

**TO:** Board Members

**THROUGH:** Jeff Walker, Executive Administrator  
Todd Chenoweth, General Counsel  
Jessica Zuba, Deputy Executive Administrator, Water Supply & Infrastructure

**FROM:** Ashley Nwonuma, Assistant General Counsel

**DATE:** November 29, 2018

**SUBJECT:** Proposed State Revolving Fund Rulemaking – 31 Texas Administrative Code Chapters 371 and 375

**ACTION REQUESTED**

Consider authorizing publication of proposed amendments to 31 Texas Administrative Code Chapters 371 and 375 related to financial assistance from the Drinking Water State Revolving Fund (DWSRF) and Clean Water State Revolving Fund (CWSRF).

**BACKGROUND**

The proposed amendments will provide clarity on the Texas Water Development Board’s (TWDB) procedures to entities seeking and receiving financial assistance through the TWDB’s CWSRF and DWSRF programs.

**KEY ISSUES**

Sections 371.14 and 375.15 are amended to streamline the procedure for setting fixed interest rates for loans with the procedure for setting interest rates for entities issuing bonds. Currently, the procedure for loans states that interest rates may not be set earlier than five business days before the execution of the loan agreement, which means that interest rates cannot be set until both the borrower and the TWDB execute the loan agreement. The procedure for setting interest rates for bonds provides that interest rates may not be set earlier than five business days before adoption of the borrower’s bond ordinance or resolution, and doesn’t require any TWDB action before interest rates can be set. The amendment will change the procedure for loans so that interest rates can be set no earlier than five business days before the borrower’s execution of the loan agreement, ensuring consistency in the procedures for all borrowers.

**Our Mission** : **Board Members**

To provide leadership, information, education, and support for planning, financial assistance, and outreach for the conservation and responsible development of water for Texas : Peter M. Lake, Chairman | Kathleen Jackson, Board Member | Brooke T. Paup, Board Member  
: Jeff Walker, Executive Administrator

Sections 371.70 and 375.91 are amended to remove the requirement that the partial redemption of bonds or other authorized securities be made in inverse order of maturity. This will provide consistency with TWDB bond language.

Sections 371.71 and 375.92 are amended to clarify that before closing financial assistance secured by promissory notes and deeds of trust that applicants must establish a dedicated source of revenue for repayment of the financial assistance. This is already a closing requirement for loans and bonds, but the procedure was not in the TWDB's rules. Federal law requires that entities receiving loans establish a dedicated source for repayment.<sup>1</sup>

Sections 371.85 and 375.106 are amended to streamline the final accounting provision with the TWDB's other financial assistance programs as provided in 31 Tex. Admin. Code §363.42. Currently, Section 363.42 provides that after final accounting any surplus loan funds may be used in a manner as approved by the executive administrator. Sections 371.85 and 375.106 are amended to match this procedure and ensure consistency across all financial programs.

Section 371.2 is amended to correct the heading of the subsection concerning what applicants are ineligible for assistance. Section 375.18 is amended to clarify that principal forgiveness may be provided in accordance with the federal appropriations acts.

#### **RECOMMENDATION**

The Executive Administrator recommends authorizing the publication of proposed amendments to 31 Texas Administrative Code Chapters 371 and 375 in order to clarify procedures relating to financial assistance.

Attachment(s): Proposed Rulemaking for Chapter 371  
Proposed Rulemaking for Chapter 375

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<sup>1</sup> See 33 U.S.C.A § 1383(d)(1)(C) and 42 U.S.C.A. § 300j-12(f)(1)(C).

The Texas Water Development Board (“TWDB” or “board”) proposes amendments to 31 Texas Administrative Code (TAC) §371.14 relating to lending rates, 31 TAC §371.2 relating to projects and activities eligible for assistance, 31 TAC §371.70 relating to financial assistance secured by bonds or other authorized securities, 31 TAC §371.71 relating to financial assistance secured by promissory notes and deeds of trust, and 31 TAC §371.85 relating to final accounting.

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

The TWDB proposes to amend various provisions in 31 TAC Chapter 371 to provide clarity on the TWDB’s procedures to those seeking and receiving financial assistance from the board. The specific provisions being amended and the reasons for the amendments are addressed in more detail below.

### SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

#### *31 TAC §371.14. Lending Rates.*

Section 371.14 is amended to streamline the procedure for setting fixed interest rates for loans with the TWDB’s procedure for setting interest rates for entities adopting bond ordinances or resolutions. Currently, the procedure for loans states that interest rates may not be set earlier than five business days before both the TWDB and the borrower execute the loan agreement. The amendment will change the procedure for loans to clarify that interest rates may be set no earlier than five business days before the borrower’s execution of the loan agreement.

