Texas Water Development Board

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**TO:** Board Members

**THROUGH:** Jeff Walker, Executive Administrator
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Jessica Zuba, Deputy Executive Administrator

**FROM:** Tom Entsminger, Manager, Program Administration and Reporting

**DATE**: November 14, 2019

**SUBJECT:** Proposed Changes to Texas Administrative Code regarding funding of flood mitigation projects

**ACTION REQUESTED**

Consider authorizing publication of a proposal to repeal existing Title 31 Texas Administrative Code Chapter 363, Subchapter D and proposal of new Title 31 Texas Administrative Code Chapter 363, Subchapter D relating to the funding of flood mitigation projects.

**BACKGROUND**

The 86th Texas Legislature passed several bills entrusting the Texas Water Development Board (TWDB) with new responsibilities related to funding flood mitigation projects and planning for future flood events. On November 5, Texas voters approved Proposition 8, a constitutional amendment providing for the creation of the Flood Infrastructure Fund (FIF) to assist in the financing of drainage, flood mitigation, and flood control projects. In conjunction with the constitutional amendment, the legislature made a one-time transfer of $793 million from the Economic Stabilization or "Rainy Day" Fund to the FIF via Senate Bill 500 and passed Senate Bill (SB) 7, which outlines uses of the FIF and creates the Texas Infrastructure Resiliency Fund (TIRF). The legislature appropriated funds to the Floodplain Management Account within the TIRF to support the development of the first state flood plan and related flood science initiatives.

Senate Bill 8, also passed by the 86th Legislature, outlined a new state-wide flood planning effort to be administered by TWDB, with the first state flood plan due no later than September 1, 2024. Only projects appearing as recommended strategies in the plan will be eligible for FIF funding once it is released. Before the plan is completed and released, SB7 funding requires projects to originate from collaborative processes in order to be eligible for funding.

Our Mission

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

Board Members

Peter M. Lake, Chairman | Kathleen Jackson, Board Member | Brooke T. Paup, Board Member

Jeff Walker, Executive Administrator

As a first step in the rulemaking process, TWDB staff went on a "listening tour" comprising workshops in 14 cities across Texas and 2 webinars to receive public input on how the TWDB should undertake its new responsibilities to best serve the needs of communities. In addition to the workshops and webinars, written public comments were accepted via email throughout the month of August. The input received during the public comment period was extensive, thoughtful, and constructive, and continues to serve as a helpful resource for the TWDB.

**KEY ISSUES**

The Executive Administrator proposes changes to 31 TAC Chapter 363, Subchapter D, to outline the TWDB's funding of flood mitigation projects. The proposed rule language covers topics including eligible use of funds, terms of financial assistance, and application requirements. In many respects the structure and content of the proposed rule language resemble those used for other TWDB financial assistance programs, but with notable exceptions.

First, the proposed rules require entities applying for flood control projects to provide a Memorandum of Understanding between all political subdivisions in a project watershed in accordance with the SB 7 requirement that projects result from collaborative processes. Also required is an affidavit attesting that the applicant has acted cooperatively with other political subdivisions, that all eligible political subdivisions substantially affected by the proposed project have participated in the project development process, that these political subdivisions have held public meetings to accept comment on proposed projects, and that technical requirements for construction projects have been compared against other potential projects in the area. Applications for construction costs must include an analysis of whether the proposed flood project could use floodwater capture techniques for water supply purposes.

The proposed rules also state that certain details about each funding cycle will appear in an annual Flood Intended Use Plan (Flood IUP). Information appearing in the Flood IUP will include loan and grant eligibilities, available funding capacity, and the prioritization criteria that will be applied to proposed projects. Communicating this information through the Flood IUP rather than codifying it in rule helps the TWDB preserve the flexibility to adjust based on experience as the program matures.

The prioritized list of projects submitted for consideration each year will appear as an attachment to the Flood IUP. Although the Flood IUP will be structured based on an annual funding cycle structure, Abridged Applications will continue to be received and ranked throughout the year. The Flood IUP will be amended as necessary to reflect the complete list of Abridged Applications under consideration. Before final adoption, both the draft rules and draft Flood IUP will be posted on the TWDB website for public comment.

**FLOOD MITIGATION PROJECT FUNDING**

The Executive Administrator envisions a funding cycle and application process similar to those in use for the State Water Implementation Fund for Texas and State Revolving Fund programs, including a two-stage application process whereby only the projects that rank within each cycle's funding capacity are invited to submit financial assistance applications.

Although a diverse variety of projects are eligible for funding through the new program, the Executive Administrator anticipates requiring all proposals to satisfy certain minimum standards before being considered. Minimum standards will be listed in the Flood IUP and may include:

- The benefit/cost ratio of the proposed project must be >1.
- All agreements and Memoranda of Understanding must be executed prior to TWDB's consideration of the full financial assistance application, but may be provided in draft form with the Abridged Application.
- The funding request must not include redundant funding.
- The area to be served by the proposed project must already be served by enforced National Flood Insurance Program minimum floodplain management standards.
- The proposed project must be developed using the best/most recent available data.
- Applicants for Construction funds must be able to document that they have:
    - planned for costs associated with operating and maintaining proposed facilities; and
    - considered possible floodwater capture techniques that could be associated with the proposed project.

