

## AGENDA ITEM MEMO

**BOARD MEETING DATE:** January 19, 2023

**TO:** Board Members

**THROUGH:** Jeff Walker, Executive Administrator  
Ashley Harden, General Counsel  
Rebecca Trevino, Chief Financial Officer

**FROM:** Jessica N. Peña, Deputy Executive Administrator, Water Supply & Infrastructure

**SUBJECT:** Chapter 363, Subchapter J Rule Amendments Adoption

### **ACTION REQUESTED**

Consider authorizing the publication of adopted amendments to 31 Texas Administrative Code (TAC) Chapter 363, Subchapter J to implement House Bill (HB 1052) (86<sup>th</sup> Regular Session).

### **BACKGROUND**

The 86<sup>th</sup> Texas Legislature enacted HB 1052, amending applicable statutes related to the State Participation Program. Changes made by HB 1052 included (1) adding interregional water supply projects as eligible projects for funding through State Participation and (2) adding a State Participation II account to fund aquifer storage and recovery and desalination projects. This rulemaking implements HB 1052 by making required statutory changes to the rule language and by providing clarity to procedural issues impacted by those statutory changes. The rules also make non-substantive changes to provide greater clarity, update citations, and correct punctuation.

The proposed rules were published in the October 21, 2022, issue of the *Texas Register* for a 30-day public comment period. No comments were received and no changes were made to the proposed rules.

### **KEY ISSUES**

The adopted rules make the following key changes:

<b>Our Mission</b>	:	<b>Board Members</b>
Leading the state's efforts in ensuring a secure water future for Texas and its citizens	:	Brooke T. Paup, Chairwoman   George B. Peyton V, Board Member   L'Oreal Stepney, P.E., Board Member
	:	Jeff Walker, Executive Administrator

1. Add interregional water supply projects as eligible projects under the State Participation Program and make conforming changes throughout, including a prioritization system
2. Add State Participation II Account and make conforming changes throughout
3. Amend language related to excess capacity due to statutory changes stating the limitations do not apply to State Participation II and to provide an option for the Board to waive these limitations upon showing of good cause
4. Amend language related to timing of applications to allow prioritization and consideration for commitment at any point during the year

**RECOMMENDATION**

Staff recommends authorizing the publication of the proposed amendments to 31 TAC Chapter 363, Subchapter J.

Attachment

1. Preamble and adopted rule revisions

The Texas Water Development Board (TWDB) adopts 31 Texas Administrative Code §§363.1001 - .1004, 363.1006 - .1008, 363.1012, and 363.1013 related to the State Participation Program. The proposal is adopted without changes as published in the October 21, 2022, issue of the *Texas Register* (47 TexReg 6968).

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

The TWDB adopts amendments to 31 TAC §§363.1001 - .1004, 363.1006 - .1008, 363.1012, and 363.1013 concerning the State Participation Program. The 86th Texas Legislature passed House Bill 1052 that revised Water Code Chapter 16 regarding the provisions of the State Participation Program.

The bill added interregional water supply projects as eligible projects for funding from the state participation account. It included a condition that at least half of the funds used in a fiscal year from the account be used for interregional water projects that benefit multiple water planning regions. The bill requires the board to establish selection criteria to prioritize interregional water supply project applications received. The bill also requires the board and the Texas Commission on Environmental Quality to enter into a memorandum of understanding for the expedited approval of permits for interregional water supply projects.

The bill also created a State Participation Account II to provide financial assistance for the development of desalination or aquifer storage and recovery facilities through the acquisition of a facility or ownership interest in a facility. Facilities receiving funding must be included in the state water plan. The bill required the board to establish a point system to prioritize desalination or aquifer storage and recovery facility financial assistance applications received. The issuance of bonds for these projects will be limited to \$200 million. If the board has not provided financial assistance for a desalination or aquifer storage and recovery facility before September 1, 2024, the board will be unable to do so after that date.

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

##### *31 TAC §363.1001 Scope of Subchapter*

Section 363.1001 is amended to clarify that the rule requirements related to applicants and participating entities do not apply when the TWDB is acting singly in implementing a project.

