

AGENDA ITEM MEMO

BOARD MEETING DATE: January 14, 2021

TO: Board Members

THROUGH: Jeff Walker, Executive Administrator
Ashley Harden, General Counsel
Jessica Zuba, Deputy Executive Administrator

FROM: Kendal Kowal, Assistant General Counsel

SUBJECT: Adoption of amendments related to the TWDB financial assistance programs

ACTION REQUESTED

Consider approving the adoption of amendments to 31 Texas Administrative Code (TAC) Chapter 363, § 371.31 and § 375.41.

BACKGROUND

The purpose of the amendments is to implement legislative changes from the 86th Legislative Session and to clarify certain aspects of TWDB rules related to financial assistance programs. This rulemaking will implement legislative changes from House Bill 3339, 86th Texas Legislative Session (HB 3339), which standardized and consolidated water conservation plan requirements for TWDB financial assistance programs. The rule also makes non-substantive changes to the general provisions of Chapter 363 in order to conform with changes made to Subchapter D (related to Flood Financial Assistance), which implements Senate Bill 7, 86th Texas Legislative Session (SB 7). The proposed amendments include various minor changes to conform rule text with agency practice.

On November 19, 2020, the Board approved the publication of the proposed amendments. The amendments were published in the December 4, 2020 edition of the Texas Register and open for a 31-day comment period. No comments were received.

Our Mission

Leading the state's efforts in ensuring a secure water future for Texas and its citizens

Board Members

Peter M. Lake, Chairman | Kathleen Jackson, Board Member | Brooke T. Paup, Board Member
Jeff Walker, Executive Administrator

RECOMMENDATION

Authorize the publication of proposed amendments to 31 Texas Administrative Code (TAC) Chapter 363, § 371.31, and § 375.41.

Attachment(s):

- Preamble Chapter 363
- Preamble Chapter 371
- Preamble Chapter 375

The Texas Water Development Board (TWDB) adopts amendments to 31 Texas Administrative Code (TAC) §§363.1, 363.4, 363.12, 363.13, 363.15, 363.16, 363.31, 363.41, 363.42, 363.43, 363.1303, 363.1304, 363.1307, and 363.1309. The proposal is adopted without changes as published in the December 4, 2020, issue of the *Texas Register* (45 TexReg 8739).

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

This rulemaking is adopted under the authority of the 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. The rulemaking is adopted under the additional authority of Texas Water Code Chapter 15, Subchapters G and H, §16.342, and Chapter 17 Subchapters D, E and F, which provides the TWDB with the authority to which provides the TWDB with the authority to adopt rules necessary to carry out its duties.

The purpose of the rule is to implement legislative changes from the 86th Legislative Session and to clarify certain aspects of TWDB rules related to state-funded financial assistance programs. This rulemaking will implement legislative changes from House Bill 3339, 86th Texas Legislative Session (HB 3339), which standardized and consolidated water conservation plan requirements for TWDB financial assistance programs. The rule also makes non-substantive changes to the general provisions of Chapter 363 in order to conform with changes made to Subchapter D (related to Flood Financial Assistance), which implements Senate Bill 7, 86th Texas Legislative Session (SB 7). The rules include various minor changes to conform rule text with agency practice, including the addition of definitions of agency terms.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

Subchapter A. General Provisions.

Division 1. Introductory Provisions

§363.1. Scope of Subchapter.

Section 363.1 is amended to show that Chapter 363, Subchapter A applies to the newly created Flood Infrastructure Fund, which was created by SB 7.

§363.4. Activities Funded.

Section 363.4 is amended to clarify that the board may provide financial assistance under this chapter for the newly created Flood Infrastructure Fund, which was created by SB 7.

Division 2. General Application Procedures.

§363.12. General, Legal, and Fiscal Information.

The requirement in Section 363.12 that the applicant submit the application in writing is deleted in order to clarify that the applicant may submit the application via the TWDB's Online Loan Application. Section 363.12(2)(A)(vii) is amended to clarify that the source of repayment is only required in the application for financial assistance requiring repayment. Section 363.12(2)(A)(xii)(V) is added to require an applicant to attest that the applicant is or will become in compliance with all of its material contracts and Section 363.12(2)(A)(xii)(VI) is amended to require the applicant to attest that at the time of the applicant and for the duration of any financial assistance provided by the TWDB, the applicant will remain in compliance with all applicable state and federal laws, rules and regulations.

Conforming changes are made to §363.12(2)(B) (see changes to §363.13).

§363.13. Preliminary Engineering Feasibility Report.

The heading of §363.13 is amended to reflect the correct title of the document mentioned in that section. Conforming changes are made throughout the Chapter.

Section 363.13 is also amended to require a general description of the existing system in the Preliminary Engineering Feasibility Report, which is consistent with TWDB practice.

§363.15. Required Water Conservation Plan.

Section 363.15 is amended to reflect legislative changes from HB 3339, including updating the citation to the new Water Code provision. Section 363.15 is also amended to state that only one copy of the water conservation plan is required. The exceptions are amended to conform to the language of HB 3339.

§363.16. Pre-design Funding Option.

Section 363.16(b) is amended to allow for the pre-design funding option for flood projects funded from the Flood Infrastructure Fund. This change is made in order to allow the Board to commit to planning, acquisition, design, and construction phases for flood projects through the FIF. The Flood Infrastructure Fund program provides extensive requirements for cooperation among entities affected by each flood project and provides extensive design requirements in order to ensure projects are successful.

Section 363.16 is amended to state that the contracts for engineering services at this point may be submitted in draft form.

Section 363.16 is also amended to clarify that any required water conservation plan must be adopted prior to closing. This change is consistent with TWDB practice.

Conforming changes are made pursuant to amendments to §363.13.

Division 3. Formal Action by the Board

§363.31. Board Consideration of Application

Section 363.31 is amended to state that the TWDB will not duplicate funding from federal sources. This change is made to satisfy federal requirements and to ensure the public interest is served by TWDB funding.

Division 4. Prerequisites to Release of State Funds.

§363.41. Engineering Design Approvals.

Section 363.41 is amended to clarify that the contract documents discussed in this section may be submitted in draft form during this phase. Section 363.41 is also amended to clarify when and how applicants should send a copy of certain documents to the Texas Commission on Environmental Quality. Section 363.41(a)(4) is added to require a high-resolution digital, searchable copy of the plans and specifications in order to update rule text in accordance with agency practice and advancing technology. Section 363.41(b) is amended to state that the iron and steel requirements of that subsection may apply to flood projects and to clarify the heading for exemptions.

§363.42. Loan Closing.

Section 363.42 is amended to conform to legislative changes from HB 3339 related to the required water conservation plans.

§363.43. Release of Funds.

Section 363.43 is amended to conform to agency practice related to release of funds for multiple construction contracts. Conforming changes are made pursuant to amendments to §363.13.

Subchapter M. State Water Implementation Fund for Texas and State Water Implementation Revenue Fund for Texas.

§363.1303. Prioritization System

Section 363.1303 is amended to state that an applicant who will submit a complete application must do so by the deadline established by the executive administrator, rather than within 30 days. This amendment reflects current practice and allows more flexibility.

§363.1304. Prioritization Criteria.

Section 363.1304 is amended to fix typographical errors. Section 363.1304(7) is amended to clarify that points will not be given for principal forgiveness or grants from the TWDB for the prioritization criteria related to local contributions to be made to the project.

§363.1307. Pre-design Funding Option.

Section 363.1307 is amended to state that contracts for engineering services may be in draft form during this phase. Section 363.1307 is also amended to clarify that any required water conservation plan must be adopted prior to closing. This change is consistent with TWDB practice. Conforming changes are made pursuant to amendments to §363.13.

§363.1309. Findings Required.

Section 363.1309 is amended to conform to legislative changes from HB 3339 related to the required water conservation plan.

REGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed the adopted 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 clarify TWDB rules.

Even if the adopted rule were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any 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 adopted solely under the general powers of the agency, but rather Texas Water Code §§15.439 and 16.4021. Therefore, this adopted rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The board evaluated this adopted 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 clarify requirements in TWDB rules in order to facilitate financial assistance for water, wastewater, and flood projects. The adopted rule would substantially advance this stated purpose by updating citations to new law, including requirements of new

legislation, and updating language to conform to agency and industry practice. The adopted rule will also require borrowers of TWDB funds to attest that they are or will be in compliance with all of their material contracts and will require borrowers to remain in compliance with all applicable state and federal laws, rules, and regulations during the term of the financial assistance from the TWDB.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this adopted 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 administers financial assistance programs for water, wastewater, and flood projects.

Nevertheless, the board further evaluated this adopted rule and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this adopted rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, this rule implement TWDB financial assistance programs that are voluntary for local governments to participate in. Therefore, the adopted rule does not constitute a taking under Texas Government Code, Chapter 2007.

PUBLIC COMMENTS

The comment period ended on January 4, 2021. No comments were received and no changes were made.

STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §§6.101, 15.439, 16,342, and 16.4021. Additionally, this rulemaking is adopted under the authority of Texas Water Code Chapter 15, Subchapters G and H, and Chapter 17, Subchapters D, E, and F.

Texas Water Code Chapters 15, 16, and 17 are affected by this rulemaking.

<rule>

TITLE 31 NATURAL RESOURCES AND CONSERVATION

PART 10 TEXAS WATER DEVELOPMENT BOARD

CHAPTER 363 FINANCIAL ASSISTANCE PROGRAMS

SUBCHAPTER A GENERAL PROVISIONS

DIVISION 1 INTRODUCTORY PROVISIONS

§363.1 Scope of Subchapter

This subchapter shall govern the board's programs of financial assistance under the following programs established by the Texas Water Code:

(1) in Chapter 15:

(A) Water Assistance Fund under Subchapter B;

(B) Water Loan Assistance Fund under Subchapter C;

(C) Storage Acquisition Program authorized under Subchapter E;

(D) Colonia Self-Help Program authorized under Subchapter P;

(E) Program for Water and Wastewater Financial Assistance for Disadvantaged Rural Communities authorized under Subchapter O;

(F) Water Infrastructure Fund under Subchapter Q;

(G) State Water Implementation Fund for Texas and State Water Implementation Revenue Fund for Texas under Subchapter M; and

(H) Flood Infrastructure Fund under Subchapter I.

(2) in Chapter 16, state participation in the purchase or acquisition of facilities under Subchapters E and F;

(3) in Chapter 17:

(A) the programs of assistance under the Texas water development funds; and

(B) the programs of assistance under the water financial assistance bond program (Development Fund II, Subchapter L), including:

(i) financing of water supply projects under Subchapter D;

(ii) water quality enhancement projects including municipal solid waste facilities under Subchapter F;

(iii) flood control projects under Subchapter G; and

(iv) economically distressed areas projects under Subchapter K.

(4) in Chapter 17, Revenue Bond Program under Subchapter I; and

(5) in Chapter 36, Groundwater District Loan Program, under Subchapter L.

§363.4 Activities Funded

The board may provide financial assistance under this chapter for one or more elements of construction defined in Texas Water Code, §17.001(8) or a flood project defined in Texas Water Code, §15.531(2).

DIVISION 2 GENERAL APPLICATION PROCEDURES

§363.12 General, Legal, and Fiscal Information

An application will be in the form and in numbers prescribed by the executive administrator.

(1) The executive administrator may request any additional information needed to evaluate the application and may return any incomplete applications.

(2) The following information is required on all applications to the board for financial assistance to be considered an administratively complete application:

(A) General, fiscal and legal information required includes:

(i) the name and address of the political subdivision;

(ii) a citation of the law under which the political subdivision operates and was created;

(iii) the total cost of the project;

(iv) the amount of financial assistance being requested;

(v) a description of the project;

(vi) the name, address, e-mail, and telephone number of the authorized representative, engineer and any other consultant(s);

(vii) for financial assistance requiring repayment, the source of repayment and the status of legal authority to pledge selected revenues;

(viii) the financing plan for repaying the total cost of the project;

(ix) the political subdivision's default history;

(x) the most recent annual financial statements and latest monthly and year-to-date financial

reports for the General Fund and Utility Fund of the political subdivision;

(xi) a certified copy of a resolution of the political subdivision's governing body requesting financial assistance from the board, authorizing the submission of the application, and designating the authorized representative for executing the application, and for appearing before the board;

(xii) a notarized affidavit from the authorized representative stating that:

(I) for a political subdivision, the decision to request financial assistance from the board was made in a public meeting held in accordance with the Open Meetings Act (Texas Government Code, Chapter 551);

(II) the information submitted in the application is true and correct according to the best knowledge and belief of the representative;

(III) the applicant has no litigation or other proceedings pending or threatened against the applicant that would materially adversely affect the financial condition of the applicant or the ability of the applicant to issue debt;

(IV) the applicant has no pending, threatened, or outstanding judgments, orders, fines, penalties, taxes, assessment or other enforcement or compliance issue of any kind or nature by EPA, the Texas Commission on Environmental Quality, Texas Comptroller, Texas Secretary of State, or any other federal, state or local government, except for such actions identified in the affidavit;

(V) the applicant is, or will become, in compliance with all of its material contracts; and

(VI) the applicant is and will remain during the term of any financial assistance received from the board, in compliance with all applicable federal laws, rules, and regulations as well as the laws of this state and the rules and regulations of the board.

(xiii) any special request for repayment structure that reflects the particular needs of the political subdivision.

(B) Preliminary Engineering feasibility report. An applicant shall submit an engineering feasibility report in accordance with §363.13 of this title (relating to Preliminary Engineering Feasibility Report).

(C) Environmental assessment. An applicant shall submit an environmental assessment in accordance with §363.14 of this title (relating to Environmental Assessment).

(D) Required water conservation plan. An applicant shall submit a water conservation plan prepared in accordance with §363.15 of this title (relating to Required Water Conservation Plan).

(E) Required water loss audit. An applicant that is a retail public utility that provides potable water shall submit its most recent water loss audit in accordance with §358.6 of this title (relating

to Water Loss Audits), unless it has previously been submitted.

(F) Funding from other sources. If additional funds are necessary to complete the project, or if the applicant has applied for and/or received a commitment from any other source for the project or any aspect of the project, an applicant shall submit a listing of those sources, including total project costs, financing terms, and current status of the funding requests.

(G) Additional application information. An applicant shall submit any additional information requested by the executive administrator as necessary to complete the financial, legal, engineering, and environmental reviews.

§363.13 Preliminary Engineering Feasibility Report

(a) An Applicant shall submit copies of a preliminary engineering feasibility report, signed and sealed by a professional engineer registered in the State of Texas. The report, based on guidelines provided by the executive administrator, shall provide:

- (1) a description and purpose of the project;
- (2) the entities to be served and current and future population;
- (3) the cost of the project;
- (4) a description of alternatives considered and reasons for the selection of the project proposed;
- (5) sufficient information to evaluate the engineering feasibility of the project;
- (6) maps and drawings as necessary to locate and describe the project area; and
- (7) a general description of the existing system.

(b) The executive administrator may request additional information or data as necessary to evaluate the project.

§363.15 Required Water Conservation Plan

(a) An applicant, if not eligible for an exemption under subsection (c) of this section, shall submit, with its application, a copy of its water conservation plan for approval, in accordance with Water Code §16.4021. The executive administrator shall review all water conservation plans submitted as part of an application for financial assistance for a project and shall determine if the plans meet the requirements of this section.