The Flood IUP will be released at the start of each year's project solicitation process and amended to include an attachment listing prioritized projects as the funding cycle advances. It is therefore intended to serve both as an informational and promotional tool for potential applicants and as documentation of each cycle's prioritization outcomes. The prioritization system will focus on protecting life and property, with consideration in the proposed first-cycle criteria also given to cost-effectiveness, speedy implementation, and regional benefit. An Abridged Application will be released concurrently with each Flood IUP to collect the information necessary to determine prioritization scores for each project.

For the inaugural funding cycle, the Executive Administrator envisions a program structure that offers grant and loan funding for activities listed in five project categories in the draft Flood IUP. The percentage of grant funding in each category depends on factors such as the entity's Annual Median Household Income or serving a project area located outside of a Metropolitan Statistical Area.

**ANTICIPATED TIMELINE**

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|---|---|
| November 2019 | Voters approve creation of the FIF through Proposition 8<br>Draft rules published (followed by 45-day public comment period);<br>Draft Flood IUP posted |
| February 2020 | Board considers adoption of final rules |
| March 2020 | Abridged Application period begins |
| April 2020 | Abridged applications due |
| June 2020 | Board considers approval of prioritization<br>TWDB issues invitations to apply |
| July 2020 | Applications due (30 days from invitation) |
| Fall 2020 | Financial Assistance Commitments |
| Spring 2021 | Borrower Closings |

**RECOMMENDATION**

The Executive Administrator recommends authorizing publication of a proposal to repeal existing Title 31 Texas Administrative Code Chapter 363, Subchapter D and proposal of new Title 31 Texas Administrative Code Chapter 363, Subchapter D relating to the funding of flood mitigation projects.

Attachments: 1. Proposed Rulemaking for publication in the *Texas Register* – Chapter 363
2. Draft Flood Intended Use Plan

The Texas Water Development Board ("TWDB" or "board") proposes to repeal 31 TAC §§363.401 - 404; and proposes new Subchapter D, 31 TAC §§363.401 – 408, relating to the establishment of flood financial assistance by recent statutory amendments to Chapter 15 and 16 of the Texas Water Code.

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

Through Senate Bill 7 of the 86th Legislature, 2019, the Legislature created the Flood Infrastructure Fund and the Texas Infrastructure Resiliency Fund to ensure financial assistance is available for flood control, drainage, and mitigation projects. The new flood financial assistance will be administered by the TWDB and is designed to make the implementation of flood projects more affordable for Texas communities and to meet the immediate needs for funding from political subdivisions.

The TWDB is proposing the present rules to implement the establishment of flood financial assistance by creating a new subchapter in Chapter 363, relating to Financial Assistance Programs. By placing the flood financial assistance rules into this chapter, the general provisions of Chapter 363 will apply. This will allow the board to use the procedures and practices common to many of the board's existing financial programs rather than to recreate them separately in the flood financial assistance rules. Applicants will find the utilization of existing practices convenient and efficient, as opposed to having to navigate and understand new processes. To read and understand the rules in Chapter 363, Subchapter D that will apply to flood financial assistance, the rules must be read together with Subchapter A, relating to General Provisions.

The executive administrator envisions that the application process for flood financial assistance will be similar to the processes for the board's financial programs, as modified by any process improvements. The board will solicit initial abridged applications and then a longer application at the appropriate time. The abridged application will allow the applicant to describe the proposed project and provide information about the issues the project will address. After the board receives the abridged applications, staff will rate and prioritize the projects. The executive administrator will recommend a prioritized list of applications based on the criteria specified in proposed rule §363.404. The prioritized list of projects, as recommended by the executive administrator, will go to the board for deliberation and preliminary decision. The projects that are selected by the board for funding may be required to submit additional information by the board. The longer application will then be subject to the executive administrator's traditional analysis for evaluating projects.

Prior to proposing these rules, the board engaged in an extensive effort of outreach for suggestions on flood planning and financing. TWDB staff traveled across the state and solicited input from stakeholders on how to implement the flood financial assistance program.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

The proposed repeal of §§363.401 - 404 removes the current flood control provisions to allow for the implementation of the new flood financial assistance program.

*Proposed Amendment to 31 TAC Chapter 363 by addition of a New Subchapter D (relating to Flood Financial Assistance)*

*31 TAC §363.401. Scope of Subchapter D.*
Section 363.401 is proposed to specify the scope and coverage of Subchapter D. Subchapter D governs the board's new flood financial assistance program established by the Texas Water Code, Chapter 15, Subchapter I and Texas Water Code, Chapter 16, Subchapter L. The new section also clarifies that the provisions of Chapter 363, Subchapter A are applicable to the flood financial assistance program unless they are in conflict with Subchapter D.

*31 TAC §363.402. Definitions.*
Section 363.402 is proposed to clarify the definitions of words and terms used throughout Subchapter D.

*31 TAC §363.403. Prioritization System.*
Section 363.403 is proposed to provide a prioritization system for projects to be funded. The processing of applications and the steps in the proposed prioritization system is similar to the functioning of the prioritization for the current State Revolving Fund programs, but the dates and timing of flood financial assistance will not be fixed by rule to give the board additional flexibility in the timing of when it will make funds available. The factors to be evaluated in the prioritization will be outlined in a Flood Intended Use Plan, which will identify the uses of the funds for flood projects.

*31 TAC §363.404. Use of Funds.*
Section 363.404 incorporates the restrictions on the use of funds provided by Texas Water Code §15.534, as related to providing financial assistance to applicants. The board expects that the terms of the financial assistance provided to applicants will be tailored to best fit the needs of the applicants. After the board adopts the initial state flood plan, the flood financial assistance funds will be used for projects in the state flood plan, as required by Texas Water Code §§15.5341 and 16.4545.

