

## AGENDA ITEM MEMO

**BOARD MEETING DATE:** April 11, 2022

**TO:** Board Members

**THROUGH:** Jeff Walker, Executive Administrator  
Ashley Harden, General Counsel  
Jessica Peña, DEA, Water Supply & Infrastructure

**FROM:** Alyssa Azari, Manager, Program Administration

**SUBJECT:** Adoption of Economically Disadvantaged Areas Program and State Water Implementation Fund for Texas Rules

### **ACTION REQUESTED**

Consider adopting and authorizing publication of additions, amendments, and repeals to 31 Texas Administrative Code (TAC) Chapter 363, related to the Economically Distressed Areas Program (EDAP), the State Water Implementation Fund for Texas (SWIFT), and the State Water Implementation Revenue Fund for Texas (SWIRFT).

### **BACKGROUND**

The Texas Water Development Board (TWDB) authorized publication of proposed additions, amendments, and repeals to 31 Texas Administration Code Chapter 363, related to the EDAP and SWIFT programs, on December 16, 2021. The proposed changes were published in the *Texas Register* on December 31, 2021, with a comment period that ended on January 31, 2022. In addition, the proposed rulemaking and comment period were posted on the TWDB's website.

No comments were received and no changes have been made to the rulemaking as proposed.

The purpose of the proposed additions, amendments, and repeals to is to implement legislative changes from Senate Bill (SB) 2452, 86<sup>th</sup> Legislative Session, relating to the EDAP, and House Bill (HB) 1905, 87<sup>th</sup> Legislative Session, relating to relieving regional water planning groups of certain duties, and to implement changes in program management.

#### **Our Mission**

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

#### **Board Members**

Brooke T. Paup, Chairwoman | Kathleen Jackson, Board Member

Jeff Walker, Executive Administrator

## **KEY ISSUES**

### **31 TAC Chapter 363 key changes:**

1. New requirements are added to describe the purpose and contents of the intended use plan and project prioritization list.
2. Updates to documentation provided by counties indicating adoption and enforcement of model subdivision rules.
3. Updates to the calculation of financial assistance for each entity and the Board's ability to maximize the portion of financial assistance for which repayment is required based on the applicant's ability to repay.
4. Updates to financial assistance options, as the program now offers an option to fund construction activities at the same time as planning, acquisition, and design funding.
5. Removal of eligibility language relating to projects identified in the state water plan through the Water Infrastructure Fund as the program is closed and funding is no longer available.
6. New requirements are added for an annual report to be placed on the agency's website.
7. Removal of the requirement for the applicable regional water planning group to prioritize projects in the State Water Implementation Fund for Texas. This change is made to implement the repeal of TWC § 15.436 made by HB 1905, 87th Legislative Session.
8. The requirement for RWPGs to perform a water infrastructure financing survey is removed. This change is made to implement the repeal of TWC § 16.053(q) made by HB 1905, 87th Legislative Session.

## **RECOMMENDATION**

The Executive Administrator recommends adopting and authorizing the publication of revisions to 31 Texas Administrative Code Chapter 363 to implement legislative changes from SB 2452, 86<sup>th</sup> Legislative Session, relating to the EDAP, and HB 1905, 87<sup>th</sup> Legislative Session, relating to relieving regional water planning groups of certain duties, and to implement changes in program management.

### Attachments:

1. Adoption of Additions and Amendments to 31 TAC Chapter 363 for publication in the *Texas Register*
2. Adoption of Repeals to 31 TAC Chapter 363 for publication in the *Texas Register*

The Texas Water Development Board (“TWDB” or “board”) adopts new 31 Texas Administrative Code (TAC) §§363.504 – 371.512, §363.514, and amendments to existing 31 TAC §§363.502 - 503, relating to the Economically Distressed Areas Program. The proposal is adopted without changes as published in the December 31, 2021, issue of the Texas Register (46 TexReg 53)

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

The TWDB adopts the additions and amendments to implement legislative changes from Senate Bill 2452, 86th (R) Legislative Session and to implement changes in program management, including the use of an intended use plan to assist in administering the program. The specific provisions amended or added and the reasons for the amendments are addressed in more detail below.

#### SECTION BY SECTION DISCUSSION OF ADOPTED ADDITIONS AND AMENDMENTS.

##### 31 TAC §363.502 Definitions of Terms

Section 363.502 is amended to delete the terms “capital component”, “comparable service provider”, “default rate”, “living unit equivalents or LUE”, “long term capital debt”, “payment rate”, “regional capital component benchmark”, and “regional payment benchmark” because the sections containing these terms are published for repeal elsewhere in this issue of the Texas Register, and to include the definition for “intended use plan” that will provide details on the uses of funds under this program.