(b) The water conservation plan required under subsection (a) of this section must be new or revised to include five-year and ten-year targets for water savings, unless the applicant has

implemented an approved water conservation plan that meets the requirements of this section, and that has been in effect for less than five years. The water conservation plan shall include an evaluation of the applicant's water and wastewater system and customer water use characteristics to identify water conservation opportunities and shall set goals to be accomplished by water conservation measures. The water conservation plan shall provide information in response to the following minimum requirements. If the plan does not provide information for each minimum requirement, the applicant shall include in the plan an explanation of why the requirement is not applicable.

(1) Minimum requirements. Water conservation plans shall include the following elements:

(A) a utility profile including, but not limited to, information regarding population and customer data, water use data, water supply system data, and wastewater system data at the most detailed level of water use data currently available and in accordance with the methodology and guidance for calculating water use and conservation developed and maintained by the executive administrator in coordination with the commission under Water Code §16.403. The utility profile must include the classification of water sales and uses for the following sectors, as appropriate:

- (i) residential;
- (I) single-family;
- (II) multi-family;
- (ii) commercial;
- (iii) institutional;
- (iv) industrial;
- (v) agricultural; and
- (vi) wholesale.

(B) specific, quantified five-year and ten-year targets for water savings to include goals for water loss programs and goals for municipal use in total gallons per capita per day and residential gallons per capita per day. As used herein, "municipal use" means the use of potable water or sewer effluent for residential, commercial, industrial, agricultural, institutional, and wholesale uses by an individual or entity that supplies water to the public for human consumption;

(C) a schedule for implementing the plan to achieve the applicant's targets and goals;

(D) a method for tracking the implementation and effectiveness of the plan;

(E) a master meter to measure and account for the amount of water diverted from the source of supply;

(F) a program for universal metering of both customer and public uses of water, for meter testing and repair, and for periodic meter replacement;

(G) measures to determine and control water loss (for example, periodic visual inspections along distribution lines; annual or monthly audit of the water system to determine illegal connections, abandoned services, etc.);

(H) a program of leak detection, repair, and water loss accounting for the water transmission, delivery, and distribution system;

(I) a program of continuing public education and information regarding water conservation;

(J) a water rate structure which is not "promotional," i.e., a rate structure which is cost-based and which does not encourage the excessive use of water;

(K) a means of implementation and enforcement which shall be evidenced by:

(i) a copy of the ordinance, resolution, or tariff indicating official adoption of the water conservation plan by the applicant; and

(ii) a description of the authority by which the applicant will implement and enforce the conservation plan;

(L) documentation that the regional water planning groups for the service area of the applicant have been notified of the applicant's water conservation plan; and

(M) a current drought contingency plan which includes specific water supply or water demand management measures and, at a minimum, includes, trigger conditions, demand management measures, initiation and termination procedures, a means of implementation, and measures to educate and inform the public regarding the drought contingency plan.

(2) Additional conservation strategies. The water conservation plan may also include any other water conservation practice, method, or technique that the applicant deems appropriate.

(c) Pursuant to Water Code §16.4021, an applicant is not required to provide a water conservation plan if the board determines an emergency exists; the amount of financial assistance to be provided is \$500,000 or less; the applicant demonstrates and the board finds that implementation of a water conservation program is not reasonably necessary to facilitate water conservation; the application is for flood control purposes under Water Code, Chapter 17, Subchapter G; the application is for a flood project under Water Code, Chapter 15, Subchapter I; or the financial assistance is to fund a project that consists of construction outside this state.

(1) An emergency exists when:

(A) a public water system or wastewater system has already failed, or is in a condition which poses an imminent threat of failure, causing the health and safety of the citizens served to be

endangered;

(B) sudden, unforeseen demands are placed on a water system or wastewater system (i.e., because of military operations or emergency population relocation);

(C) a disaster has been declared by the governor or president; or

(D) the governor's Division of Emergency Management of the Texas Department of Public Safety has determined that an emergency exists.

(2) If the board determines that an emergency exists and commits to financial assistance without requiring a water conservation plan, the applicant must report whether the emergency continues to exist every six months after the board commits to financial assistance. If the Executive Administrator finds that the emergency no longer exists, the applicant must submit a water conservation plan within six months of the finding.

(d) Pursuant to Water Code §16.4021(g), if the applicant will utilize the project financed by the board to furnish water or wastewater services to another entity that in turn will furnish the water or wastewater services to the ultimate consumer, the applicant shall:

(1) submit its own water conservation plan before closing on the financial assistance; and

(2) submit the other entity's water conservation plan, if one exists, before closing on the financial assistance; and

(3) require, by contract, that the other entity adopt a water conservation plan that conforms to the board's requirements and submit it to the board. If the requirement is to be included in an existing water or wastewater service contract, it may be included, at the earliest of the renewal or substantial amendment of that contract, or by other appropriate measures.

(e) The board will accept a water conservation plan determined by the commission to satisfy the requirements of 30 TAC Chapter 288 for purposes of meeting the minimum requirements of subsection (b) of this section.

(f) Water conservation plans that are submitted to the TCEQ and copied to the board under Water Code §16.402 must contain the applicable minimum requirements for water conservation plans established by the Commission in its rules at 30 TAC Chapter 288.

(g) Annual reports.

(1) Each entity that is required to submit a water conservation plan to the board or the commission, other than a recipient of financial assistance from the board, shall file a report annually not later than May 1st to the executive administrator on the entity's progress in implementing each of the minimum requirements in the water conservation plan.

(2) Recipients of financial assistance from the board shall maintain an approved water

conservation plan in effect until all financial obligations to the state have been discharged and shall file a report with the executive administrator on the applicant's progress in implementing each of the minimum requirements in its water conservation plan and the status of any of its customers' water conservation plans required by contract, within one year after closing on the financial assistance and annually thereafter until all financial obligations to the state have been discharged.

(3) Annual reports prepared for the Commission providing the information required by this subsection may be provided to the board to fulfill the board's reporting requirements.

(h) The following are violations of board rules for purposes of Water Code §16.402:

(1) failure to submit a water conservation plan containing the minimum requirements in subsections (b) and (f) of this section; and

(2) failure to timely submit a complete annual report on the entity's progress in implementing its plan that addresses each element in its water conservation plan, as required by Water Code §16.402 and subsection (g) of this section.

§363.16 Pre-design Funding Option

(a) This loan application option will provide an eligible applicant that meets all applicable board requirements an alternative to secure a commitment and close a loan for the pre-design, design or building costs associated with a project. Under this option, a loan may be closed and funds necessary to complete planning and design activities released. If planning requirements have not been satisfied, design and building funds will be held or escrowed and released in the sequence described in this section. After planning and environmental review, the executive administrator may require the applicant to make changes in order to proceed with the project. If the portion of a project associated with funds in escrow cannot proceed, the loan recipient shall use the escrowed funds to redeem bonds purchased by the board in inverse order of maturity.

(b) Except for flood projects funded through the Flood Infrastructure Fund, flood control and municipal solid waste projects are not eligible for funding under this option.

(c) The executive administrator may recommend to the board the use of this section if, based on available information, there appear to be no significant permitting, social, environmental, engineering, or financial issues associated with the project. An application for pre-design funding may be considered by the board despite a negative recommendation from the executive administrator.

(d) Applications for pre-design funding must include the following information:

(1) for loans including building cost, a preliminary engineering feasibility report which will include at minimum: a description and purpose of the project; area maps or drawings as necessary to fully locate the project area(s); a proposed project schedule; estimated project costs

and budget including sources of funds; current and future populations and projected flows; alternatives considered; and a discussion of known permitting, social or environmental issues which may affect the alternatives considered and the implementation of the proposed project;

(2) contracts for engineering services, which may be in draft form;

(3) evidence that an approved water conservation plan will be adopted prior to closing;

(4) all information required in §363.12 of this title (relating to General, Legal and Fiscal Information); and

(5) any additional information the executive administrator may request to complete evaluation of the application.