*31 TAC §363.405. Terms of Financial Assistance.*
Section 363.405 is proposed to clarify when deferrals for principal and interest payments may be made, and to outline the terms that applicants will follow when receiving flood financial assistance.

*31 TAC §363.406. Findings Required.*
Section 363.407 is proposed to state the findings that are required prior to approval of an application for flood financial assistance, pursuant to Texas Water Code §15.536.

*31 TAC §363.407. Application Requirements.*
Section 363.407 is proposed to outline the requirements applicants will follow when applying for flood financial assistance. If an applicant proposes a flood control project, and that flood control project is located in a watershed with other political subdivisions, the applicant will be required to submit a memorandum of understanding that includes all the affected political subdivisions. This requirement is from Texas Water Code §15.005. Applicants will have to

submit an affidavit demonstrating that they have acted cooperatively with the public and other political subdivisions in the area. The affidavit will fulfill the purposes of Texas Water Code §15.535, which requires political subdivisions to demonstrate their cooperation.

*31 TAC §363.408. Investment and Administration of Funds.*
Section 363.408 is proposed to implement the requirement from Texas Water Code §§15.537 and 16.460, which require that the board outline the investment and administration of funds.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will not be fiscal implications for state government 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. There are no fiscal implications to local governments in general as a result of enforcing or administering the rules, since no local government is required to apply for assistance under these programs. For local governments that choose to apply for funding under these programs, there will be costs associated with applying for and receiving funding, but those costs are anticipated to be more than offset by savings to the local government in financing costs for the projects.

These rules are not expected to result in reductions in costs to either state or local governments. 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. However, §§363.401 - 404 are being repealed. Furthermore, the requirement in Section 2001.0045 does not apply because these rules are proposed in response to a natural disaster; are necessary to protect water resources of this state as authorized by the Water Code; are necessary to protect the health, safety, and welfare of the residents of this state; and are necessary to implement legislation.

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 applicants are able to receive low cost financing for flood projects, or receive grants for flood projects.

## LOCAL EMPLOYMENT IMPACT STATEMENT

The board has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, 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 implement legislation and create a new flood financial assistance program.

Even if the proposed rule were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed a standard set by 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 §§15.537 and 16.460. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

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

TAKINGS IMPACT ASSESSMENT

The board evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to implement legislation and create a new flood mitigation financing program. The proposed rule would substantially advance this stated purpose by proposing new rules for flood financial assistance and guide applicants in the application process.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that that provides financial assistance for flood mitigation and flood control 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 regulations do 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 regulations. 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 Code §2001.0221 and has determined, for the first five years the proposed rules would be in effect, the proposed rules will not: (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 board has reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rules would be in effect, the proposed rules will: (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; (6) expand, limit, or repeal an existing regulation. The board is required to implement a new financing program for flood mitigation as a result of legislation from the 86th Legislature.

SUBMISSION OF COMMENTS

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov, or by fax to (512) 475-2053. COMMENTS MUST

INCLUDE REFERENCE TO CHAPTER 363 IN THE SUBJECT LINE. Comments will be accepted until 5:00 p.m. on January 13, 2020.

31 TAC §§363.401 - 363.404 STATUTORY AUTHORITY

The repeals are 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.

[Subchapter D. Flood Control.]
[§363.401. Scope of Subchapter.]
[§363.402. Definitions of Terms.]
[§363.403. Projects Eligible.]
[§363.404. Flood Control.]

31 TAC §§363.401 - 363.408 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 §§15.537 and 16.460, which require that the TWDB adopt rules necessary to carry out the affected subchapters.

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

<rule>

Subchapter D. Flood Financial Assistance

§363.401. Scope of Subchapter D.

(a) This subchapter shall govern the board's programs of flood financial assistance under the programs established by the Texas Water Code, Chapter 15, Subchapter I and Texas Water Code, Chapter 16, Subchapter L. Unless in conflict with the provisions in this subchapter, the provisions of Subchapter A of this chapter (relating to General Provisions) shall apply to projects under this subchapter.

§363.402. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Drainage-- includes, but is not limited to, bridges, catch basins, channels, conduits, creeks, culverts, detention ponds, ditches, draws, flumes, pipes, pumps, sloughs, treatment works, and

appurtenances to those items, whether natural or artificial, or using force or gravity, that are used to draw off surface water from land, carry the water away, collect, store, or treat the water, or divert the water into natural or artificial watercourses.

(2) Eligible political subdivision-- a district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, a district or river authority that is subject to Chapter 49 of the Texas Water Code and participates in cooperative flood control planning, a municipality, or a county.

(3) Flood control-- structural mitigation or anything that diverts, redirects, impedes, or otherwise modifies the flow of water.

(4) Flood mitigation-- the implementation of actions, including both structural and nonstructural solutions, to reduce flood risk to protect against the loss of life and property.

(5) Flood Intended Use Plan-- a document prepared by the board which identifies the uses of the funds for flood projects.

(6) Flood project-- a drainage, flood mitigation, or flood control project, including:

(A) planning and design activities;

(B) work to obtain regulatory approval to provide nonstructural and structural flood mitigation and drainage;

(C) construction of structural flood mitigation and drainage projects, including projects that use nature-based features to protect, mitigate, or reduce flood risk.