##### 31 TAC §363.503 Determination of Economically Distressed Area

Section 363.503 is amended to remove a determination that water service is considered inadequate based on the project area being identified in the state water plan. This method applied to prior funding that is no longer available for the program and therefore is not applicable.

##### 31 TAC §363.504 Intended Use Plan and Project Priority List

Section 363.504 is added to describe the purpose and contents of the intended use plan and project priority list in the administration of the program. The existing §363.504 is published for repeal elsewhere in this issue of the Texas Register.

##### 31 TAC §363.505 Required Information for Full Applications

Section 363.505 is added to replace the rule previously numbered as 363.504. Several changes are made based on Senate Bill 2452, 86th (R) Legislative Session. The notarized statement from the county judge now indicates the county is enforcing the model rules and includes a description of any measures taken to correct any deficiencies in compliance. Further, the

application must indicate the method for repayment of financial assistance to assist the board in assessing the political subdivision's ability to repay the financial assistance. The requirements of the notarized affidavit from the authorized representative related to the applicant having no outstanding judgments, orders, fines, penalties, taxes, assessment or other enforcement or compliance issue of any kind or nature now refers only to those not related to public health and safety issues resulting from water supply or sewer services. The reference to five years of compliance with the model subdivision rules is deleted to emphasize the requirement to enforce model subdivision rules. Additional application information required in statute is added. The existing §363.504 is published for repeal elsewhere in this issue of the Texas Register.

#### 31 TAC §363.506 Review of Full Application and Assistance Conditions

Section 363.506 is added to replace the rule previously numbered as 363.505. The program now offers as an option funding construction activities at the same time as planning, acquisition, and design funding. The existing §363.505 is published for repeal elsewhere in this issue of the Texas Register.

#### 31 TAC §363.507 [Reserved]

Section 363.507 is added and reserved for future use.

#### 31 TAC §363.508 Calculation of Financial Assistance

Section 363.508 is added to replace the rule previously numbered as 363.506. The program will use an intended use plan to describe the form of financial assistance being offered at a particular time, including the manner of calculating the amount and form of any repayments. The existing §363.506 is published for repeal elsewhere in this issue of the Texas Register.

#### 31 TAC §363.509 [Reserved]

Section 363.509 is added and reserved for future use.

#### 31 TAC §363.510 Terms of Financial Assistance

Section 363.510 is added to replace the rule previously numbered as 363.507. Consistent with Senate Bill 2452, 86th (R) Legislative Session, repayment is based on the political subdivision's ability to repay the financial assistance. The board will consider among other things the ability to maximize the portion of financial assistance for which repayment is required based on the political subdivision's ability to repay the assistance and take into account the limit on the total amount of financial assistance that does not require repayment found in Texas Water Code §17.933. The existing §363.507 is published for repeal elsewhere in this issue of the Texas Register.

#### 31 TAC §363.511 Required Sewer Connections

Section 363.511 is added to replace the rule previously numbered as 363.508. No changes were made to the existing language. The existing §363.508 is published for repeal elsewhere in this issue of the Texas Register.

#### 31 TAC §363.512 Financial, Managerial, and Technical Training Requirements

Section 363.512 is added to replace the rule previously numbered as 363.510. No changes were made to the existing language. The existing §363.510 is published for repeal elsewhere in this issue of the Texas Register.

#### 31 TAC §363.513 Residential Water and Sewer Connections

Section 363.513 is amended for a minor edit to the name of the Texas Water Code and formatting.

#### 31 TAC §363.14 Reporting and Transparency Requirements

Section 363.14 is added to establish new reporting requirements to comply with Texas Water Code §17.937, as enacted by Senate Bill 2452, 86th (R) Legislative Session.

#### REGULATORY IMPACT ANALYSIS DETERMINATION (Texas Government Code §2001.0225)

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 legislative changes that will enhance the effectiveness and administration of the program.

Even if the adopted amendments and rules were 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 §§17.921, 17.9225, 17.927, 17.9275, 17.933, and 17.936. Therefore, the adopted amendments do not fall under any of the applicability criteria in Texas Government Code §2001.0225. TAKINGS IMPACT ASSESSMENT (Texas Government Code §2007.043)

The board evaluated the adopted rules and amendments 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 new requirements in state law and enhancements in program management. The adopted rule would substantially advance this stated purpose by ensuring consistency with current law and improving the effectiveness of the program.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to the adopted rules 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 implements the Economically Distressed Areas Program.

Nevertheless, the board further evaluated the adopted rules and performed an assessment of whether it constitutes a taking under Texas Government Code Chapter 2007. Promulgation and enforcement of the adopted rules 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, restrict, or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, this rule requires compliance with state law regarding financial assistance under the Economically Distressed Areas Program without burdening or restricting or limiting the owner's right to property and reducing its value by 25% or more. Therefore, the adopted rule does not constitute a taking under Texas Government Code, Chapter 2007.