#### *31 TAC §371.2. Projects and Activities Eligible for Assistance.*

Section 371.2 is amended to correct the heading of the subsection concerning what applicants are ineligible for assistance.

#### *31 TAC §371.70. Financial Assistance Secured by Bonds or Other Authorized Securities.*

Section 371.70 is amended to remove the requirement that the partial redemption of bonds or other authorized securities be made in inverse order of maturity.

#### *31 TAC §371.71. Financial Assistance Secured by Promissory Notes and Deeds of Trust.*

Section 371.71 is amended to clarify that before closing financial assistance secured by promissory notes and deeds of trust that applicants must establish a dedicated source of revenue for repayment of the financial assistance. This is already a closing requirement for loans and bonds, but the procedure was not in the TWDB rules. This is required by 42 U.S.C.A §300j-12(f)(1)(C).

#### *31 TAC §371.85. Final Accounting.*

Section 371.85 is amended to streamline the final accounting provision with the TWDB’s other financial assistance programs. Currently, 31 TAC §363.42 provides that after final accounting

any surplus loan funds may be used in a manner as approved by the executive administrator. Section 371.85 is amended to match this procedure.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will be no significant 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 for state and local governments because the proposed amendments are only clarifications to the language in the rules. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code Section 2001.0045 to repeal a rule does not apply. Furthermore, the requirement in Section 2001.0045 does not apply because these rules are necessary to receive a source of federal funds and are necessary to comply with federal law.

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

#### PUBLIC BENEFITS AND COSTS

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as it is intended to provide greater clarity to those seeking and receiving financial assistance from the board.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

The board has determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are 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, micro-businesses, or rural communities 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 streamline the procedures for those seeking and receiving financial assistance from the board.

Even if the proposed rules were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: 1) does not exceed any federal law; 2) does not exceed an express requirement of state law; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and 4) is not proposed solely under the general powers of the agency, but rather is proposed under the authority of Texas Water Code §§15.604, 15.605, and 16.093. Therefore, the proposed amendments do 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 the proposed rules and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the rules is to provide clarity to those seeking and receiving financial assistance from the board. The proposed rules would substantially advance this stated purpose by updating internal references regarding TWDB financial assistance programs and streamlining the procedures across the financial assistance programs.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to the proposed rules because this is an action that is reasonably taken to fulfill an obligation mandated by state and federal law, which is exempt under Texas Government Code,

§2007.003(b)(4). The board is the agency that provides financial assistance for the construction of water, wastewater, flood control, and other related projects.

Nevertheless, the board further evaluated the proposed rules and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the 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, these rules require compliance with state and federal laws regarding financial assistance under the state revolving funds without burdening or restricting or limiting an owner's right to property and reducing its value by 25% or more. Therefore, the proposed rules do not constitute a taking under Texas Government Code, Chapter 2007.

#### GOVERNMENT GROWTH IMPACT STATEMENT

The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government §2001.0221 and has determined for the first five years the proposed rule would be in effect, the proposed rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy. The proposed rules provide greater clarity on the financial assistance process.

#### SUBMISSION OF COMMENTS

Written comments on the proposed rulemaking may be submitted by mail to Mr. Todd Chenoweth, Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to [rulescomments@twdb.texas.gov](mailto:rulescomments@twdb.texas.gov), or by fax to (512) 475-2053. Comments will be accepted until 5:00 p.m. of the 31st day following publication in the Texas Register.

#### STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Chapters 15 and 16 of the Texas Water Code are affected by this rulemaking.

<rule>

§371.14. Lending Rates.

(a) (No change.)

(b) Procedure for setting fixed interest rates.

(1) The executive administrator will set fixed interest rates as described in the IUP and further determined in this section, on a date that is:

(A) no earlier than five business days prior to the adoption of the political subdivision's bond ordinance or resolution or the borrower's execution of a loan agreement; and

(B) not more than 45 days before the anticipated closing of a commitment from the Board.

(2) After 45 days from the assignment of the interest rate, rates may be extended only with the executive administrator's approval.

(c) - (e) (No change.)

§371.2. Projects and Activities Eligible for Assistance.

(a) - (c) (No change.)

(d) Ineligible applicants [~~projects~~]. Assistance from the Fund may not be provided to:

(1) Federally-owned public water systems or for-profit noncommunity water systems.