(D) construction and implementation of nonstructural projects, including projects that use nature-based features to protect, mitigate, or reduce flood risk;

(E) nonstructural or natural flood control strategies; and

(F) a federally authorized project to deepen a ship channel affected by a flooding event.

(7) Nonstructural flood mitigation-- includes, but is not limited to, measures such as acquisition of floodplain land for use a public open space, acquisition and removal of buildings located in a floodplain, relocation of residents of buildings removed from a floodplain, flood warning systems, educational campaigns, and land use planning policies.

(8) Metropolitan statistical area-- an area so designated by the United States Office of Management and Budget.

(9) Project Watershed-- the area upstream and downstream substantially affected by the proposed flood project as documented in the project application and sealed by a Professional Engineer or Geoscientist. The Project Watershed shall be estimated using the best available data with analysis performed in accordance with sound engineering principles and practices.

(10) Structural flood mitigation-- includes, but is not limited to, measures such as construction of storm water retention basins, enlargement of stream channels, modification or reconstruction of bridges, coastal erosion control measures, or beach nourishment.

§363.403. Prioritization System.

(a) The board will establish deadlines for application submittals. The executive administrator will provide the prioritization of those applications to the board for approval as soon thereafter as practicable. To be considered for prioritization, an applicant must provide adequate information to establish that the applicant qualifies for funding, to describe the project comprehensively, and to establish the cost of the project, as well as any other information requested by the executive administrator. The executive administrator will develop and provide an abridged application to gather information necessary for prioritization. If an applicant submits an abridged application for prioritization purposes, the applicant must submit a complete application to the board by the deadline established by the executive administrator, or the project will lose its priority ranking and the board may commit to other projects consistent with the prioritization.

(b) For each application that the executive administrator has determined has adequate information and is administratively complete for prioritization purposes and prior to each board meeting at which applications may be considered for prioritization, the executive administrator shall:

(1) prioritize the applications by the criteria identified in the Flood Intended Use Plan; and

(2) provide to the board a prioritized list of all complete applications as recommended by the executive administrator, the amount of funds requested and the priority of each application received.

(c) The board will identify the amount of funds available for new applications by category, establish the structure of financing and the terms of any subsidy, and will consider applications in accordance with this title. The board reserves the right to limit the amount of funding available to an individual entity.

§363.404. Use of Funds.

The board may use the funds for financial assistance to eligible political subdivisions as follows:

(1) to make a loan to an eligible political subdivision at or below market interest rates for a flood project;

(2) to make a grant or loan at or below market interest rates to an eligible political subdivision for a flood project to serve an area outside of a metropolitan statistical area in order to ensure that the flood project is implemented;

(3) to make a loan at or below market interest rates for planning and design costs, permitting costs, and other costs associated with state or federal regulatory activities with respect to a flood project;

(4) to make a grant to an eligible political subdivision to provide matching funds to enable the eligible political subdivision to participate in a federal program for a flood project;

(5) to make a grant to an eligible political subdivision for a flood project if the board determines that the eligible political subdivision does not have the ability to repay a loan;

(6) to meet matching requirements for projects funded partially by federal money; and

(7) to make a loan to an eligible political subdivision below market interest rates and under flexible repayment terms, including a line of credit or loan obligation with early repayment terms, to provide financing for the local share of a federally authorized ship channel improvement project.

§363.405. Terms of Financial Assistance.

(a) Principal and interest payments on loans at or below market interest rates for planning and design costs, permitting costs, and other costs associated with state or federal regulatory activities with respect to a flood project may be deferred for not more than 10 years or until construction of the flood project is completed, whichever is earlier.

(b) The board shall determine the amount and form of financial assistance and the amount and form of repayment.

(c) The board shall determine the method of evidence of debt.

(d) If the board determines non-performance on the terms of the grant, the board may require reimbursement of all or part of the funds provided by grant assistance or impose sanctions such as prohibition of further board financial assistance.

§363.406. Findings Required.

On review and recommendation by the executive administrator, the board may approve an application only if the board finds:

(1) the application and the assistance applied for meet requirements of this subchapter and board rules;

(2) the application demonstrates a sufficient level of cooperation among eligible political subdivisions and includes all of the eligible political subdivisions substantially affected by the flood project;

(3) the taxes or other revenue, or both the taxes and other revenue, pledged by the applicant will be sufficient to meet all the obligations assumed by the eligible political subdivision; and

(4) other findings as required in the Flood Intended Use Plan.

§363.407. Application Requirements.

In addition to the general application requirements of Subchapter A of this chapter (relating to General Provisions), the following are required to be considered an administratively complete application:

(1) if the project is a flood control project and there is more than one political subdivision located in a watershed, the applicant must submit a memorandum of understanding relating to management of the project watershed. The memorandum of understanding must be approved and signed by all governing bodies of political subdivisions located in the project watershed. The memorandum of understanding at a minimum, must contain a requirement that all political subdivisions in the project watershed agree to work cooperatively.

(2) an affidavit attesting to the following:

(A) that the applicant has acted cooperatively with other political subdivisions to address flood control needs in the area in which the eligible political subdivisions are located;

(B) that all eligible political subdivisions substantially affected by the proposed flood project have participated in the process of developing the proposed flood project;

(C) that the eligible political subdivisions, separately or in cooperation, have held public meetings to accept comment on proposed flood projects from interested parties; and

(D) that the technical requirements for the proposed flood project have been completed and compared against any other potential flood projects in the same area. This statement is not required for applications for assistance for planning and design costs, permitting costs, and other costs associated with state or federal regulatory activities with respect to a flood project.