PUBLIC COMMENTS (Texas Government Code §2001.033(a)(1))

No comments were received by the end of the public comment period on January 31, 2022, and no changes were made.

STATUTORY AUTHORITY (Texas Government Code §2001.024(a)(3))

The additions and amendments are 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 Water Code §§15.439, 15.537, 17.921, 17.9225, 17.927, 17.9275, 17.933, and 17.936.

This rulemaking affects Water Code, Chapters 15 and 17.

<rule>

§363.502 Definitions of Terms

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

[(1) Capital component--That component of the existing rate of a provider utility for the applicable utility service used to retire the long term capital debt of the system determined by calculating a monthly average of the existing annual long term capital debt payments of the utility service provider divided by the total number of living unit equivalents (LUE).]

[(2) Comparable service provider--A service provider that provides the same type of service as the provider utility for the proposed project to a similarly sized population, with a similar treatment capacity, and serving a population that has a similar per capita income based on available census data adjusted pursuant to the calculation set forth in the §371.24(b)(7) of this title (relating to Disadvantaged Community Program through Loan Subsidies) for adjusted median household income.]

[(3) Default rate--The average monthly number of residential customers that are delinquent in payment in excess of six months for the service provided divided by the average monthly total number of residential customers.]

(1)[(4)] Economically distressed area--An area in which:

(A) water supply or sewer services are inadequate to meet minimal needs of residential users as defined by board rules;

(B) financial resources are inadequate to provide water supply or sewer services that will satisfy those needs; and

(C) an established residential subdivision was located on June 1, 2005, as determined by the board.

(2) Intended Use Plan--a document adopted by the board after public review and comment that identifies the uses of the funds under this program.

[(5) Living unit equivalents or LUE--The number of existing or projected residential rate payer equivalents for the provider utility in the area to be served by a proposed project which is calculated by dividing:

(A) for existing provider utilities, the total historical annual water use of the provider utility, which includes the residential, commercial and institutional water use, by the historical average annual water use of an average residential connection of the provider utility, provided however, that in no event shall the number of LUE's for the project area be less than the number of service connections of the provider utility for the project area; or

(B) for new provider utilities, the total estimated annual water use of the provider utility, which includes the residential, commercial and institutional water use, by the estimated average annual water use of an average residential connection of the provider utility, provided however, that in no event shall the number of LUE's for the project area be less than the estimated number of service connections of the provider utility for the project area.]

[(6) Long term capital debt--The total amount of outstanding indebtedness of an applicant that at the time the debt was incurred was intended to be repaid over a period longer than one year, the proceeds of such indebtedness being used for the purpose of acquiring, constructing, or improving a water or sewer system or a necessary component to the service, operation, or maintenance of such system, including long term capital leases of real property and provided that leases for personal property are excluded.]

(3)[(7)] Operating entity--(the individuals who compose) the governing body of a provider utility [(and the individuals)] who are employed by the provider utility to perform the financial, managerial, and technical tasks associated with the operation of the provider utility.

[(8) Payment rate--One minus the default rate of a service utility.]

(4)[(9)] Provider utility--The entity [which] will provide water supply or wastewater service to the economically distressed area.

[(10) Regional capital component benchmark--The average capital component of all customers of no less than three comparable service providers.]

[(11) Regional payment benchmark--The average of the payment rates of no less than three comparable service providers.]

### §363.503 Determination of Economically Distressed Area

To determine that an area is economically distressed, the board shall consider information and data presented with the application or otherwise available to the board to determine that the water or sewer services are inadequate to meet the minimal needs of residential users; that the financial resources of the residential users of the services are inadequate to provide water or sewer services that will satisfy those minimal needs; and that an established residential subdivision was located in the economically distressed area on June 1, 2005.

(1) Water service is inadequate to meet the minimal needs of the residential users in an economically distressed area if the board determines that water service:

(A) does not exist or is not provided;

(B) is provided by a community water system that does not meet drinking water standards established by the commission;

(C) is provided by individual wells that, after treatment, do not meet drinking water standards established by the commission; or

(D) does not meet applicable drinking water standards of any other governmental unit with jurisdiction over such area.

[(E) The water service is considered inadequate if the project area is identified in the water plan as having a water supply need and the project to address that need is identified as a recommended strategy in the state and regional water plan. Projects brought under this subparagraph shall follow the procedures outlined in Subchapter A of this chapter (relating to General Provisions) and paragraphs (3) and (4) of this section and §363.504 of this subchapter (relating to Required Application Information).]

(2) Sewer service is inadequate to meet the minimal needs of residential users in an economically distressed area if the board determines that sewer service:

(A) does not exist or is not provided;

(B) is provided by an organized sewage collection and treatment facility that does not comply with the standards and requirements established by the commission;

(C) is provided by on-site sewerage facilities that do not comply with the standards and requirements established by the commission; or

(D) does not meet applicable wastewater standards of any other governmental unit with jurisdiction over such area.

