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AGENDA ITEM MEMO

BOARD MEETING DATE: May 9, 2024

TO: Board Members

THROUGH: Bryan McMath, Interim Executive Administrator
Ashley Harden, General Counsel

FROM: Carla G. Guthrie, Ph.D., Director, Surface Water
John T. Dupnik, P.G., Deputy Executive Administrator, Water Science
and Conservation

SUBJECT: Adoption of rulemaking for 31 Texas Administrative Code Chapter 360,
relating to the designation of river and coastal basin boundaries

ACTION REQUESTED

Consider authorizing the publication of the adoption of amendments to 31 Texas Administrative Code Chapter (TAC) Chapter 360, relating to the designation of river and coastal basin boundaries.

BACKGROUND

Prior to the passage of Senate Bill 1 (1997), the Texas Water Code required the state water plan to define and designate river basins and watersheds as separate units for the purpose of water development and interbasin transfers. However, Senate Bill 1 amended the Water Code to require that the TWDB designate river basins and watersheds by rule. In November 1998, the TWDB adopted 31 TAC Chapter 360, relating to the designation of river and coastal basins, in accordance with the requirement of Texas Water Code Section 16.051(c). The adopted rules largely maintained the historical designations—that of 15 major river basins and 8 coastal watersheds—which were already in use and which also had become the standard for water rights permitting actions. At the time of adoption, the basin boundaries were designated as lines delineated on U.S. Geological Survey quadrangle “quad” maps which had been digitized and stored on CD-ROMs. As such, the existing rules reference the use of CD-ROMs. However, these digital files are now stored via other electronic means, with archival paper copies maintained by the Texas Geographic Information Office.

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KEY ISSUES

The proposed amendments to 31 TAC Chapter 360 serve to modernize the rule language and update all references to the manner in which the TWDB stores digital files of the maps designating the state's river and coastal basins. There were no proposed changes to the digital images that display the basin boundaries or to the boundaries themselves.

Publication of proposed amendments to 31 TAC Chapter 360 was approved by the Board on January 18, 2024. The proposed rules were posted to the *Texas Register* on February 2, 2024, (49 *Texas Register* 489). Public comment was accepted for 30 days until March 4, 2024. No public comments were received.

RECOMMENDATION

The Executive Administrator recommends adoption of previously proposed amendments to 31 TAC Chapter 360 relating to the designation of river and coastal basin boundaries.

Attachment:

1. Adoption of rulemaking to be filed with the *Texas Register*.

The Texas Water Development Board (TWDB) adopts 31 Texas Administrative Code (TAC) §§360.1, 360.2, and 360.3 concerning Designation of River and Coastal Basins. The proposal is adopted without changes as published in the February 2, 2024, issue of the *Texas Register* (49 Tex Reg 489) and will not be republished.

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

31 TAC, Chapter 360 contains the agency's rules related to the designation of river and coastal basins in accordance with the requirement of Texas Water Code Section 16.051(c). The TWDB proposed amendments to the rules to modernize the rule language and reflect the new manner that the TWDB stores the digital files of the maps of that designate the state's river and coastal basins.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

In §360.1, the section is adopted with amendments that modernize the rule language.

In §360.2, the section is adopted with amendments that modernize the rule language.

In §360.3, the section is adopted with amendments updating how the TWDB stores the digital files of the state's designated river and coastal basins. The section is also amended to remove references to the storage of a "quad map" on a CD-ROM, because CD-ROMs are no longer the medium the TWDB uses to store digital files. As stated in the proposal for rulemaking, the amendments to this section do not change any of the state's designations of its river and coastal basins.

Additionally, in §360.3, subsections (a) through (w) contain figures that were not proposed to be amended in the proposal for rulemaking. No changes are adopted to subsection (a) through (w) in §360.3.

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 modernize the rule language and to update how the TWDB stores the digital files of the designations of the state's coastal and river basins.

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 proposed solely under the general powers of the agency, but rather the specific statutory authorization for this specific rulemaking is authorized by Texas Water Code §16.051(c). 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 this rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this proposed amendment is to update how the TWDB stores the digital files of the designations of the state's coastal and river basins and modernize the rule language.

The TWDB's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation under state law, which is exempt under Texas Government Code §2007.003(b)(4). The TWDB is the agency charged with designating the state's coastal and river basins in accordance with Chapter 16, Texas Water Code.

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 proposed rule 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, 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 proposed rule is merely an amendment to reflect how the TWDB stores the digital files of the designations of the state's coastal and river basins and modernize the rule language. It does not require regulatory compliance with any persons or political subdivisions.

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 March 4, 2024. No public comments were received; therefore, no revisions to the rule as proposed will be made and the rule as published in 49 Tex Reg 489 will not be republished.

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 under the authority of Texas Water Code §16.051(c).

This rulemaking affects Water Code, §16.051(c).