(3) an analysis of whether the proposed flood project could use floodwater capture techniques for water supply purposes, including floodwater harvesting, detention or retention basins, or other methods of capturing storm flow or unappropriated flood flow.

(4) a description of the Project Watershed sealed by a Professional Engineer or Geoscientist. Revisions to the Project Watershed may be necessary with additional data, development of

more refined modeling tools, refinement of design criteria, or other factors. The applicant must provide the executive administrator with updates of the description of the Project Watershed as it is modified. If a revision to the Project Watershed results in the inclusion of additional political subdivisions, the Applicant must provide the executive administrator with the additional memoranda of understanding.

(5) additional information as needed to allow the board to comply with its responsibility to act as a clearinghouse for information about flood planning and its reporting requirements.

§363.408. Investment and Administration of Funds.

The investment and administration of funds shall be managed in accordance with the Board's investment policy, in accordance with State of Texas Comptroller guidelines, and the Public Funds Investment Act, Texas Government Code, Chapter 2257.

Attachment 2

Texas Water Development Board

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# Flood Intended Use Plan

*SFY 2020*

*Cover image by Jon Shapley/Houston Chronicle via Associated Press, 2019*

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# Program Overview

The 86th Texas Legislature passed several bills entrusting the Texas Water Development Board (TWDB) with new responsibilities related to funding flood mitigation projects and planning for future flood events. On November 5, Texas voters approved Proposition 8, a constitutional amendment providing for the creation of the Flood Infrastructure Fund (FIF) to assist in the financing of drainage, flood mitigation, and flood control projects. including:

- planning and design activities;
- work to obtain necessary regulatory approvals; and
- construction and/or implementation of flood projects.

Administrative rules for the flood mitigation project funding are found in 31 TAC Part 10, Chapter 363. This Intended Use Plan outlines the timeline and structure of the project solicitation for the SFY 2020 prioritization.

## Eligible Applicants

Political subdivisions are eligible to apply for financial assistance for flood mitigation projects. This includes cities, counties, and any district or authority created under Section 52, Article III or Section 59, Article XVI of the Texas Constitution.

## Eligible Projects

FIF rules allow for a wide range of flood projects, including structural and nonstructural projects as well as nature-based solutions. Examples include the following:

### Planning Phase Activities

- Feasibility assessments
- Coordination and development of regional projects
- Obtaining regulatory approvals
- Hydraulic and hydrologic studies

### Construction/Rehabilitation/Implementation Phase Activities

- Retention basins
- Detention ponds
- Drainage ditches
- Permeable pavement
- Rehabilitation of existing infrastructure, not including costs associated with current or future operations and maintenance activities
- Property acquisitions determined to be the best solution for highest-risk properties
- Restoration of riparian corridors
- Natural erosion control

## Other Eligible Activities

The assistance is also able to support activities that may not traditionally be thought of as flood projects. These include:

- warning systems;
- stream gages;
- educational campaigns; and
- crossing barriers.

The list of activities eligible to receive assistance is too long to accurately depict in this document, and applicants are encouraged to discuss the eligibility of prospective requests with TWDB staff.

## Minimum Standards

Items on this list constitute minimum eligibility criteria that must be met by all projects seeking funding consideration:

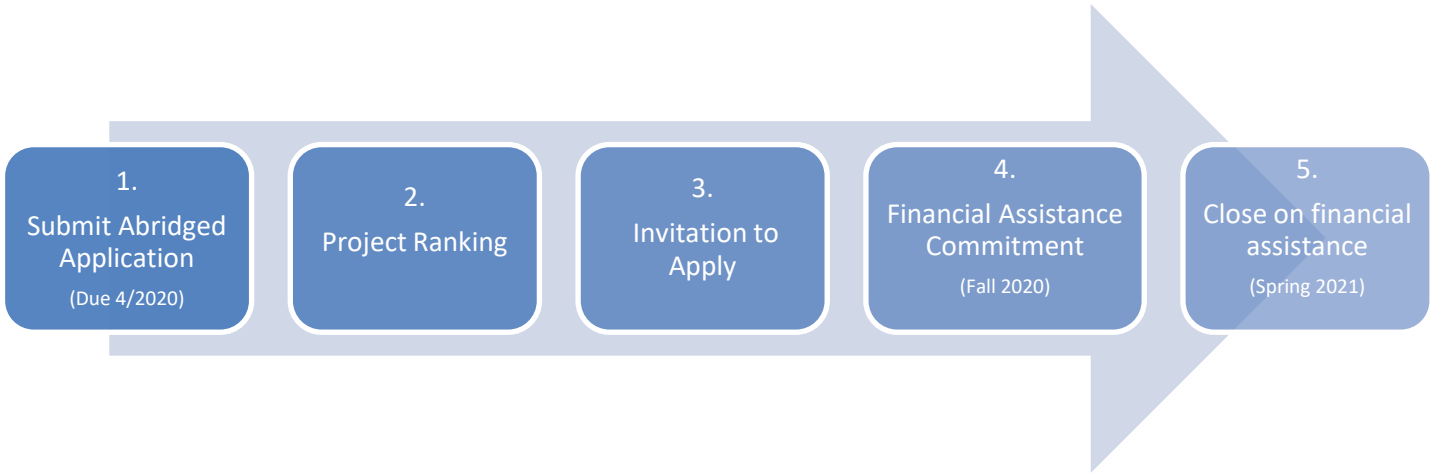
- The benefit/cost ratio of the proposed project must be >1.
- All agreements and required Memoranda of Understanding with affected political subdivisions in the watershed must be executed prior to the TWDB's consideration of the full financial assistance application, but may be provided in draft form with the Abridged Application. The Memorandum of Understanding between all political subdivisions in a project watershed must fulfill the requirement that projects result from collaborative processes.
- The funding request must not include redundant funding.
- The area to be served by the proposed project must already have enforced floodplain management standards equivalent to National Flood Insurance Program (NFIP) minimum standards.
- The proposed project must be developed using the best/most recent available data.
- Applicants for construction funds must be able to document that they:
    - planned for costs associated with operating and maintaining proposed facilities; and
    - considered possible floodwater capture techniques that could be associated with the proposed project.