(3) The financial resources of the residential users in the economically distressed area are inadequate to provide the needed services if the board finds that the area to be served by a proposed project has a median household income that is not greater than 75% of the median state household income for the most recent year for which statistics are available.

(4) An established residential subdivision was located in the economically distressed area on June 1, 2005, if the board determines the following:

- (A) either a plat of the area is recorded in the county plat or deed records; or a pattern of subdivision, without a recorded plat, is evidenced by the existence of multiple residential lots with roads, streets, utility easements, or other such incidents of common usage or origin;
  - (B) at least one occupied residential dwelling existed within the platted or subdivided area on June 1, 2005, and
  - (C) such other factors as may be determined relevant by the board.
- (5) The boundary or limits of a water or sewage project to serve an economically distressed area may be determined by:
- (A) a subdivision plat prepared by a registered engineer, whether recorded or not;
  - (B) a metes and bounds description, natural boundaries, roads, or other natural features that delineate an unplatted area within which a feasible cost-effective project can be developed; or
  - (C) inclusion of occupied dwellings with inadequate water or wastewater services in close proximity to an economically distressed area determined as provided in paragraph (4) of this section when such dwellings can be feasibly served by the proposed project.

#### §363.504 Intended Use Plan and Project Priority List

- (a) Periodically, the board will adopt an Intended Use Plan to determine the use of funds for the specified application period. The Intended Use Plan may include:
  - (1) structure and method of determining the financial assistance provided, including any subsidies;
  - (2) criteria to be used by the executive administrator in prioritization of abridged applications; and
  - (3) other requirements related to program administration.
- (b) The executive administrator shall allow a period for public review and comment before the board considers adoption and approval of the Intended Use Plan and the initial project priority list or any substantive amendments to the Intended Use Plan. The executive administrator may make amendments to the project priority list after a 14-day public comment period without any public hearing.
- (c) Eligible applicants who wish to submit a project for inclusion in the Intended Use Plan and on the initial project priority list must submit a complete and accurate abridged application by the date specified by the board.
- (d) The information that must be included in an abridged application will be included in the Intended Use Plan. Failure to submit all required information specified in the Intended Use Plan may result in the project being ineligible for further board consideration and prioritization.
- (e) Projects will be rated in the initial project prioritization based upon the information submitted by the applicant in the abridged application and any supporting documentation, with points being awarded by the executive administrator in amounts specified in the Intended Use Plan.
- (f) If two or more projects receive the same number of points in the project prioritization, the executive administrator will use the tie-breaker procedures listed in the applicable Intended Use Plan.
- (g) If sufficient funds are available, applicants with projects included on the priority list adopted by the board will be invited to submit a full application for consideration by the board in accordance with the Intended Use Plan and this chapter. Additional invitations to submit a full application may be extended from time to time while funds remain available.

(h) The applicant for a proposed project listed within the project priority list adopted by the board may be allowed certain changes without requiring a re-ranking in the following circumstances:

(1) the applicant for a proposed project changes but the project does not change; or

(2) the number of participants in a regional project changes and the change does not result in a change to the rating.

#### §363.505 Required Information for Full Applications

A full application for planning, acquisition, design, construction, or a combination thereof, shall be in the form and numbers prescribed by §363.12 of this title (relating to General, Legal, and Fiscal Information). Full applications will be reviewed for administrative completeness, as determined by the executive administrator. In addition to any other information that may be required by the executive administrator or the board, the full application shall include:

(1) information to establish to the satisfaction of the executive administrator that the county in which the applicant is located has adopted and is enforcing the model rules adopted by the board pursuant to Texas Water Code §16.343 (model rules) and that, if any part of the project is located within the corporate limits of a municipality or its extraterritorial jurisdiction, the municipality has adopted and is enforcing the model rules, including the following information:

(A) A copy of the subdivision regulations adopted by the county and the municipality, if applicable;

(B) From the county and the municipality, if applicable, the lesser of either the three most recently approved residential subdivision plats, or all recently approved subdivision plats, that are within the jurisdiction of the county, and, if applicable, the municipality; provided that, if a county or municipality has not approved any residential subdivision plats within the last five years, the county judge and mayor, if applicable, shall submit a notarized statement to such effect;

(C) A notarized statement from the county judge that:

(i) the residential subdivision regulations adopted by the county and submitted with the statement fully incorporate the model rules;

(ii) any residential subdivision plats submitted with this statement fully comply with the county regulations;

(iii) the county is enforcing the applicable model rules developed under Texas Water Code §16.343, and a description of any measures taken to mitigate any deficiencies in compliance;

(iv) acknowledges that, if the executive administrator determines that the county is not enforcing the model rules, all funds provided by the board under this subchapter and committed for Economically Distressed Areas Program (EDAP) projects in the county shall be suspended; and;

(v) Such statement shall be considered sufficient to establish compliance with the model rules unless the executive administrator identifies significant violations with the model rules and the county is unable to correct the deficiencies within 90 days of notification of the violations;

(D) If any part of the project is located within the corporate limits of a municipality or its extraterritorial jurisdiction, a notarized statement from the mayor that:

(i) the residential subdivision regulations adopted by the municipality and submitted with the statement fully incorporate the model rules;

(ii) any residential subdivision plats submitted with this statement fully comply with the municipality's regulations;

(iii) acknowledges that, if the executive administrator determines that the municipality is not enforcing the model rules, all funds provided by the board under this subchapter and committed for EDAP projects in the municipality or its extraterritorial jurisdiction shall be suspended; and

(iv) such statement shall be considered sufficient to establish compliance with the model rules unless the executive administrator identifies significant violations with the model rules and the municipality is unable to correct the deficiencies within 90 days of notification of the violations;

(E) If the county or municipality, if applicable, has only been required or authorized to adopt residential subdivision rules that enforce the model rules within one year of the submission of the application the executive administrator may require that each member of the applicable governing body:

(i) complete a course of training of not more than two hours on the implementation of the model rules prepared and provided by the executive administrator in a widely available medium at no cost; and

(ii) provide a notarized statement that the member has completed the training.

(2) Any relevant data or information identified in §355.73(b) of this title (relating to Scope of Facility Plan) that may be requested by the board or the executive administrator.

(3) a proposed project schedule and budget that includes estimated project costs, identifying the source of funds, and method for repayment of financial assistance;

(4) a resolution from its governing body which shall:

(A) request financial assistance and identify the amount of requested assistance;

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

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

(5) 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, §§551.001, et seq.,) and after providing all such notice as required by such Act as is applicable to the applicant or, for a corporation, that the decision to request financial assistance from the board was made in a meeting open to all customers and after providing all customers written notice at least 72 hours prior to such meeting that a decision to request public assistance would be made during 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 fines, penalties, taxes, assessment or other enforcement or compliance issue of any kind or nature by the Texas Comptroller, Texas Secretary of State, or any other federal, state or local government or identifying such judgments, orders, fines, penalties, taxes, assessment or other enforcement or compliance issue as may be outstanding for the applicant that are not related to public health and safety issues resulting from water supply or sewer services;

(D) the applicant warrants compliance with the representations made in the application in the event that the board provides the financial assistance; and

- (E) the applicant will comply with all applicable federal laws, rules, and regulations as well as the laws of this state and the rules and regulations of the board;
- (6) copies of any proposed or existing contracts with any appropriate consultants such as financial advisory, engineering, general counsel and bond counsel services to be used by the applicant in applying for financial assistance or constructing the proposed project. Contracts for engineering services should include the scope of services, level of effort, costs, schedules, and other information necessary for adequate review by the executive administrator;
- (7) a citation to the specific legal authority in the Texas Constitution and statutes pursuant to 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 as may be deemed necessary by the executive administrator;
- (8) if the applicant provides or will provide water supply or treatment or sewer 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;
- (9) documentation of the ownership interest, with supporting legal documentation, of property on which 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;
- (10) the name of the political subdivision and its principal officers;
- (11) a preliminary facility engineering plan, prepared and certified by an engineer registered to practice in this state, that must:
- (A) describe the proposed planning, design, and construction activities necessary to provide water supply and/or sewer services that meet minimum state standards provided by board rules;
- (B) identify the households to which water supply and sewer services will be provided; and
- (C) described the existing water supply and sewer facilities located in the area to be served by the proposed project, including a statement that the facilities do not meet minimum state standards;
- (12) information identifying the median household income for the area to be served by the proposed project; and
- (13) the water conservation plan required by Texas Water Code §16.4021.

#### §363.506 Review of Full Application and Assistance Conditions

- (a) The funds available for projects eligible for financial assistance from the Economically Distressed Areas Program Account under this subchapter shall be determined by the board.
- (b) The board may provide financial assistance from the Economically Distressed Areas Program Account in the amount and manner provided in §363.508 of this title (relating to Calculation of Financial Assistance) for costs necessary to provide water or sewer services for the activities as defined in Texas Water Code §17.001(8), including:
- (1) preliminary planning, including contingencies as determined by the board, to determine the feasibility of a water supply project or wastewater treatment works;
- (2) engineering, architectural, legal, title, fiscal, or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures, or other necessary actions;
- (3) the expense of any acquisition, condemnation or other legal proceedings associated with real property acquisitions;

(4) construction including erecting, building, acquiring, altering, remodeling, improving, acquiring or extending a water supply project or water services, treatment works or sewer services or facilities;

(5) asset management planning; and

(6) the inspection or supervision of any of the items listed herein.