(e) After board commitment and completion of all closing and release prerequisites as specified in §363.42 of this title (relating to Loan Closing) and §363.43 of this title (relating to Release of Funds), funds will be released in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase;

(2) for design costs, after receipt of executed contracts for the design phase and upon approval of an engineering feasibility report as specified in §363.13 of this title (relating to Engineering Feasibility Report) and compliance with §363.14 of this title (relating to Environmental Assessment) as applicable; and

(3) for building costs, after issuance of any applicable permits, and after bid documents are approved and executed construction documents are contingently awarded.

(f) Board staff will use preliminary environmental data provided by the applicant, as specified in subsection (d) of this section and make a written report to the executive administrator on known or potential significant social or environmental concerns. Subsequently, these projects must have a favorable executive administrator's recommendation which is based upon a full environmental review during planning, as provided under §363.14 of this title (relating to Environmental Assessment), as applicable.

(g) The executive administrator will advise the board concerning projects that involve major economic or administrative impacts to the applicant resulting from environmentally related special mitigative or precautionary measures from an environmental assessment under §363.14 of this title (relating to Environmental Assessment), as applicable.

DIVISION 3 FORMAL ACTION BY THE BOARD

§363.31 Board Consideration of Application

The executive administrator shall submit the application to the board with comments concerning financial assistance. The application will be scheduled on the agenda for board consideration at the earliest practical date. The applicant and other interested parties known to the board shall be notified of the time and place of such meeting. If the applicant has received an obligation of federal funds from any federal source that would duplicate funding from the board for the same project, as evidenced in writing from the applicable federal agency, the executive administrator shall not submit the application to the board and shall notify the applicant that its application will no longer be considered for this reason, unless good cause is shown that the application should be submitted to the board.

DIVISION 4 PREREQUISITES TO RELEASE OF STATE FUNDS

§363.41 Engineering Design Approvals

(a) An applicant with a commitment of financial assistance from the board shall obtain Executive Administrator approval of contract documents, including engineering plans and specifications and bid documents, prior to receiving bids and awarding construction contracts. The applicant shall submit two copies of contract documents, which shall be as detailed as would be required for submission to contractors bidding on the work, and which shall be consistent with the engineering feasibility information submitted with the application. These contract documents may be submitted in draft form. For water supply projects requiring commission review, the applicant shall send an additional copy to the commission. The contract documents must contain the following:

- (1) provisions assuring compliance with the board's rules and all relevant statutes;
 - (2) provisions providing for the political subdivision to retain a minimum of 5.0% of the progress payments otherwise due to the contractor until the building of the project is substantially complete and a reduction in the retainage is authorized by the executive administrator;
 - (3) a contractor's act of assurance form to be executed by the contractor which shall warrant compliance by the contractor with all laws of the State of Texas and all rules and published policies of the board;
 - (4) a high-resolution digital, searchable copy of the plans and specifications; and
 - (5) any additional conditions that may be requested by the executive administrator.
- (b) Engineering Design Approvals for those Projects Required to use Iron or Steel Products

Produced in the United States.

(1) Except as provided by subsections (c) and (d) of this section, this section applies to Projects with the board and resulting bid documents submitted to the board or construction contracts entered into after September 1, 2017.

(2) In this section, the following terms have the assigned meanings:

(A) Iron and steel products--Products made primarily of iron or steel that are permanently incorporated into the public water system, treatment works, agricultural water conservation Project, or flood project, including, but not limited to: lined or unlined pipes and fittings, manhole covers and other municipal castings, hydrants, tanks, flanges, pipe clamps and restraints, valves, structural steel, reinforced precast concrete, construction materials.

(B) Manufacturing Process--The application of a process to alter the form or function of materials or elements of a product in a manner that adds value and transforms the materials or elements into a new finished product functionally different from a finished product produced merely from assembling the materials into a product or elements into a product.

(C) Mechanical and electrical components, equipment, systems, and appurtenances--Include, but are not limited to, pumps, motors, gear reducers, drives (including variable frequency drives), electric/pneumatic/manual accessories used to operate valves (such as electric valve actuators), mixers, gates, motorized screens (such as traveling screens), blowers/aeration equipment, compressors, meters, sensors, controls and switches, supervisory control and data acquisition (SCADA), membrane bioreactor systems, membrane filtration systems, filters, clarifiers and clarifier mechanisms, rakes, grinders, disinfection systems, presses (including belt presses), conveyors, cranes, HVAC (excluding ductwork), water heaters, heat exchangers, generators, cabinetry and housings (such as electrical boxes/enclosures), lighting fixtures, electrical conduit, emergency life systems, metal office furniture, shelving, laboratory equipment, analytical instrumentation, dewatering equipment, electrical supports/covers/shielding, and other appurtenances related to an electrical system necessary for operation or concealment. An electrical system includes all equipment, facilities, and assets owned by an electric utility, as that term is defined in §31.002 Utilities Code.

(D) Political subdivision--Includes a county, municipality, municipal utility district, water control and improvement district, special utility district, and other types of water districts, including those created under Texas Constitution Article III, Section 52 or Article XVI, Section 59, and nonprofit water supply corporations created and operating under Texas Water Code, Chapter 67.

(E) Produced in the United States--With respect to iron or steel products, a product for which all manufacturing processes, from initial melting through application of coatings, occur in the United States, other than metallurgical processes to refine steel additives.

(F) Project--A contract between the board and a person or political subdivision.

(3) Political subdivisions and persons with Projects funded with financial assistance from the board shall obtain Executive Administrator approval of contract documents, including engineering plans and specifications and bid documents, prior to receiving bids and awarding construction contracts. Except as provided by subsections (c) and (d) of this section, contract documents and bid documents provided to all bidders must include language requiring that any iron or steel products produced through a manufacturing process used in the Project, be produced in the United States, specifically where funds will be used to:

(A) construct, remodel, or alter buildings, structures, or infrastructure; or

(B) supply a material for a project between the board and a person or a political subdivision; or

(C) finance, refinance, or provide money from funds administered by the board for a project.

(c) Exemptions from subsection (b).

(1) Section 363.41(b)(3) does not apply if the board or Executive Administrator has made a determination that:

(A) iron or steel products, produced in the United States, to be used in the Project are not:

(i) produced in sufficient quantities; or

(ii) reasonably available at the time contract documents and bid documents are executed with contractors or subcontractors; or

(iii) of a satisfactory quality to be used in the Project; or

(B) the use of iron or steel products produced in the United States will increase the total cost of the Project by more than 20 percent; or

(C) complying with the use of iron or steel products as required by this section is inconsistent with the public interest.

(2) The following components are exempt from complying with §363.41(b)(3) as they are not iron or steel products:

(A) mechanical and electrical components, equipment, systems, and appurtenances; and

(B) iron or steel products that are not permanently incorporated into a Project.

(d) Section 363.41(b) does not apply where the board has adopted a resolution approving an application for financial assistance before May 1, 2019, for any portion of financing as described by §§15.432 or 15.472, Water Code.