# SFY 2020 Project Solicitation

Funding for flood mitigation projects operates on an annual funding cycle with a two-stage application process. Projects are prioritized and entities are then invited to submit full financial assistance applications based on their priority rank in relation to the program's annual funding capacity. The prioritization criteria, allocations, and anticipated schedule described in this solicitation packet apply only to the SFY 2020 project solicitation.

## Timeline

The anticipated timeline for the inaugural funding cycle is as follows:




### Step 1: Abridged Application

The Abridged Application is a tool designed to help the TWDB collect the information necessary to prioritize projects and determine the best source of funding without requiring every interested entity to complete a full TWDB financial assistance application. See Attachment 1 for a copy of the SFY 2020 Flood Mitigation Abridged Application. **Target due date: April 2020**

### Step 2: Prioritization & Ranking

TWDB staff prioritize and rank projects according to the scheme outlined in each year's Project Solicitation Packet.

### Step 3: Invitation

The TWDB invites entities whose proposed projects ranked within the program's funding capacity to submit applications for financial assistance. The application is a standard TWDB document that asks for the detailed engineering, legal, fiscal, and other information necessary to make a funding recommendation. Applications are due 30 days from the date of invitation. **Target date: July 2020 (Applications due 30 days from invitation)**

### Step 4: Financial Assistance Commitments

After reviewing each application, TWDB staff will make a funding recommendation to be considered by the Board in a public meeting. **Target date: Fall 2020**

### Step 5: Borrower Closings

Entities in receipt of financial assistance commitments will have up to one year to close on their financing.

## Year-Round Submittals

Abridged Applications may be submitted for consideration at any time throughout the year. The Flood IUP will be amended as necessary to include newly-ranked projects.

## Financial Assistance Categories and Eligibilities

| Project Category | Financing * | Eligibility |
|---|---|---|
| CATEGORY 1<br>Planning, Acquisition, and Design (PAD) | May not exceed the following:<br>**50% grant** with 50% local match for entities located outside a Metropolitan Statistical Area (MSA); or<br>**75% grant** with 25% local match for applicants with an Annual Median Household Income (AMHI) ≤75% of state-wide AMHI. | • Cities and Counties: AMHI of the entire jurisdiction<br>• Other entities: AMHI of the service area |
| CATEGORY 2<br>Watershed Planning and Updates to Floodplain Maps | **May be up to 100% grant** | Projects establishing or updating site specific floodplain maps or regional plans. |
| CATEGORY 3<br>Construction, Rehabilitation, and Implementation | Loans with interest rate of **0%**; or may not exceed the following:<br>**50% grant** for applicants that are located outside an MSA and have an AMHI ≤75% of state-wide AMHI | • Requires documented prior coordination with impacted entities throughout the watershed.<br>• Includes nonstructural and nature-based solutions not specifically listed under Category 5. |
| CATEGORY 4<br>Federal Award Matching Funds for Disadvantaged Communities | May not exceed the following:<br>**Grants** not to exceed:<br>• **50%** of the applicant's federal match requirement with the remaining 50% contributed as local match for applicants with an AMHI ≤75% of state-wide AMHI; or<br>• **75%** with 25% local match for applicants with an AMHI ≤50% of state-wide AMHI. | • Applicant's AMHI must be ≤75% of state-wide AMHI.<br>• Must provide documentation of an existing federal award contingent on availability of matching funds.<br><br>*Category 4 projects may only be considered up to 10% of overall annual program capacity, as determined by the Board.* |
| CATEGORY 5<br>Measures immediately effective in protecting life and property | May not exceed the following:<br>**May be grants up to 100%** for entities located outside an MSA with an AMHI ≤75% of state-wide AMHI; or<br>**50% grant** with 50% local match for entities located in an MSA with an AMHI ≤75% of state-wide AMH | Including but not limited to:<br>• Warning systems<br>• Crossing barriers<br>• Public education and outreach<br>• Reverse 911 systems |
| *** Loans with an interest rate of 0% is a funding option available in all project categories**.<br><br>**Grants – the TWDB may limit the amount of funds available for grants.** | | |

**Both loans and grants are available, depending on the activity funded and the AMHI of the applicant entity. Eligible activities are organized into five categories sharing available financing types. An application may request financial assistance for any combination of activities from Categories 1-5. The TWDB may limit the amount of grant funding available in each category and in total.**

Category 1 – includes activities related to planning, land acquisition, and/or design of the project. Planning includes feasibility analyses, hydraulic and hydrological studies, activities to obtain regulatory approval, and coordination other related work. Projects in this category are eligible to receive grants up to 50% of total project costs with a 50% local match requirement for entities outside a Metropolitan Statistical Area (MSA), or may qualify for up to a 75% grant portion if the applicant entity's AMHI is less than or equal to 75% of the state-wide AMHI based on the most recently available American Community Survey 5-year estimates.