(2) Systems that lack the technical, financial, and managerial capability to ensure compliance with the requirements of the Act, unless the assistance will ensure compliance and the owners or operators of the systems agree to undertake feasible and appropriate changes in operations to ensure compliance over the long term.

(3) Systems that are in significant noncompliance with any national primary drinking water regulation or variance, unless:

(A) The purpose of the assistance is to address the cause of the significant noncompliance and will ensure that the systems return to compliance; or

(B) The purpose of the assistance is unrelated to the cause of the significant noncompliance and the systems are on enforcement schedules (for maximum contaminant level and treatment technique violations) or have compliance plans (for monitoring and reporting violations) to return to compliance.

(e) - (f) (No change.)

§371.70. Financial Assistance Secured by Bonds or Other Authorized Securities.

(a) Applicability and required documents. This section applies to closings for financial assistance with entities issuing bonds or other authorized securities. The following documents are required for closing financial assistance secured by bonds or other authorized securities:

(1) evidence that applicable requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) a certified copy of the ordinance or resolution adopted by the governing body authorizing the issuance of debt to be sold to the Board that is acceptable to the executive administrator. The ordinance or resolution shall have sections providing as follows:

(A) - (H) (No change.)

~~[(I) that the partial redemption of bonds or other authorized securities be made in inverse order of maturity;]~~

~~[(J)]~~ that insurance coverage be obtained and maintained in an amount sufficient to protect the Board's interest in the project;

~~[(K)]~~ that the Applicant, or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the Applicant's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis as required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the Board were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the Board and the beneficial owner of the political subdivision's obligations, if the Board sells or otherwise transfers such obligations, and the beneficial owners of the Board's bonds if the political subdivision is an obligated person with respect to such bonds under rule 15c2-12. The ordinance or resolution shall also contain any other requirements of the SEC or the IRS relating to arbitrage, private activity bonds, or other relevant requirements regarding the securities held by the Board;

~~[(L)]~~ the maintenance of current, accurate, and complete records and accounts in accordance with generally accepted accounting principles to demonstrate compliance with requirements in the financial assistance documents;

~~[(M)]~~ that the Applicant shall annually submit an audit, prepared by a certified public accountant in accordance with generally accepted auditing standards;

~~[(N)]~~ that the Applicant shall submit a final accounting within 60 days of the completion of the project;

~~[(O)]~~ that the Applicant shall document the adoption and implementation of an approved water conservation program for the duration of the financial assistance;

(O)~~(P)~~ the Applicant's agreement to comply with special environmental conditions specified in the Board's environmental finding as well as with any applicable Board laws or rules relating to use of the financial assistance;

(P)~~(Q)~~ that the Applicant shall establish a dedicated source of revenue for repayment of the financial assistance;

(Q)~~(R)~~ that interest payments shall commence no later than one year after the date of closing;

(R)~~(S)~~ that annual principal payments will commence no later than one year after completion of project construction; and

(S)~~(T)~~ any other recitals mandated by the executive administrator;

(3) - (11) (No change.)

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

#### §371.71. Financial Assistance Secured by Promissory Notes and Deeds of Trust.

(a) - (b) (No change.)

(c) Documents required for closing. The executive administrator shall ensure that the following documents have been submitted prior to closing financial assistance secured by promissory notes and deeds of trust:

(1) evidence that applicable requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) an executed promissory note and loan agreement in a form approved by the executive administrator;

(3) a Deed of Trust and Security Agreement that shall contain a first mortgage lien evidenced by a deed of trust on all the real and personal property of the water system; provided, however, these are not needed if the financial assistance consists of 100 percent principal forgiveness;

(4) an owner's title insurance policy for the benefit of the Board covering all the real property identified in the deed of trust; provided, however, these are not needed if the financial assistance consists of 100 percent principal forgiveness;

(5) evidence that the rates on which the Applicant intends to rely for repayment of the financial assistance have received final and binding approval from the Utility Commission and, for Applicants required to utilize a surcharge account, evidence that the approval of the Utility Commission was conditioned on the creation of a surcharge account;

(6) a certified copy of the resolution adopted by the governing body authorizing the indebtedness and a certificate from the secretary of the governing body attesting to adoption of the resolution in accordance with the by-laws or rules of the governing body and in compliance with the Open Meetings Act, if applicable;

(7) a legal opinion from Applicant's counsel that provides:

(A) that the entity has the legal authority to enter into the loan agreement and to execute a promissory note;

(B) that the entity is not in breach or default of any state or federal order, judgment, decree, or other instrument which would have a material effect on the loan transaction;

(C) that there is no pending suit, action, proceeding, or investigation by a public entity that would materially adversely affect the enforceability or validity of the required financial assistance documents;

(D) evidence that the entity is in good standing with the Texas Office of the Secretary of State; and

(E) a statement relating to any other issues deemed relevant by the executive administrator.