§363.42 Loan Closing

(a) Instruments needed for closing. The documents which shall be required at the time of closing shall include the following:

(1) if not closing under the pre-design funding option, evidence that 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 bond ordinance, order or resolution adopted by the governing body authorizing the issuance of debt to be sold to the board, or an executed promissory note and loan agreement, that is acceptable to the executive administrator and which shall have sections providing as follows:

(A) if loan proceeds are to be deposited into an escrow account at the closing on all or a portion of the loan, then an escrow account shall be created that shall be separate from all other accounts and funds, as follows:

(i) the account shall be maintained by an escrow agent as defined in §363.2 of this title (relating to Definitions of Terms);

(ii) funds shall not be released from the escrow account without written approval by the executive administrator;

(iii) upon request of the executive administrator, the escrow account statements shall be provided to the executive administrator;

(iv) the investment of any loan proceeds deposited into an approved escrow account shall be handled in a manner that complies with the Public Funds Investment Act, Texas Government Code, Chapter 2256; and

(v) the escrow account shall be adequately collateralized in a manner sufficient to protect the board's interest in the project and that complies with the Public Funds Collateral Act, Texas Government Code, Chapter 2257;

(B) that a construction account shall be created which shall be separate from all other accounts and funds of the applicant;

(C) that a final accounting be made to the board of the total sources and authorized use of project funds within 60 days of the completion of the project and that any surplus loan funds be used in a manner as approved by the executive administrator;

(D) that an annual audit of the political subdivision, prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant be provided annually to the executive administrator;

(E) that the political subdivision shall fix and maintain rates and collect charges to provide adequate operation, maintenance and insurance coverage on the project in an amount sufficient to protect the board's interest;

(F) that, if applicable, the political subdivision shall document the adoption and implementation of an approved water conservation program for the duration of the loan, in accordance with §363.15 of this title;

(G) that the political subdivision shall maintain current, accurate and complete records and accounts in accordance with generally accepted accounting principles necessary to demonstrate compliance with financial assistance related legal and contractual provisions;

(H) that the political subdivision covenants to abide by the board's rules and relevant statutes, including the Texas Water Code, Chapters 15, 16, and 17;

(I) that the political subdivision, or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the political subdivision's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis substantially in the manner 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;

(J) that all payments shall be made to the board via wire transfer at no cost to the board;

(K) that the partial redemption of bonds or other authorized securities be made in inverse order of maturity;

(L) that insurance coverage be obtained and maintained in an amount sufficient to protect the board's interest in the project;

(M) that the political subdivision shall establish a dedicated source of revenue for repayment; and

(N) any other recitals mandated by the executive administrator;

(3) if applicable, evidence that the political subdivision has adopted a water conservation program in accordance with §363.15 of this title (relating to Required Water Conservation Plan);

(4) unqualified approving opinions of the attorney general of Texas and if bonds are issued, a certification from the comptroller of public accounts that such debt has been registered in that office;

(5) if bonds are issued, an unqualified approving opinion by a recognized bond attorney acceptable to the executive administrator, or if a promissory note and loan agreement is used, an opinion from the corporation's attorney which is acceptable to the executive administrator;

(6) executed escrow agreement entered into by the entity and an escrow agent satisfactory to the executive administrator, in the event that funds are escrowed, or a certificate of trust as defined in §363.2 of this title, if applicable; and

(7) other or additional data and information, if deemed necessary by the executive administrator.

(b) Certified transcript. Within 60 days of closing, the political subdivision shall submit a transcript of proceedings relating to the debt purchased by the board which shall contain those instruments normally furnished a purchaser of debt.

(c) Additional closing requirements for bonds. A political subdivision shall be required to comply with the following closing requirements if the applicant issues bonds that are purchased by the board:

(1) all bonds shall be closed in book-entry-only form;

(2) the political subdivision shall use a paying agent/registrar that is a Depository Trust Company (DTC) participant;

(3) the political subdivision shall be responsible for paying all DTC closing fees assessed to the political subdivision by the board's custodian bank directly to the board's custodian bank;

(4) the political subdivision shall provide evidence to the board that one fully registered bond has been sent to the DTC or to the political subdivision's paying agent/registrar prior to closing; and

(5) if bonds are being sold to the board, the political subdivision shall provide a private placement memorandum containing a detailed description of the issuance of debt to be sold to the board that is acceptable to the executive administrator.

§363.43 Release of Funds

(a) Release of funds for planning, design and permits. Prior to the release of funds for planning, design, and permits, the political subdivision shall submit for approval to the executive administrator the following documents:

(1) a statement as to sufficiency of funds if additional funds are necessary to complete the activity;

(2) certified copies of each contract under which revenues for repayment of the political subdivision's debt will accrue;

(3) executed consultant contracts relating to services provided for planning, design, and/or permits;

(4) unless funds are released under the pre-design funding option, documentation that the requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations; and

(5) other such instruments or documents as the board or executive administrator may require.

(b) Pre-design funding. The funds needed for the total estimated cost of the engineering planning, and design cost if the preliminary engineering feasibility report required under §363.13 of this title (relating to Preliminary Engineering Feasibility Report) has been approved, the cost of issuance associated with the loan, and any associated capitalized interest will be released to the loan recipient and the remaining funds will be escrowed to the escrow agent until all applicable requirements in subsections (a) and (c) of this section and §363.16 of this title (relating to Pre-design Funding Option) have been met.

(c) Release of funds for building purposes. Prior to the release of funds for building purposes, the political subdivision shall submit for approval to the executive administrator the following documents:

(1) a tabulation of all bids received and an explanation for any rejected bids or otherwise disqualified bidders;

(2) one executed original copy of each construction contract the effectiveness and validity of which is contingent upon the receipt of board funds;

(3) evidence that the necessary acquisitions of land, leases, easements and rights-of-way have been completed or that the applicant has the legal authority necessary to complete the acquisitions;

(4) a statement as to sufficiency of funds if additional funds are necessary to complete the project;

(5) certified copies of each contract under which revenues to the project will accrue;

(6) documentation that all requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including permits and authorizations; and

(7) other such instruments or documents as the board or executive administrator may require.

(d) Release of funds for projects constructed through one or more construction contracts. For projects constructed through one or more construction contracts, the executive administrator may approve the release of funds for all or a portion of the estimated project cost, provided all requirements of subsection (c) of this section have been met, only for the construction contract that has been approved for construction.

(e) Escrow of funds. The executive administrator may require the escrow of an amount of project funding related to contracts which have not met the requirements of subsection (c) of this section at the time of loan closing.

(f) Release of funds in installments to water supply corporations. Funds may be released to water supply corporations in installments and pursuant to the provisions of this section.

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STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §§6.101, 15.439, 16.342, and 16.4021. Additionally, this rulemaking is adopted under the authority of Texas Water Code Chapter 15, Subchapters G and H, and Chapter 17, Subchapters D, E, and F.

Texas Water Code Chapters 15, 16, and 17 are affected by this rulemaking.

<rule>

SUBCHAPTER M STATE WATER IMPLEMENTATION FUND FOR TEXAS AND STATE WATER IMPLEMENTATION REVENUE FUND FOR TEXAS

§363.1303 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 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 §363.1304 of this title (relating to Prioritization Criteria); 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 from SWIFT and SWIRFT for new applications by category, establish the structure of financing and the terms of any subsidy, and will consider applications according to §363.1304 of this title. The board reserves the right to limit the amount of funding available to an individual entity.

§363.1304 Prioritization Criteria

The executive administrator will prioritize applications based on the following point system:

(1) Projects will be evaluated on the criteria provided in paragraphs (2) - (5) of this section. The points awarded for paragraphs (2) - (5) of this section shall be the lesser of the sum of the points for paragraph (2) - (5), or 50 points.

(2) Either stand-alone projects or projects in conjunction with other recommended water management strategies relying on the same volume of water that the project relies on, in accordance with Chapter 357 of this title (relating to Regional Water Planning), that will serve in total when the project water supply volume is fully operational:

(A) at least 10,000 population, but not more than 249,999 population, 6 points; or

(B) at least 250,000 population, but not more than 499,999 population, 12 points; or

(C) at least 500,000 population, but not more than 749,999 population, 18 points; or

(D) at least 750,000 population, but not more than 999,999 population, 24 points; or

(E) at least 1,000,000 population, 30 points; or

(F) less than 10,000 population, zero points.