##### *31 TAC §363.1002 Definition of Terms*

Section 363.1002(2) is amended to add “interregional” to the definition of facility.

Section 363.1002(6) is added to define the term “State Participation Account II.”

Section 363.1002(7) is renumbered to accommodate the addition of Section 363.1002(6).

##### *31 TAC §363.1003 Board Participation*

Section 363.1003(a) is added to clarify that the section does not apply to use of the State Participation Account II. Section 363.1003(c) is added to state that the Board may waive the

excess capacity limitations of subsection (b) upon showing of good cause. The Board may do this at its sole discretion. The excess capacity limitations set in this rule are not required by statute.

Section 363.1003(b) is renumbered to accommodate the addition of Section 363.1003(a) and amended to delete “Texas Water Development Fund I,” which has been replaced by the Texas Water Development Fund II.

*31 TAC §363.1004 Application for Assistance*

Section 363.1004(10)(F) is amended to reflect legislative changes made by HB 3339, 86<sup>th</sup> Legislative Session.

*31 TAC §363.1006 Prioritization System*

Section 363.1006(a) is amended to allow prioritization and consideration for commitment at any point during the year. This will create greater flexibility for the TWDB and potential applicants. Sections 363.1006(a) and (c) are also amended to clarify that interregional water supply projects will be prioritized separately from other projects.

*31 TAC §363.1007 Prioritization Criteria*

Section 363.1007(b) is amended to mention the exception of newly added subsection (c).

Section 363.1007(c) is added to provide prioritization criteria for interregional water supply projects.

*31 TAC §363.1008 Determination*

Section 363.1008(a) is amended to mention the exception of the newly added subsection for the State Participation Account II.

Section 363.1008(a)(5) is amended to add “interregional” regarding the facility.

Section 363.1008(b) is added to list required Board findings for State Participation II projects, as required by HB 1052.

*31 TAC §363.1012 Requirements of Application*

Section 363.1012 is amended to correct punctuation.

*31 TAC §363.1013 Notice of Participating Political Subdivision and Others*

Section 363.1013 is amended to correct punctuation.

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

The TWDB reviewed the 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.

Even if the 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 §§16.131, 16.145, 16.146, 16.182, and 17.957. Therefore, this rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

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

The TWDB evaluated the rule 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 legislative changes. The rule would substantially advance this stated purpose by adding language related to the legislative changes.

The TWDB’s analysis indicates that Texas Government Code, Chapter 2007 does not apply to this 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 TWDB is the agency that provides financial assistance for the construction of water projects through the State Participation Program.

Nevertheless, the TWDB further evaluated this rule and performed an assessment of whether it constitutes a taking under Texas Government Code Chapter 2007. Promulgation and enforcement of this rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject rule 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 rule. In other words, this rule requires compliance with state law regarding financing water supply projects. Therefore, the rule does not constitute a taking under Texas Government Code, Chapter 2007.

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

The public comment period ended November 21, 2022. No comments were received and no changes were made.

STATUTORY AUTHORITY (Texas Government Code §2001.033(a)(2))

The amendment is adopted under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Water Code §§16.131, 16.145, 16.146, 16.182, and 17.957.

This rulemaking affects Texas Water Code, Chapter 16, Subchapters E and F.

<rule>

TITLE 31 NATURAL RESOURCES AND CONSERVATION

PART 10 TEXAS WATER DEVELOPMENT BOARD

CHAPTER 363 FINANCIAL ASSISTANCE PROGRAMS

SUBCHAPTER J STATE PARTICIPATION PROGRAM

§363.1001. Scope of Subchapter.

The sections of this subchapter shall pertain to applications for financing state participation projects authorized by the Texas Water Code, Chapter 16, Subchapters E and F. Unless in conflict with the provisions of this subchapter, the provisions of Subchapter A of this chapter (relating to General Provisions) shall apply to state participation projects. The requirements of this subchapter do not apply if the board is acting singly.

§363.1002. Definitions of Terms.

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

- (1) Excess capacity--The difference between the foreseeable needs of the area to be served by the useful life of the facility and the existing needs for the area to be served by the facility.
- (2) Facility--A regional or interregional facility for which an application has been submitted requesting financial assistance from the state participation account and that includes sufficient capacity to serve the existing needs of the applicant and excess capacity.
- (3) Alternate facility--A construction project that would be necessary to serve the excess capacity of the area to be served by the facility in the event that the facility was not initially constructed to

meet the excess capacity.

(4) Existing needs--Maximum capacity necessary for service to the area receiving service from the facility for current population and including the service necessary to serve the estimated population in the area ten years from the date of the application.

(5) New water supply project--A project which will create new, usable water supply through the construction of a reservoir, dam, stormwater retention basin, or the development of conservation or innovative technologies including, but not limited to, desalinization, demineralization, other advanced water treatment practices, floodwater harvesting, or aquifer storage and recovery.

(6) State Participation II Account—An account within the State Participation Account for the development of desalination or aquifer storage and recovery facilities under Texas Water Code 16.146.

(7) Water plan project--A project which is identified as a recommended strategy in the water plan.

#### §363.1003. Board Participation.

(a) This section does not apply to use of the State Participation Account II.

(b) Unless otherwise directed by legislation, or in accordance with subsection (c), the board will only use the State Participation Account of the Texas Water Development Fund II to provide financial assistance for all or a part of the cost to construct the excess capacity of:

(1) an eligible new water supply or water plan project where:

(A) at least 20% of the total facility capacity of the proposed project will serve existing need, or

(B) the applicant will finance at least 20% of the total project cost from sources other than the State Participation Account; and

(2) all other projects eligible for state participation where:

(A) at least 50% of the total facility capacity of the proposed project will serve existing need, or

(B) the applicant will finance at least 50% of the total project cost from sources other than the State Participation Account.

(c) The board, in its sole discretion, may waive the requirements of subsection (b) upon a showing of good cause.

#### §363.1004. Application for Assistance.

In addition to any other information that may be required by the executive administrator or the

board, the applicant shall provide:

(1) 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 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 or the board;

(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, §551.001, et seq.) and after providing all such notice as required by such Act;

(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 issue of any kind or nature by EPA, Texas Commission on Environmental Quality (commission), 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;

(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;

(3) a proposed schedule for purchase of the board's interest in the project;

(4) copies of any proposed or existing contracts for consultant financial advisory, engineering, 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;

(5) 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;

(6) if the applicant provides or will provide water supply or treatment 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;

(7) 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;

(8) if payment under the master agreement is based either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts under which applicant's gross income is expected to accrue. Prior to release of funds, an applicant shall submit executed copies of such contracts to the executive administrator;

(9) if an election is required by law to authorize participation in the project, the executive administrator may require applicant to provide the election date and election results as to each proposition necessary for the participation of the applicant as part of the application.

(10) Applicant shall submit an 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:

(A) description and purpose of the project;

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

(C) the cost of the project;

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

(E) sufficient information to evaluate the engineering feasibility; and

(F) maps and drawings as necessary to locate and describe the project service area. The executive administrator may request additional information or data as necessary to evaluate the project.

(11) a water conservation plan prepared in accordance with §363.15 of this title (relating to Required Water Conservation Plan).

#### §363.1006. Prioritization System.

(a) The executive administrator will prioritize all applications in accordance with §363.1007 of this title and may prioritize projects under §363.1007(b) and (c) separately. The executive administrator will provide the prioritization to the board for approval. The executive administrator may set additional application deadlines, prioritize applications, and present the prioritization and those applications to the board for a commitment if the executive administrator deems it necessary in order to utilize available funds in any fiscal year. To be considered for

prioritization, an applicant must provide adequate information to establish that the applicant qualifies for state participation 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 to applicants detailed information on the abridged application necessary for prioritization. If an applicant submits an abridged application for prioritization purposes, the applicant must submit a complete application to the board within 30 days after the board meeting at which the applicant's project received priority for funding, or the project will lose its priority ranking and the board may commit to other projects consistent with the prioritization.

(b) Prior to each board meeting at which applications may be considered, the executive administrator shall:

(1) for each application that the executive administrator has determined has adequate information for prioritization purposes, prioritize the applications using the criteria identified in §363.1007 of this title (relating to Prioritization Criteria).

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

(3) identify to the board, the total amount of funds available in the State Participation Account for new applications.

(c) When making commitments for financial assistance from the State Participation Account, the board will consider projects in descending numerical order based on the priority assigned to the application according to §363.1007 of this title. The board will consider the next application on each list only if there are funds available in the account and allocated to the type of projects under consideration sufficient to fund all or, if acceptable to the applicant, a part of the application.

(d) The board shall determine the amount of funds available for water plan projects and shall prioritize and consider those separately from projects that are not water plan projects.

#### §363.1007. Prioritization Criteria.

(a) The board will give priority to projects that the legislature has determined shall receive priority for financial assistance from the State Participation Account.

(b) Except as provided by subsection (c), after first prioritizing projects that the legislature has determined shall receive priority, the factors to be used by the executive administrator to prioritize the remaining projects seeking financial assistance from the State Participation Account shall be as follows:

(1) water development projects will receive priority over wastewater projects;

(2) priority will be given to projects which have received previous board funding for facility

planning, design, or permitting for the project;

(3) priority will be given to entities that:

(A) have already demonstrated significant water conservation savings, as determined by comparing the highest rolling five-year average gallons per capita per day since 1980 to the average gallons per capita per day for the most recent four-year period; or

(B) will achieve significant water conservation savings by implementing the proposed project for which the financial assistance is sought, as determined by comparing the conservation to be achieved by the project with the average gallons per capita per day for most recent four-year period.

(4) priority will be given to projects which have the earliest identifiable need, as outlined in the water plan.

(c) Notwithstanding subsection (b), any interregional water supply projects seeking financial assistance from the State Participation Account for interregional water supply projects under Texas Water Code §16.145 shall be prioritized in accordance with an applicable request for proposals, which shall prioritize projects that:

(1) maximize the use of private financial resources;

(2) combine the financial resources of multiple water planning regions; and

(3) have a substantial economic benefit to the regions served by:

(A) affecting a large population;

(B) creating jobs in the regions served; and

(C) meeting a high percentage of the water supply needs of the water users served by the project.

§363.1008. Determination.

(a) Except as provided by subsection (b), the board may provide funding from the State Participation Account when the information available to the board is sufficient for the board to determine that:

(1) it is reasonable to expect that the state will recover its investment in the facility based upon a determination that the revenue to be generated by the projected number of customers served by the facility will be sufficient to purchase the excess capacity owned by the state;

(2) the estimated cost of the facility as set forth in the application exceeds the current financing capabilities of the area to be served by the facility based on a determination that the existing rates of the applicant available for payment of the facility collected from the number of connections at

the end of construction and other revenues available for payment of the facility;

(3) the optimum regional development cannot be reasonably financed by local interests based on a determination that the estimated cost to construct the alternate facility and the revenue to be generated by the projected number of customers of the facility;

(4) the public interest will be served by acquisition of the facility based on a determination that the cost of the facility to the public are reduced by the state's participation in the facility; and

(5) the facility to be constructed or reconstructed contemplates the optimum regional or interregional development which is reasonably required under all existing circumstances of the site based on a determination that design capacity of the components of the facility are sufficient to meet the foreseeable needs of the area over the useful life of the facility.

(b) The board may provide funding from the State Participation Account II when the information available to the board is sufficient for the board to determine that:

(1) it is reasonable to expect that the state will recover its investment in the facility;

(2) the public interest will be served by the acquisition of the facility based on a determination that the cost of the facility to the public are reduced by the state's participation in the facility; and

(3) the project is a recommended water strategy in the most recent state water plan.

#### §363.1012. Requirements of Application.

A prospective purchaser of the board's ownership interest in a facility or of the use of such board interest other than under terms specified in the master agreement, shall submit an application in the form and number prescribed by the executive administrator. The executive administrator may request any additional information needed to evaluate the application and may return any incomplete applications.

#### §363.1013. Notice to Participating Political Subdivision and Others.

Upon receipt of an application by a prospective purchaser of the board's ownership interest in a facility or use of the facility, the board will send notice of its receipt by regular United States mail to all co-owners of the facility and any users of the facility or water from the facility.