Category 2 – projects associated with establishing or updating regional flood planning information such as floodplain maps or regional plans. Grants up to 100% may be offered for these activities.

Category 3 – includes construction and rehabilitation activities, but may also include demolition, decommissioning, and other activities not necessarily thought of as construction. Loans are offered for Category 3 activities with an interest rate of 0%, as well as grants covering up to 50% of project costs for applicants that are located outside an MSA and have an AMHI ≤75% of state-wide AMHI.

Minimum standards require Category 3 applicants to certify that they have:

- planned for operations and maintenance costs resulting from the proposed project;
- evaluated possible floodwater capture techniques that may be implemented; and
- coordinated with other entities in the watershed.

Category 4 – reserved for communities with an AMHI less than or equal to 75% of the state-wide AMHI that have received a federal award for flood-related activities contingent on the availability of local matching funds. Projects in this category are eligible to receive grants up to the following percentages depending on the applicant's AMHI:

- up to 50% of the applicant's required federal match amount with a 50% local match requirement if the applicant entity's AMHI is less than or equal to 75% of the state-wide AMHI; or
- up to 75% grant portion if the AMHI is less than or equal to 50% of the state-wide AMHI.

Funding for proposed Category 4 projects is limited to 10% of the annual available Category 4 costs, as determined by the Board.

Category 5 – projects are those that can be implemented quickly and are understood to be immediately effective in protecting life and property. Eligible Category 5 projects include warning systems, crossing barriers, gages, and public education and outreach. TWDB does not maintain an exhaustive list of activities eligible under Category 5, and applicants are encouraged to discuss possible Category 5 proposals with TWDB staff.

Category 5 projects may be eligible for up to 100% grants for entities located outside an MSA, or up to a 50% grant for entities located inside an MSA that have an AMHI ≤75% of the state-wide AMHI.

Each Abridged Application should describe proposed projects from one category described above. Applicants may submit multiple Abridged Applications if they seek to propose projects from multiple categories in a single prioritization cycle.

## Prioritization and Selection Process

The TWDB invites entities to submit financial assistance applications for their projects starting with the top-ranked project on the list and extending down the list until the available funding capacity is exhausted.

The example below shows the five top-ranked projects competing for loans in a year for which the total available loan capacity is $400 million. The first three projects are invited because they fit within the available capacity. The entity proposing the fourth project is asked whether a reduced commitment amount would be feasible. If not, the TWDB will continue down the list in rank order to identify a project that fits within capacity.

| Score | Request | Invited? |
|---|---|---|
| 100 | $100,000,000 | Y |
| 96 | $100,000,000 | Y |
| 92 | $100,000,000 | Y |
| 89 | $125,000,000 | Offered reduced commitment |
| 85 | $100,000,000 | Offered if reduced commitment not feasible for entity above |

The Board members may consider any proposed project for funding, including in cases that involve bypassing a higher-ranking project.

## Prioritization Criteria

| Criteria | Points | Methodology/Notes |
|---|---|---|
| Priority Projects<br><br>Watershed/HUC planning and updates to regional floodplain maps (Category 2) | 25 | Points awarded to all projects falling under Category 2. |
| Priority Projects<br><br>Measures immediately effective in protecting life and property (Category 5) | 20 | Points awarded to all projects falling under Category 5 |
| Rural Applicant<br><br>All entities within the project benefit area are outside MSAs and have populations <10,000. | Yes = 10<br>No = 0 | Verified with Census data (most recent American Community Survey (ACS) 5-year estimates) |
| Social Vulnerability Index (SVI)<br><br>The SVI uses 15 U.S. census variables to help local officials identify communities that may need support in preparing for hazards or recovering from disaster. SVI values range from 0 to 1. | SVI x 10 | Average SVI of the benefitting area, verified using online SVI map: https://svi.cdc.gov/map.html<br><br>May use the Census tract or County data depending on the size and shape of the benefitting area. |
| Emergency Need Due to Recent or Imminent Failure<br><br>A need exists for flood hazard mitigation actions to address a clear and imminent threat to public health, safety, and welfare or property due to recent or imminent failure of existing flood infrastructure. | Recent failure = 10<br>Imminent failure = 5<br>N/A = 0 | Requires documentation from the applicant. |
| Distributed Benefits<br><br>Is the project expected to directly benefit or include the active participation of political subdivisions other than the applicant? | Yes = 10<br>No = 0 | Requires documentation supporting anticipated shared benefits and/or planned contributions by the other entities. |
| Estimated Completion Date | Within 18 months = 10<br>Within 36 months = 5<br>All others = 0 | Based on the amount of time before all project phases are anticipated to be complete, assuming the applicant closes on financing in late Fall. |

| | | |
|---|---|---|
| Additional Criteria for Construction Projects Only: Water Supply Benefit<br><br>Project is anticipated to result in an integral, reliable, and quantifiable water supply benefit to a specific water user group with an identified need. | Yes = 10<br>No = 0 | TWDB staff may request supporting documentation.<br><br>Points will only result in changes in rank among construction projects, with no impact to their rank compared to non-construction projects. |
| Additional Criteria for Construction Projects Only: Floodplain Impacts<br><br>Number of structures that are anticipated to no longer be located in a floodplain due to the proposed project's impact on floodplain characteristics. | Scores are assigned relative to the responses for other proposed projects.<br><br>Top 25% of construction applicants in terms of structures removed: 12 points<br>Top 75%: 9 points<br>Top 50%: 6 points<br>Bottom 25%: 3 points | |
| <u>TIEBREAKER</u><br>Total project cost. | The tie is broken in favor of the project with the lower total project cost. | Includes all costs necessary to implement the project, not just the TWDB portion. |

# Attachment 1: SFY 2020 Flood Mitigation Project Abridged Application

By submitting this Abridged Application, you understand and confirm that the information provided is true and correct to the best of your knowledge and further understand that the failure to submit a complete Abridged Application by the stated deadlines, or to respond in a timely manner to additional requests for information, may result in the withdrawal of the Abridged Application without review.

## GENERAL INFORMATION

| Entity Name |
|---|
| |

| | | |
|---|---|---|
| **Contact** Who should TWDB contact with questions during the review of this submission? | **Name** | |
| | **Title** | |
| | **Phone** | |
| | **Email** | |

## PROJECT INFORMATION

| | |
|---|---|
| **Project Name** | |
| **Amount Requested from TWDB** | $ |
| **Total Project Cost** | $ |

| **Category Applied For** | | | | |
|---|---|---|---|---|
| ☐ Category 1 Planning, Acquisition, and Design (PAD) | ☐ Category 2 Watershed Planning/ Floodplain Map Updates | ☐ Category 3 Construction/ Rehabilitation/ Implementation | ☐ Category 4 Federal Award Matching Funds for Disadvantaged Communities | ☐ Category 5 Measures immediately effective in protecting life and property |

## MINIMUM STANDARDS

| | | |
|---|---|---|
| Only projects that satisfy all minimum standards will be included in prioritization. | ☐ | The benefit-cost ratio of the proposed project is >1. |
| | ☐ | All necessary agreements and Memoranda of Understanding are available in draft form. |
| | ☐ | The funding request does not include redundant funding for activities already performed and/or funded through another source. |
| | ☐ | The area to be served by the proposed project is already served by enforced NFIP minimum floodplain management standards. |
| | ☐ | The proposed project was developed using the best and most recent available data. |
| | ☐ | (Construction applicants only) Operations and maintenance costs associated with proposed facilities have been considered. |
| | ☐ | (Construction applicants only) Floodwater capture techniques have been considered. |

## DESCRIPTION OF PROPOSED PROJECT

## PRIORITIZATION CRITERIA

| | |
|---|---|
| **Rural Applicant**<br><br>All entities within the project benefit area are outside MSAs and have populations <10,000. | ☐ Yes ☐ No<br>*(Please attach a list of all entities in the project benefit area and Census data indicating the population of each.)* |
| **Social Vulnerability Index (SVI)** | Average SVI of benefitting area: Click or tap here to enter text.<br><br>Geographic basis:<br>☐ Census Tracts ☐ Counties<br>*Please attach a list of the selected geographies and an explanation of why they were selected.* |
| **Emergency Need Due to Recent or Imminent Failure**<br><br>A need exists for flood hazard mitigation actions to address a clear and imminent threat to public health, safety, and welfare or property due to recent or imminent failure of existing flood infrastructure. | ☐ Yes, due to a recent failure. ☐ Yes, due to imminent failure. ☐ No |
| **Distributed Benefits**<br><br>Is the project expected to directly benefit or include the active participation of jurisdictions other than the applicant? | ☐ Yes ☐ No |
| **Estimated Completion Date**<br><br>When would all project phases expected to be complete, assuming funds for the project are closed on in Fall of the current year? | ☐ Within 18 months of closing ☐ Within 36 months of closing ☐ Other |

| | | |
|---|---|---|
| **Construction Projects Only**<br><br>Project is anticipated to result in an integral, reliable, and quantifiable water supply benefit to a specific water user group with an identified need. | ☐ Yes | ☐ No |
| **Construction Projects Only**<br><br>How many structures are anticipated to be removed from floodplains as a result of the proposed project? | Click or tap here to enter text. | |

## ATTACHMENT CHECKLIST

| ✓ | N/A | Attachment Description |
|---|---|---|
| ☐ | ☐ | Draft agreements/MOUs. |
| ☐ | ☐ | Cost-benefit ratio methodology. |
| ☐ | ☐ | Documentation indicating the best/most recent data was used in the development of the proposed project. |
| ☐ | ☐ | Documentation demonstrating the project area is served by NFIP minimum standards, and that these standards are enforced. |
| ☐ | ☐ | (If applying for matching funds) Documentation of an existing federal award pending availability of local match. |
| ☐ | ☐ | (If the project involves property acquisitions) Documentation supporting the determination that acquisitions are the best solution and the properties are a high risk. |
| ☐ | ☐ | (Construction projects) Description of the anticipated funding source for operations and maintenance costs. |
| ☐ | ☐ | (Construction projects) Map and description of area benefitting from the proposed project, including a list of all benefitting political subdivisions. |
| ☐ | ☐ | List and explanation of geographies used to determine average SVI. |
| ☐ | ☐ | (If applicable) Documentation of recent or immanent infrastructure failure causing an emergency need. |

# Attachment 2: Project List

TBD – Project list will be added after prioritization is complete.