(3) Projects that will serve a diverse urban and rural population:

(A) serves one or more urban populations and one rural population, 10 points; and

(B) for each additional rural population served, 4 points up to a maximum of 30 points; or

(C) serves only an urban population, or only a rural population, zero points.

(4) As specified in the application, projects which provide regionalization:

(A) serves additional entities other than the applicant, 5 points per each political subdivision served for a maximum of 30 points; or

(B) serves only applicant, zero points.

(5) Projects that meet a high percentage of the water supply needs of the water users to be served calculated from those served and needs that will be met during the first decade the project becomes operational, based on state water plan data:

(A) at least 50 percent of needs met, 10 points; or

(B) at least 75 percent of needs met, 20 points; or

(C) at least 100 percent of needs met, 30 points; or

(D) less than 50 percent of needs met, zero points.

(6) Projects will receive additional points of the project's score on each of the criteria of paragraphs (7) - (12) of this section.

(7) Local contribution to be made to implement the project, including federal funding, and including up-front capital, such as funds already invested in the project or cash on hand and/or in-kind services to be invested in the project, provided that points will not be given for principal forgiveness or grants from the board:

(A) other funding at least 10 percent, but not more than 19 percent, of total project cost, 1 point; or

(B) other funding at least 20 percent, but not more than 29 percent, of total project cost, 2 points; or

(C) other funding at least 30 percent, but not more than 39 percent, of total project cost, 3 points; or

(D) other funding at least 40 percent, but not more than 49 percent, of total project cost, 4 points; or

(E) other funding at least 50 percent of total project cost, 5 points; or

(F) other funding less than 10 percent of total project cost, zero points.

(8) Financial capacity of the applicant to repay the financial assistance provided:

(A) applicant's household cost factor is less than or equal to 1 percent, 2 points; or

(B) applicant's household cost factor is greater than 1 percent but not more than 2 percent, 1 point; or

(C) applicant's household cost factor is greater than 2 percent, zero points.

(9) Projects which address an emergency need:

(A) applicant, or entity to be served by the project, is included on the list maintained by the Commission of local public water systems that have a water supply that will last less than 180 days without additional rainfall, or is otherwise affected by a Commission emergency order, and drought contingency plan has been implemented by the applicant or entity to be served, 3 points; plus

(B) water supply need is anticipated to occur in an earlier decade than identified in the most recent state water plan, 1 point; plus

(C) applicant has used or applied for federal funding for emergency, 1 point; or

(D) none of the above, zero points.

(10) Projects which are ready to proceed:

(A) preliminary planning and/or design work (30 percent of project total) has been completed or is not required for the project, 3 points; plus

(B) applicant is able to begin implementing or constructing the project within 18 months of application deadline, 3 points; plus

(C) applicant has acquired all water rights associated with the project or no water rights are required for the project, 2 points; or

(D) none of the above, zero points.

(11) Entities that have demonstrated water conservation or projects which will achieve water conservation, including preventing the loss of water:

(A) for municipal projects, applicant has already demonstrated significant water conservation savings, as determined by comparing the highest rolling four-year average total gallons per capita per day within the last twenty years to the average total gallons per capita per day for the most recent four-year period based on board water use data; or significant water conservation savings will be achieved by implementing the proposed project, as determined by comparing the conservation to be achieved by the project with the average total gallons per capita per day for most recent four-year period:

(i) 2 to 5.9 percent total gallons per capita per day reduction, 2 points; or

(ii) 6 to 9.9 percent total gallons per capita per day reduction, 4 points; or

(iii) 10 to 13.9 percent total gallons per capita per day reduction, 6 points; or

(iv) 14 to 17.9 percent total gallons per capita per day reduction, 8 points; or

(v) 18 percent or greater total gallons per capita per day reduction, 10 points; or

(vi) less than 2 percent total gallons per capita per day reduction, zero points.

(B) for municipal projects, applicant has achieved the water loss threshold established by §358.6 of this title (relating to Water Loss Audits), as demonstrated by most recently submitted water loss audit:

(i) less than the threshold, 5 points; or

(ii) at or above the threshold, zero points.

(C) for wholesale water providers, applicant has already demonstrated significant water conservation savings, as determined by comparing the highest rolling four-year average total gallons per capita per day within the last twenty years to the average total gallons per capita per day for the most recent four-year period based on board water use data for customers affiliated with the application; or significant water conservation savings will be achieved by implementing the proposed project, as determined by comparing the conservation to be achieved by the project with the average total gallons per capita per day for the most recent four-year period for customers affiliated with the application.

(i) 2 to 5.9 percent total gallons per capita per day reduction, 2 points; or

(ii) 6 to 9.9 percent total gallons per capita per day reduction, 4 points; or

(iii) 10 to 13.9 percent total gallons per capita per day reduction, 6 points; or

(iv) 14 to 17.9 percent total gallons per capita per day reduction, 8 points; or

(v) 18 percent or greater total gallons per capita per day reduction, 10 points; or

(vi) less than 2 percent total gallons per capita per day reduction, zero points.

(D) for agricultural projects, significant water efficiency improvements will be achieved by implementing the proposed project, as determined by the projected percent improvement:

(i) 1 to 1.9 percent increase in water use efficiency, 1 point; or

(ii) 2 to 5.9 percent increase in water use efficiency, 3 points; or

(iii) 6 to 9.9 percent increase in water use efficiency, 6 points; or

(iv) 10 to 13.9 percent increase in water use efficiency, 9 points; or

(v) 14 to 17.9 percent increase in water use efficiency, 12 points; or

(vi) 18 percent or greater increase in water use efficiency, 15 points; or

(vii) less than 1 percent increase in water use efficiency, zero points.

(12) Priority assigned by the applicable regional water planning group within the project sponsor's primary planning region:

(A) top 80 to top 61 percent of regional project ranking, 3 points; or

(B) top 60 to top 41 percent of regional project ranking, 6 points; or

(C) top 40 to top 21 percent of regional project ranking, 9 points; or

(D) top 20 to top 11 percent of regional project ranking, 12 points; or

(E) top 10 percent of regional project ranking, 15 points; or

(F) less than 80 percent of regional project ranking, zero points.

(13) If two or more projects receive the same priority ranking, priority will be assigned based on the relative score(s) from paragraph (11) of this section. If after considering the relative scores of the projects based on the criteria of paragraph (11) of this section, then priority will be assigned based on the relative score(s) from paragraph (9) of this section.

§363.1307 Pre-design Funding Option

(a) This loan application option will provide an eligible applicant that meets all applicable board requirements an alternative to secure a commitment and close a loan for the pre-design, design or construction costs associated with funding of a project under §363.1305 of this subchapter (relating to Use of Funds). Under this option, a loan may be closed and funds necessary to complete planning and design activities released. If planning requirements have not been satisfied, design and construction funds will be held or escrowed and released in the sequence described in this section. Following completion of planning activities and environmental assessment, the executive administrator may require the applicant to make changes in order to proceed with the project. If the portion of a project associated with funds in escrow cannot proceed, the loan recipient shall use the escrowed funds to redeem bonds purchased by the board in inverse order of maturity.

(b) Reservoir projects are eligible for a board commitment to fund planning, permitting, acquisition, and design costs under this option. Applicants for reservoir construction funds must complete planning, permitting, acquisition, and design before receiving a commitment to fund reservoir construction costs.

(c) The executive administrator may recommend to the board the use of this section if, based on available information, there appear to be no significant permitting, environmental, engineering, or financial issues associated with the project. An application for pre-design funding may be considered by the board despite a negative recommendation from the executive administrator.