(8) evidence that an approved water conservation plan has been adopted and will be implemented through the life of the project;

(9) evidence of the Applicant's agreement to comply with special environmental conditions contained in the Board's environmental finding;

(10) evidence that the Applicant shall establish a dedicated source of revenue for repayment of the financial assistance;

(11[40]) evidence that the Applicant has adopted final water rates and charges that are not subject to appeal to the Utility Commission;

(12[44]) copies of executed service and revenue contracts;

(13[42]) evidence that the Applicant has the technical, managerial, and financial capacity to maintain the system unless the use of the funds will be to ensure that the system has the technical, managerial, and financial capacity to comply with the national primary or applicable state drinking water regulations over the long term;

(14[43]) if the project will result in the development of surface or groundwater resources, the Applicant shall demonstrate that it has the right to use the quantity of water necessary for project effectiveness and efficiency. Upon receipt of the information, the executive administrator shall prepare a finding that the Applicant has a reasonable expectation of obtaining the water rights necessary for project implementation prior to any release of funds for

planning, land acquisition, and design activities. A written water rights certification must be prepared by the executive administrator before funds can be released for construction activities based upon a showing by the Applicant that the necessary water rights have been acquired;

(15[14]) when any portion of the financial assistance is to be held in an escrow account, the Applicant shall execute an escrow agreement, approved as to form and substance by the executive administrator; and

(16[15]) any other documents relevant to the particular transaction.

(d) - (f) (No change.)

#### §371.85. Final Accounting.

(a) (No change.)

(b) After the final accounting, the executive administrator shall notify the Applicant if remaining surplus funds exist and advise the Applicant that the remaining surplus funds may be used in a manner as approved by the executive administrator. [~~as specified in any applicable bond ordinance, for:~~

~~(1) payment of bonds in inverse order of maturity;~~

~~(2) deposit into the interest and sinking fund; or~~

~~(3) deposit to a reserve fund.]~~

The Texas Water Development Board (“TWDB” or “board”) proposes amendments to 31 Texas Administrative Code (TAC) §375.15 relating to lending rates, 31 TAC §375.18 relating to principal forgiveness, 31 TAC §375.91 relating to financial assistance secured by bonds or other authorized securities, 31 TAC §375.92 relating to financial assistance secured by promissory notes and deeds of trust, and 31 TAC §375.106 relating to final accounting.

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

The TWDB proposes to amend various provisions in 31 TAC Chapter 375 to provide clarity on the TWDB’s procedures to those seeking and receiving financial assistance from the board. The specific provisions being amended and the reasons for the amendments are addressed in more detail below.

## SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

### *31 TAC §375.15. Lending Rates.*

Section 375.15 is amended to streamline the procedure for setting fixed interest rates for loans with the TWDB’s procedure for setting interest rates for entities adopting bond ordinances or resolutions. Currently, the procedure for loans states that interest rates may not be set earlier than five business days before both the TWDB and the borrower execute the loan agreement. The amendment will change the procedure for loans to clarify that interest rates may be set no earlier than five business days before the borrower’s execution of the loan agreement.

### *31 TAC §375.18. Principal Forgiveness.*

Section 375.18 is amended to clarify that the board may provide principal forgiveness for financial assistance in accordance with the federal appropriations acts, and for eligible activities as detailed in the TWDB’s Intended Use Plan.

### *31 TAC §375.91. Financial Assistance Secured by Bonds or Other Authorized Securities*

Section 375.91 is amended to remove the requirement that the partial redemption of bonds or other authorized securities be made in inverse order of maturity.

### *31 TAC §375.92. Financial Assistance Secured by Promissory Notes and Deeds of Trust.*

Section 375.92 is amended to clarify that before closing financial assistance secured by promissory notes and deeds of trust that applicants must establish a dedicated source of revenue for repayment of the financial assistance. This is already a closing requirement for loans and bonds, but the procedure was not in the TWDB rules. This is required by 33 U.S.C.A §1383(d)(1)(C).

### *31 TAC §375.106. Final Accounting.*

Section 375.106 is amended to streamline the final accounting provision with the TWDB’s other financial assistance programs. Currently, 31 TAC §363.42 provides that after final

accounting any surplus loan funds may be used in a manner as approved by the executive administrator. Section 375.106 is amended to match this procedure.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will be no significant 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 for state and local governments because the proposed amendments are only clarifications to the language in the rules. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code Section 2001.0045 to repeal a rule does not apply. Furthermore, the requirement in Section 2001.0045 does not apply because these rules are necessary to receive a source of federal funds and are necessary to comply with federal law.

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

#### PUBLIC BENEFITS AND COSTS

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as it is intended to provide greater clarity to those seeking and receiving financial assistance from the board.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

The board has determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are 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, micro-businesses, or rural communities 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 streamline the procedures for those seeking and receiving financial assistance from the board.

Even if the proposed rules were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: 1) does not exceed any federal law; 2) does not exceed an express requirement of state law; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and 4) is not proposed solely under the general powers of the agency, but rather is proposed under the authority of Texas Water Code §§15.604, 15.605, and 16.093. Therefore, the proposed amendments do 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 the proposed rules and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the rules is to provide clarity to those seeking and receiving financial assistance from the board. The proposed rules would substantially advance this stated purpose by updating internal references regarding TWDB financial assistance programs and streamlining the procedures across the financial assistance programs.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to the proposed rules because this is an action that is reasonably taken to fulfill an obligation mandated by state and federal law, which is exempt under Texas Government Code,

§2007.003(b)(4). The board is the agency that provides financial assistance for the construction of water, wastewater, flood control, and other related projects.

Nevertheless, the board further evaluated the proposed rules and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the 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, these rules require compliance with state and federal laws regarding financial assistance under the state revolving funds without burdening or restricting or limiting an owner's right to property and reducing its value by 25% or more. Therefore, the proposed rules do not constitute a taking under Texas Government Code, Chapter 2007.

#### GOVERNMENT GROWTH IMPACT STATEMENT

The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government §2001.0221 and has determined for the first five years the proposed rule would be in effect, the proposed rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy. The proposed rules provide greater clarity on the financial assistance process.

#### SUBMISSION OF COMMENTS

Written comments on the proposed rulemaking may be submitted by mail to Mr. Todd Chenoweth, Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to [rulescomments@twdb.texas.gov](mailto:rulescomments@twdb.texas.gov), or by fax to (512) 475-2053. Comments will be accepted until 5:00 p.m. of the 31st day following publication in the Texas Register.

#### STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Chapters 15 and 16 of the Texas Water Code are affected by this rulemaking.

<rule>

§375.15. Lending Rates.

(a) (No change.)

(b) Procedure for setting fixed interest rates.

(1) The executive administrator will set fixed interest rates as described in the IUP and further determined in this section, on a date that is:

(A) no earlier than five business days prior to the adoption of the political subdivision's bond ordinance or resolution or the borrower's execution of a loan agreement; and

(B) not more than 45 days before the anticipated closing of a commitment from the Board.

(2) After 45 days from the assignment of the interest rate, rates may be extended only with the executive administrator's approval.

(c) - (e) (No change.)

§375.18. Principal Forgiveness.

(a) The Board may provide principal forgiveness for financial assistance in accordance with 33 U.S.C. §1383(i) or federal appropriations acts:

(1) for an entity that meets the affordability criteria established in this chapter and in the IUP for a Disadvantaged Community; [~~or~~]

(2) to implement a process, material, technique, or technology:

(A) to address water-efficiency goals;

(B) to address energy-efficiency goals;

(C) to mitigate stormwater runoff; and/or

(D) to encourage sustainable project planning, design, and construction; or [-]

(3) for any other eligible activity as detailed in the Intended Use Plan.

(b) (No change.)

§375.91. Financial Assistance Secured by Bonds or Other Authorized Securities.

(a) Applicability and required documents. This section applies to closings for financial assistance with entities issuing bonds or other authorized securities. The following documents are required for closing financial assistance secured by bonds or other authorized securities:

(1) evidence that applicable requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) a certified copy of the ordinance or resolution adopted by the governing body authorizing the issuance of debt to be sold to the Board that is acceptable to the executive administrator. The ordinance or resolution shall have sections providing as follows:

(A) - (H) (No change.)