(c) A full application for construction funding only shall include all the requirements in §363.505 of this title (relating to Required Information for Full Applications) as well as a facility plan that includes all of the facility engineering data, studies, and analysis and any other relevant data or information as may be requested by the board or the executive administrator.

(d) The grant agreement may contain provisions for the board to retain a minimum of 5% of the progress payments otherwise due to the applicant until the funded deliverable, as defined in the grant agreement, is substantially complete and is authorized by the executive administrator.

(e) The board shall set the terms of the financial assistance provided under subsection (b) of this section, and such terms may be extended at the sole discretion of the board.

#### §363.507 Reserved

#### §363.508 Calculation of Financial Assistance

(a) The amount and form of financial assistance, including the amount and form of repayment, if any, will be calculated as specified in the Intended Use Plan.

#### §363.509 Reserved

#### §363.510 Terms of Financial Assistance

(a) The board shall determine the amount and form of financial assistance and the amount and form of repayment, if applicable. The board shall establish repayment based on the political subdivision's ability to repay the financial assistance and shall consider:

(1) rates, fees, and charges that the average customer to be served by the project will be able to pay;

(2) sources of funding available to the political subdivision from federal and private funds and from other state funds;

(3) any local funds available from the political subdivision if the economically distressed area to be served by the board's financial assistance is within the boundary of the political subdivision;

(4) the just, fair, and reasonable charges for water and wastewater service as provided in the Texas Water Code; and

(5) the ability of the board to maximize the portion of financial assistance for which repayment is required based on the political subdivision's ability to repay the assistance, as provided by board rule; and

(6) the limit on the total amount of financial assistance that does not require repayment pursuant to Texas Water Code §17.933.

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

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

#### §363.511 Required Sewer Connections

Any applicant receiving financial assistance from the board for the construction of wastewater system improvements shall exercise the authority granted to such applicant pursuant to the Texas Water Code, §17.934, and require property owners that can be served by such wastewater system improvements to connect to the applicant's sewer system.

#### §363.512 Financial, Managerial, and Technical Training Requirements

(a) The board may determine or request that the commission make a determination that an operating entity complete training to obtain the necessary financial, managerial, or technical capacity to ensure the project will provide adequate water or wastewater service or to maintain the financial viability of the provider utility in any of the following circumstances:

(1) upon receipt of an application from the provider utility for financial assistance under this subchapter;

(2) upon receipt of a request for amendment to the financial assistance commitment previously provided to the provider utility;

(3) upon a determination of the board that the provider utility which has received a commitment of financial assistance under this subchapter has failed to provide the board documentation required under state law, board rule, bond covenant or the grant agreement for the financial assistance provided by the board; or

(4) upon receipt of notification that the commission has determined that the provider utility has a history of compliance problems or that the commission has assessed a penalty in an enforcement action against the provider utility.

(b) The board may determine that an operating entity will be required to undertake financial, managerial, or technical training based on an assessment performed by the commission or an assessment performed by the executive administrator and approved by the board. In the event that the executive administrator prepares the assessment, the assessment as provided to the board will consist of:

(1) a summary of any documentation and information reviewed by the executive administrator relating to or developed for:

(A) an application for financial assistance from the provider utility;

(B) a request by the provider utility for an amendment to the terms or conditions of the financial assistance provided to the provider utility;

(C) compliance efforts of the provider utility with criteria and requirements identified in applicable state or federal law, board rule, bond covenants, loan agreements, or grant agreements; and

(D) any communication with the operating entity of the provider utility or its staff; and

(2) a recommendation from the executive administrator specifically identifying:

(A) any particular financial, managerial, or technical capability that the entity may lack;

(B) the basis for concluding that the entity lacks such capability by referencing the applicable state or federal law, board rule, and bond or grant agreement covenants and the action taken by the entity that suggests that training would be useful;

(C) the appropriate training course or curriculum from the approved training program and provider list; and

(D) the positions at the operating entity, whether governing body and/or employees of the operating entity, required to take the training.

(c) Upon review of an assessment by the commission or an assessment by the executive administrator recommending that training be required of an operating entity, the board will determine whether the governing body or employees of an operating entity shall be required to complete a course of training.

(1) In considering the action to be taken by the board on the assessment, the board may:

(A) decline to approve an application for financial assistance or the request for amendment to the terms or conditions of the financial assistance submitted by the provider utility based on the assessment provided to the board or for any reason identified by the board;

(B) table the action requested of the board by the operating entity based on the determination that the operating entity should complete training and that further action by the board on the request will be postponed until such time as the provider utility submits a certificate of completion of training;

(C) approve the action requested of the board by providing that the action of the board will not be implemented or performed until such time as the executive administrator is provided a certificate of completion of the required training;

(D) approve the request of the provider utility; or

(E) take such action as determined by the board.