(d) Applications for pre-design funding must include the following information:

(1) for loans including construction cost, preliminary engineering feasibility report, which will include at minimum: a description and purpose of the project; area maps or drawings as necessary to fully locate the project area(s); a proposed project schedule; estimated project costs and budget including sources of funds; current and future populations and projected water needs and sources; and a discussion of known permitting, social or environmental issues which may affect the alternatives considered and the implementation of the proposed project;

(2) contracts for engineering services, which may be in draft form;

(3) evidence that an approved water conservation plan will be adopted prior to closing;

(4) all information required in §363.12 of this chapter (relating to General, Legal and Fiscal Information); and

(5) any additional information the executive administrator may request to complete evaluation of the application.

(e) After board commitment and completion of all closing and release prerequisites as specified in §363.42 of this chapter (relating to Loan Closing) and §363.43 of this chapter (relating to Release of Funds), funds will be released in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase;

(2) for acquisition and design costs, after receipt of executed contracts for the design phase and upon approval of an engineering feasibility report as specified in §363.13 of this chapter (relating to Preliminary Engineering Feasibility Report) and compliance with §363.14 of this chapter (relating to Environmental Assessment); and

(3) for construction costs, after issuance of any applicable permits, and after bid documents are approved and executed construction documents are contingently awarded.

(f) The executive administrator will use preliminary environmental data provided by the applicant, as specified in subsection (d) of this section, together with information available to the executive administrator, and make a written report to the board on known or potential significant social or environmental concerns.

(g) The executive administrator will advise the board concerning projects that involve major economic or administrative impacts to the applicant resulting from environmentally related special mitigative or precautionary measures from an environmental assessment under §363.14 of this chapter.

§363.1309 Findings Required

(a) The executive administrator shall submit the application for financing under this subchapter to the board with comments concerning financial assistance. The application will be scheduled on the agenda for board consideration at the earliest practical date. The applicant and other interested parties known to the board shall be notified on the time and place of such meeting.

(b) The board shall grant the application only if the board finds that at the time the application for financial assistance was made that:

(1) the applicant has submitted and implemented a water conservation plan in accordance with Texas Water Code §16.4021 and §363.15 of this chapter;

(2) the applicant satisfactorily completed a request by the executive administrator or a regional water planning group for information relevant to the project for which the financial assistance is sought, including a water infrastructure financing survey under Texas Water Code §16.053(q); and

(3) the applicant has acknowledged its legal obligation to comply with any applicable requirements of federal law relating to contracting with disadvantaged business enterprises, and any applicable state law relating to contracting with historically underutilized businesses.

The Texas Water Development Board (TWDB) adopts an amendment to 31 TAC §371.31, concerning Timeliness of Application and Required Application Information. The proposal is adopted without changes as published in the December 4, 2020, issue of the *Texas Register* (45TexReg 49).

DISCUSSION OF THE ADOPTED AMENDMENTS

This amendment is proposed under the authority of the 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. The amendment is proposed under the additional authority of Texas Water Code § 15.605 which provides the TWDB with the authority to adopt rules necessary to carry out Chapter 15, Subchapter J.

The purpose of the proposed rule is to conform rule text with agency practice for the Drinking Water State Revolving Fund program administered by the TWDB.

TWDBREGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed the amendment in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the amendment 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 amendment is to strengthen application requirements in order to facilitate financial assistance for water projects.

Even if the amendment were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this amendment 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 amendment 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 § 15.605. Therefore, this amendment 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 amendment and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to strengthen application requirements in order to facilitate financial assistance for water projects. The amendment will advance this purpose by requiring borrowers of TWDB funds to attest that they are or will be in compliance with all of its material contracts. Further, the amendment requires borrowers of TWDB to remain in compliance with all applicable state and federal laws, rules, and regulations during the term of the financial assistance from the TWDB.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this amendment 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 administers financial assistance programs for water, wastewater, and flood projects.

Nevertheless, the board further evaluated this amendment and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this amendment would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

PUBLIC COMMENTS

The public comment period extended through January 4, 2021 and no comments were received.

STATUTORY AUTHORITY

The amendment is adopted under the authority of §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 § 15.605 which provides the TWDB with the authority to adopt rules necessary to carry out Chapter 15, Subchapter J.

Texas Water Code Chapter 15 is affected by this rulemaking.

TEXAS ADMINISTRATIVE CODE: As in effect on 04/13/2020.

TITLE 31 NATURAL RESOURCES AND CONSERVATION

PART 10 TEXAS WATER DEVELOPMENT BOARD

SUBCHAPTER D APPLICATION FOR ASSISTANCE

§371.31 Timeliness of Application and Required Application Information

(a) Time to submit applications. Applications and required additional data or information, must be submitted by the deadlines established by the executive administrator. Failure to timely submit the application, the information necessary to complete the application or additional requested information will result in the bypass of the project.

(b) Required application information. For eligible public Applicants, an application shall be in the form and number of copies prescribed by the executive administrator and, in addition to any other information that may be required by the executive administrator or the Board, the Applicant shall provide the following documentation:

(1) a resolution from its governing body that shall:

(A) request financial assistance, identifying the amount of requested assistance;

(B) designate the authorized representative to act on behalf of the governing body; and

(C) authorize the representative to execute the application, appear before the Board on behalf of the Applicant, and submit such other documentation as may be required by the executive administrator;

(2) a notarized affidavit from the authorized representative stating that:

(A) the decision to request financial assistance from the Board was made in a public meeting held in accordance with the Open Meetings Act (Texas Government Code, Chapter 551) and after providing all such notice as is required by the Open Meetings Act or, for a corporation, that the decision to request financial assistance from the Board was made in a meeting open to all customers after providing all customers written notice at least 72 hours prior to such meeting;

(B) the information submitted in the application is true and correct according to best knowledge and belief of the representative;

(C) the Applicant has no outstanding judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issues of any kind or nature by EPA, the Commission, Texas Comptroller of Public Accounts, the Utility Commission, Texas Office of the Secretary of State, or any other federal, state, or local government, that would materially affect the Applicant's ability

to repay its debt, or identifying such judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issue as may be outstanding for the Applicant;

(D) the Applicant warrants compliance with the representations made in the application in the event that the Board provides the financial assistance;

(E) the Applicant is, or will become, in compliance with all of its material contracts; and

(F) the Applicant is, and will remain during the term of any financial assistance received from the board, in compliance with all applicable federal laws, rules, and regulations as well as the laws of this State and the rules and regulations of the Board;

(3) copies of the following project documents:

(A) any draft or executed contracts for consulting services to be used by the Applicant in applying for financial assistance or constructing the proposed project, including but not limited to, financial advisor, engineer, and bond counsel; and

(B) contracts for engineering services should include the scope of services, level of effort, costs, project schedules, and other information necessary for adequate review by the executive administrator. A project schedule shall be provided with the contract; the schedule must provide firm timelines for the completion of each phase of a project and note the milestones within the phase of the project;

(4) a citation to the specific legal authority in the Texas Constitution and statutes under which the Applicant is authorized to provide the service for which the Applicant is receiving financial assistance as well as the legal documentation identifying and establishing the legal existence of the Applicant;

(5) if the Applicant provides or will provide wastewater service to another service provider, or receives such service from another service provider, the proposed agreement, contract, or other documentation which legally establishes such service relationship, with the final and binding agreements provided prior to closing;

(6) documentation of the ownership interest, with supporting legal documentation, for the property on which the proposed project shall be located, or if the property is to be acquired, certification that the Applicant has the necessary legal power and authority to acquire the property;

(7) if financing of the project will require a contractual loan agreement or the sale of bonds to the Board payable either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts, for a duration specified by the executive administrator, under which the Applicant's gross income is expected to accrue. Before the financial assistance is closed, an Applicant shall submit executed copies of such contracts to the executive administrator;

(8) if the bonds to be sold to the Board are revenue bonds secured by a subordinate lien, a copy of the authorizing instrument of the governing body for all prior and outstanding bonds shall be furnished;

(9) if a bond election is required by law to authorize the issuance of bonds to finance the project, the executive administrator may require Applicant to provide the election date and election results necessary for the issuance of the bonds as part of the application or prior to closing;

(10) an audit of the Applicant for the preceding year prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant, unless an alternative method of establishing a reliable accounting of the financial records of the Applicant is approved by the executive administrator; and

(11) a listing of all the funds used for the project, including funds already expended from sources other than financial assistance offered from the Board, such as from participating local government entities or prior-issued debt.