~~[(I) that the partial redemption of bonds or other authorized securities be made in inverse order of maturity;]~~

~~[(J)]~~ that insurance coverage be obtained and maintained in an amount sufficient to protect the Board's interest in the project;

~~[(K)]~~ that the Applicant, or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the Applicant's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis as required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the Board were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the Board and the beneficial owner of the political subdivision's obligations, if the Board sells or otherwise transfers such obligations, and the beneficial owners of the Board's bonds if the political subdivision is an obligated person with respect to such bonds under rule 15c2-12. The ordinance or resolution shall also contain any other requirements of the SEC or the IRS relating to arbitrage, private activity bonds or other relevant requirements regarding the securities held by the Board;

~~[(L)]~~ the maintenance of current, accurate, and complete records and accounts in accordance with generally accepted accounting principles to demonstrate compliance with requirements in the financial assistance documents;

~~[(M)]~~ that the Applicant shall annually submit an audit, prepared by a certified public accountant in accordance with generally accepted auditing standards;

~~[(N)]~~ that the Applicant shall submit a final accounting within 60 days of the completion of the project;

~~[(O)]~~ that the Applicant shall document the adoption and implementation of an approved water conservation program for the duration of the financial assistance;

(O)~~(P)~~ the Applicant's agreement to comply with special environmental conditions specified in the Board's environmental finding as well as with any applicable Board laws or rules relating to use of the financial assistance;

(P)~~(Q)~~ that the Applicant shall establish a dedicated source of revenue for repayment of the financial assistance;

(Q)~~(R)~~ that interest payments shall commence no later than one year after the date of closing;

(R)~~(S)~~ that annual principal payments will commence no later than one year after completion of project construction; and

(S)~~(T)~~ any other recitals mandated by the executive administrator;

(3) - (9) (No change.)

(b) - (c) (No change.)

#### §375.92. Financial Assistance Secured by Promissory Notes and Deeds of Trust.

(a) - (b) (No change.)

(c) Documents required for closing. The executive administrator shall ensure that the following documents have been submitted prior to closing financial assistance secured by promissory notes and deeds of trust:

(1) evidence that applicable requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) an executed promissory note and loan agreement in a form approved by the executive administrator;

(3) a Deed of Trust and Security Agreement that shall contain a first mortgage lien evidenced by a deed of trust on all the real and personal property of the water system;

(4) an owner's title insurance policy for the benefit of the Board covering all the real property identified in the deed of trust;

(5) evidence that the rates on which the Applicant intends to rely for repayment of the financial assistance have received final and binding approval from the Utility Commission and, for Applicants required to utilize a surcharge account, evidence that the approval of the Utility Commission was conditioned on the creation of a surcharge account;

(6) a certified copy of the resolution adopted by the governing body authorizing the indebtedness and a certificate from the secretary of the governing body attesting to adoption of

the resolution in accordance with the by-laws or rules of the governing body and in compliance with the Open Meetings Act, if applicable;

(7) a legal opinion from Applicant's counsel that provides:

(A) that the entity has the legal authority to enter into the loan agreement and to execute a promissory note;

(B) that the entity is not in breach or default of any state or federal order, judgment, decree, or other instrument which would have a material effect on the loan transaction;

(C) that there is no pending suit, action, proceeding, or investigation by a public entity that would materially adversely affect the enforceability or validity of the required financial assistance documents;

(D) evidence that the entity is in good standing with the Texas Office of the Secretary of State; and

(E) a statement relating to any other issues deemed relevant by the executive administrator.

(8) evidence that an approved water conservation plan has been adopted and will be implemented through the life of the project;

(9) evidence of the Applicant's agreement to comply with special environmental conditions contained in the Board's environmental finding;

(10) evidence that the Applicant shall establish a dedicated source of revenue for repayment of the financial assistance;

(11[40]) evidence that the Applicant has adopted final water rates and charges that are not subject to appeal to the Utility Commission;

(12[44]) copies of executed service and revenue contracts;

(13[42]) when any portion of the financial assistance is to be held in an escrow account, the Applicant shall execute an escrow agreement, approved as to form and substance by the executive administrator; and

(14[43]) any other documents relevant to the particular transaction.

(d) - (f) (No change.)

§375.106. Final Accounting.

(a) (No change.)

(b) After the final accounting, the executive administrator shall notify the Applicant if remaining surplus funds exist and advise the Applicant that the remaining surplus funds may be used in a manner as approved by the executive administrator. [~~as specified in any applicable bond ordinance, for:~~

~~(1) payment of bonds in inverse order of maturity;~~

~~(2) deposit into the interest and sinking fund; or~~

~~(3) deposit to a reserve fund.]~~