(2) If an operating entity is required to complete training as part of the action taken by the board, the board will identify the financial, managerial, or technical capability which is to be addressed by the training and the course curriculum that the operating entity must complete.

(3) The provider utility which has an operating entity that is required to complete training as part of the action taken by the board will:

(A) select the training provider from the board approved list of training providers for required training curricula or request that the board approve an alternative curriculum or training provider by submitting to the board a proposed alternative curriculum or training provider, together with sufficient documentation for the board to evaluate the curriculum or training provider;

(B) make arrangements, including payment, with the selected training provider and assume the responsibility of insuring that the operating entity complete the training required by the board; and

(C) submit a certificate of completion from the approved training provider to the executive administrator. Upon receipt of the certificate of completion, the executive administrator shall take such actions as directed by the board in its resolution on the action requested by the provider utility.

(d) At such intervals as determined by the board, the board will consider and may approve a list of training providers that can provide any required financial, managerial, and technical training. In addition to any other information the board deems necessary or appropriate, the list shall identify:

- (1) training providers identified by name and contact information that currently provide training that is intended to improve financial, managerial, or technical capabilities of water and wastewater utilities;
- (2) the course curriculum offered by the training providers;
- (3) which managerial, financial, or technical capability that the training addresses; and
- (4) the method by which the training provider will determine that the operating entity has satisfactorily completed the required curriculum.

### §363.513 Residential Water and Sewer Connections

- (a) EDAP funds may be used to provide financial assistance to political subdivisions for plumbing connections to residences pursuant to Texas Water Code §17.9225,[Water Code,] relating to residential water and sewer connection assistance.
- (b) Definitions. The following words and terms shall have the following meanings when used in this section.
  - (1) Connection--joining the indoor water and wastewater plumbing of a residence to an existing public water supply or sanitary sewer system.
  - (2) Public System--a public water supply or sanitary sewer system.
  - (3) Public Water Supply System--a system that supplies safe drinking water as defined in Chapter 341, Health and Safety Code.
  - (4) Sanitary Sewer System--a system used to transport waste as defined by Chapter 26, Water Code.
  - (5) Yard Water Service--the residence supply piping that carries potable water from the water meter or other source of water supply to the point of connection to the residence.
- (c) Financial assistance may be provided for first-time connection to a public system to pay for the following costs:
  - (1) the costs of connecting a residence to a public water supply system constructed with financial assistance;
  - (2) the costs of installing yard water service connections;
  - (3) the costs of installing indoor plumbing facilities and fixtures;
  - (4) the costs of connecting a residence to a sanitary sewer system constructed with financial assistance;
  - (5) necessary connection and permit fees; and
  - (6) necessary costs related to the design of plumbing improvements described by this subsection.
- (d) Financial assistance under this section is limited to residences that demonstrate an inability to pay for the improvements. Proof of household income that does not exceed the definition of a low[ ]-income family as defined by the Department of Housing and Urban Development shall constitute a demonstrated inability to pay for the improvements provided for purposes of this section.
- (e) To document household income, the political subdivision shall use the board's Economically Distressed Areas Program Survey Instrument.
- (f) The political subdivision shall determine the needs related to connection of residences in the area to be served by the project to water supply and sewer services during the planning phase of a project.

§363.514 Reporting and Transparency Requirements

(a) Annually, the board shall make publicly available a report on the agency website detailing each project for which the board has provided financial assistance under Texas Water Code, Chapter 17, Subchapter K. The report must meet the requirements listed in Texas Water Code §17.937.

The Texas Water Development Board (TWDB or “board”) adopts the repeal of 31 Texas Administrative Code (TAC) §§363.504 – 508, 31 TAC §§363.510 – 363.512, and 31 TAC §363.1304(12), and language within 31 TAC §363.1309(2). The proposal is adopted without changes as published in the December 31, 2021, issue of the *Texas Register* (46 TexReg 53).

## BACKGROUND AND SUMMARY OF THE FACTUAL ISSUES FOR THE ADOPTED REPEALS.

The TWDB adopts the repeal to these sections of the rules because new rules 31 TAC §§363.504 – 363.508 and 31 TAC §§363.510 – 363.512 are being adopted elsewhere in this issue of the Texas Register to implement legislative changes from House Bill 2452, 86<sup>th</sup> Legislative Session. Repeals to 31 TAC §§ 363.1304(12) and language within 363.1309(b)(2) are also being adopted to implement changes by House Bill 1905 from the 87<sup>th</sup> Texas Legislature relating to relieving regional water planning groups of certain duties.

## SECTION BY SECTION DISCUSSION OF THE ADOPTED REPEALS

### 31 TAC §363.504 Required Application Information

Section 363.504 is repealed due to the addition of a new §363.504 covering the intended use plan and project priority list used for administering the program. The new §363.504 is adopted elsewhere in this issue of the Texas Register. The required application information for the full application is adopted under the new §363.505 found elsewhere in the Texas Register.

### 31 TAC §363.505 Application Review and Assistance Conditions

Section 363.505 is repealed due to addition of a new §363.505 covering required information for the full application used for administering the program. The new §363.505 is adopted elsewhere in this issue of the Texas Register. The full application review and assistance conditions are adopted under the new §363.506 found elsewhere in the Texas Register.

### 31 TAC §363.506 Calculation of Financial Assistance

Section 363.506 is repealed due to addition of a new §363.506 covering review of the full application and assistance conditions used for administering the program. The new §363.506 is adopted elsewhere in this issue of the Texas Register. The calculation of financial assistance is adopted under the new §363.508 found elsewhere in the Texas Register.

### 31 TAC §363.507 Terms of Financial Assistance

Section 363.507 is repealed due to addition of a new §363.507 that is reserved for future use. The new §363.507 is adopted elsewhere in this issue of the Texas Register. The terms of financial assistance are adopted under the new §363.510 found elsewhere in the Texas Register.

### 31 TAC §363.508 Required Sewer Connections

Section 363.508 is repealed due to addition of a new §363.508 covering calculation of financial assistance used for administering the program. The new §363.508 is adopted elsewhere in this issue of the Texas Register. The requirements for required sewer connections are adopted under the new §363.511 found elsewhere in the Texas Register.

#### 31 TAC §363.510 Financial, Managerial, and Technical Training Requirements

Section 363.510 is repealed due to addition of a new §363.510 covering terms of financial assistance used for administering the program. The new §363.510 is adopted elsewhere in this issue of the Texas Register. The financial, managerial, and technical training requirements are adopted under the new §363.512 found elsewhere in the Texas Register.

#### 31 TAC §363.511 Temporary Continuation of Funding

Section 363.511 is repealed because the authorizing statute expired and was not renewed. The application of this section of the rule to the program expired by operation of law in on September 1, 2009.

#### 31 TAC §363.512 Projects Related to Implementation of the Water Plan

Section 363.512 is repealed because the language related to the state water plan and prior funding that is no longer available is no longer needed for program administration.

#### 31 TAC §363.1304(12) Prioritization Criteria

Section 363.1304(12) is repealed because House Bill 1905 of the 87th Legislature removed the prioritization requirement for Regional Water Planning Groups and its inclusion would be inconsistent with statute.

#### 31 TAC §363.1309(2) Findings Required

Section 363.1309(2) is modified to implement the repeal of Texas Water Code §16.053(q) and the amendment made by House Bill 1905, 87th Legislative Session (relating to Infrastructure Financing Surveys). The revision removes the requirement for Regional Water Planning Groups to perform an infrastructure financing analysis.

#### REGULATORY IMPACT ANALYSIS DETERMINATION (Texas Government Code §2001.0225)

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 these repeals is to implement legislative changes that will enhance the effectiveness and administration of the program.

Even if the adopted repeals were major environmental rules, 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 §§17.921, 17.9225, 17.927, 17.9275, 17.933, and 17.936. Therefore, the adopted repeals does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

#### TAKINGS IMPACT ASSESSMENT (Texas Government Code §2007.043)

The board evaluated the adopted repeals and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the repeals is to implement new requirements in state law and enhancements in program management. The adopted repeals would substantially advance this stated purpose by ensuring consistency with current law and improving the effectiveness of the program.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to the adopted repeals 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 implements the Economically Distressed Areas Program.

Nevertheless, the board further evaluated the adopted repeals and performed an assessment of whether it constitutes a taking under Texas Government Code Chapter 2007. Promulgation and enforcement of the adopted repeals would be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden, 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 repeal. In other words, this rule requires compliance with state law regarding financial assistance under the Economically Distressed Areas Program without burdening or restricting or limiting the owner's right to property and reducing its value by 25% or more. Therefore, the adopted rulemaking does not constitute a taking under Texas Government Code, Chapter 2007.

PUBLIC COMMENTS (Texas Government Code §2001.033(a)(1))

No comments were received by the end of the public comment period on January 31, 2022, and no changes were made.

STATUTORY AUTHORITY (Texas Government Code §2001.024(a)(3))

The repeals are 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, and also under the authority of Water Code §§15.439, 15.537, 17.921, 17.9225, 17.927, 17.9275, 17.933, and 17.936.

Texas Water Code, Chapter 17, Subchapter K, Chapter 15.435(g), 15.437(d) are affected by this rulemaking.

<rule>

§363.504 Required Application Information

§363.505 Application Review and Assistance Conditions

§363.506 Calculation of Financial Assistance

§363.507 Terms of Financial Assistance

§363.508 Required Sewer Connections

§363.510 Financial, Managerial, and Technical Training Requirements

§363.511 Temporary Continuation of Funding

§363.512 Projects Related to Implementation of the Water Plan