(12) Preliminary Engineering Feasibility Report signed and sealed by a professional engineer registered in the State of Texas. The report, based on guidelines provided by the executive administrator, must provide:

(A) a description and purpose of the project;

(B) the entities to be served and current and future population;

(C) the cost of the project;

(D) a description of alternatives considered and reasons for the selection of the project proposed;

(E) sufficient information to evaluate the engineering feasibility of the project;

(F) maps and drawings as necessary to locate and describe the project area; and

(G) any other information the executive administrator determines is necessary to evaluate the project.

(c) For eligible private Applicants and eligible NPNC Applicants that are not also eligible public Applicants, an application shall be in the form and number of copies prescribed by the executive administrator, and, in addition to any other information that may be required by the executive administrator or the Board, such Applicant shall provide:

The Texas Water Development Board (TWDB) adopts 31 TAC §375.41. The proposal is adopted without changes as published in the December 4, 2020, issue of the *Texas Register* (45TexReg 49).

DISCUSSION OF THE ADOPTED AMENDMENTS

This amendment is proposed under the authority of the 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. The amendment is proposed under the additional authority of Texas Water Code § 15.605 which provides the TWDB with the authority to adopt rules necessary to carry out Chapter 15, Subchapter J.

The purpose of the proposed rule is to conform rule text with agency practice for the Clean Water State Revolving Fund program administered by the TWDB.

TWDBREGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed the amendment in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the amendment 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 amendment is to strengthen application requirements in order to facilitate financial assistance for water projects.

Even if the amendment were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this amendment 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 amendment 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 § 15.605. Therefore, this amendment 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 amendment and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to strengthen application requirements in order to facilitate financial assistance for water projects. The amendment will advance this purpose by requiring borrowers of TWDB funds to attest that they are or will be in compliance with all of its material contracts. Further, the amendment requires borrowers of TWDB to remain in compliance with all applicable state and federal laws, rules, and regulations during the term of the financial assistance from the TWDB.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this amendment 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 administers financial assistance programs for water, wastewater, and flood projects.

Nevertheless, the board further evaluated this amendment and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this amendment would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

PUBLIC COMMENTS

The public comment period extended through January 4, 2021 and no comments were received.

STATUTORY AUTHORITY

The amendment is adopted under the authority of §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 § 15.605 which provides the TWDB with the authority to adopt rules necessary to carry out Chapter 15, Subchapter J.

Texas Water Code Chapter 15 is affected by this rulemaking.

TITLE 31 NATURAL RESOURCES AND CONSERVATION

PART 10 TEXAS WATER DEVELOPMENT BOARD

SUBCHAPTER D APPLICATION FOR ASSISTANCE

§ 375.41 Timeliness of Application and Required Application Information

(a) Time to submit applications. Applications and required additional data or information, must be submitted by the deadlines established by the executive administrator. Failure to timely submit the application, the information necessary to complete the application or additional requested information will result in the bypass of the project.

(b) Required application information. For eligible public Applicants, an application shall be in the form and number of copies prescribed by the executive administrator and, in addition to any other information that may be required by the executive administrator or the Board, the Applicant shall provide the following documentation:

(1) a resolution from its governing body that shall:

(A) request financial assistance, identifying the amount of requested assistance;

(B) designate the authorized representative to act on behalf of the governing body; and

(C) authorize the representative to execute the application, appear before the Board on behalf of the Applicant, and submit such other documentation as may be required by the executive administrator;

(2) a notarized affidavit from the authorized representative stating that:

(A) the decision to request financial assistance from the Board was made in a public meeting held in accordance with the Open Meetings Act (Texas Government Code, Chapter 551) and after providing all such notice as is required by the Open Meetings Act or, for a corporation, that the decision to request financial assistance from the Board was made in a meeting open to all customers after providing all customers written notice at least 72 hours prior to such meeting;

(B) the information submitted in the application is true and correct according to best knowledge and belief of the representative;

(C) the Applicant has no outstanding judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issues of any kind or nature by EPA, the Commission, Texas Comptroller of Public Accounts, the Utility Commission, Texas Office of the Secretary of State, or any other federal, state, or local government, that would materially affect the Applicant's ability to repay its debt, or identifying such judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issue as may be outstanding for the Applicant;

(D) the Applicant warrants compliance with the representations made in the application in the event that the Board provides the financial assistance;

(E) the Applicant is, or will become, in compliance with all of its material contracts; and

(F) the Applicant is, and will remain during the term of any financial assistance received from the board, in compliance with all applicable federal laws, rules, and regulations as well as the laws of this State and the rules and regulations of the Board;

(3) copies of the following project documents:

(A) any draft or executed contracts for consulting services to be used by the Applicant in applying for financial assistance or constructing the proposed project, including but not limited to, financial advisor, engineer, and bond counsel; and

(B) contracts for engineering services should include the scope of services, level of effort, costs, project schedules, and other information necessary for adequate review by the executive administrator. A project schedule shall be provided with the contract; the schedule must provide firm timelines for the completion of each phase of a project and note the milestones within the phase of the project;

(4) a citation to the specific legal authority in the Texas Constitution and statutes under which the Applicant is authorized to provide the service for which the Applicant is receiving financial assistance as well as the legal documentation identifying and establishing the legal existence of the Applicant;

(5) if the Applicant provides or will provide wastewater service to another service provider, or receives such service from another service provider, the proposed agreement, contract, or other documentation which legally establishes such service relationship, with the final and binding agreements provided prior to closing;

(6) documentation of the ownership interest, with supporting legal documentation, for the property on which the proposed project shall be located, or if the property is to be acquired, certification that the Applicant has the necessary legal power and authority to acquire the property;

(7) if financing of the project will require a contractual loan agreement or the sale of bonds to the Board payable either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts, for a duration specified by the executive administrator, under which the Applicant's gross income is expected to accrue. Before the financial assistance is closed, an Applicant shall submit executed copies of such contracts to the executive administrator;

(8) if the bonds to be sold to the Board are revenue bonds secured by a subordinate lien, a copy of the authorizing instrument of the governing body for all prior and outstanding bonds shall be furnished;

(9) if a bond election is required by law to authorize the issuance of bonds to finance the project, the executive administrator may require Applicant to provide the election date and election results necessary for the issuance of the bonds as part of the application or prior to closing;

(10) an audit of the Applicant for the preceding year prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant, unless an alternative method of establishing a reliable accounting of the financial records of the Applicant is approved by the executive administrator; and

(11) a listing of all the funds used for the project, including funds already expended from sources other than financial assistance offered from the Board, such as from participating local government entities or prior-issued debt.

(12) Preliminary Engineering Feasibility Report signed and sealed by a professional engineer registered in the State of Texas. The report, based on guidelines provided by the executive administrator, must provide:

(A) a description and purpose of the project;

(B) the entities to be served and current and future population;

(C) the cost of the project;

(D) a description of alternatives considered and reasons for the selection of the project proposed;

(E) sufficient information to evaluate the engineering feasibility of the project;

(F) maps and drawings as necessary to locate and describe the project area; and

(G) any other information the executive administrator determines is necessary to evaluate the project.

(c) For eligible private Applicants, an application shall be in the form and number of copies prescribed by the executive administrator, and, in addition to any other information that may be required by the executive administrator or the Board, such Applicant shall provide: