire state.” In their view it is the Board alone that balances the regional plans to protect the resources of the State. Region D, County Judge James M. Carlow, County Judge Becky Wilbanks, and TFA, felt that the Legislature intended that the water planning process should consider the effect of water management strategies on the agricultural and natural resources of the region where the strategy is located, “not simply on the overall state impacts.”

Sierra Club supported broadening the concept of what the regional plans must accomplish, but to avoid misunderstandings, they suggested using both the concept of the regional water plans protecting the agricultural and natural resources of both the state and “affected” regional water

planning areas. Ward Timber also made a similar comment and provided suggested wording that no water management strategy proposed in a regional water plan could have an “unacceptable degree of potential for substantial adverse effects on the economic development or agricultural or natural resources of another region of the state.” Ward Timber went on to offer specific examples of unacceptable degree of potential for substantial adverse effects, including closure of a “significant level of any type of farming, ranching, or timber activity across the region.” LIVT and an individual suggested the alternative of keeping the existing rule intact and adding an additional rule that addresses the required consistency with the state water plan.

FUSE objected to the deletion of “regional water planning area” and its replacement by “state.” FUSE felt that the changes effectively deprives regional water planners of their authority and assigns it to the TWDB.

Response

As International Paper points out in its comments, the Texas Water Code §16.053(h)(7)(C) requires a Regional Water Planning Group (RWPG) to develop a plan that is “consistent with long-term protection of the state’s water resources, agricultural resources and natural resources.” The RWPG must provide a record on which the Board can meaningfully make this determination. *See* 31 TAC §357.41. The board further notes that the required quantitative analysis of the water management strategy of environmental factors, impacts to agricultural resources, and consideration of third-party social and economic effects in 31 TAC §357.34, is not limited to effects and impacts on the regional planning area of the region proposing the water management strategy. Therefore, to align the rule with Water Code §16.053(h)(7)(C) and 31 TAC §357.34, the board has reworded the final rule to add “affected” as a modifier to “regional water planning areas,” and expanded the rule to include state coverage.

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.

§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 affected regional water planning areas and the state.

(5) - (28) (No change.)