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AGENDA ITEM MEMO

BOARD MEETING DATE: April 10, 2025

TO: Board Members

THROUGH: Bryan McMath, Executive Administrator
Ashley Harden, General Counsel
Jessica Peña, Deputy Executive Administrator, Water Supply and Infrastructure

FROM: Marvin Cole-Chaney, Director, Program Administration and Reporting
Trae Tillis, State Programs Manager, Program Administration

SUBJECT: Adoption of Rulemaking for 31 Texas Administrative Code Chapter 363, Subchapter N, Related to the Creation of a New Subchapter for the New Water Supply Fund for Texas.

ACTION REQUESTED

Consider adopting the publication of proposed amendments to 31 Texas Administrative Code Chapter 363 relating to the creation of a new subchapter for the New Water Supply Fund for Texas.

BACKGROUND

Chapter 363 contains the agency's programmatic rules related to financial assistance programs. The proposed creation of subchapter N will implement legislation enacted by the 88th Texas Legislature under Senate Bill 28, amending the Texas Water Code Chapter 15, Texas Water Assistance Program, to undertake the financing of projects that will lead to seven million acre-feet of new water supplies by December 31, 2033.

KEY ISSUES

At its November 6, 2024 meeting, the Board authorized publishing the Subchapter N for the New Water Supply Fund for Texas document for public comment. The public comment period extended from November 22 to December 23, 2024. During the comment process, the TWDB received written comments from eight organizations and two individuals. The TWDB appreciates all the comments that were submitted.

This adoption adds subchapter N to 31 Texas Administrative Code Chapter 363 to implement Senate Bill 28 establishing the procedures by which the TWDB will administer the New Water Supply for Texas Fund.

Our Mission

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

Board Members

L'Oreal Stepney, P.E., Chairwoman | Tonya R. Miller, Board Member
Bryan McMath, Executive Administrator

The adoption includes the definition of terms, use of funds, and determination of availability, including the publication of notice requesting applications, application requirements, consideration of applications, findings required, and terms.

RECOMMENDATION

The Executive Administrator recommends adopting the publication of new rules to 31 Texas Administrative Code Chapter 363 relating to the creation of the New Water Supply for Texas Fund.

Attachment(s):

1. Draft Texas Register Notice of Adoption of 31 Texas Administrative Code § 363.1401-1408 and Response to Comments

The Texas Water Development Board (TWDB) adopts amendments to 31 Texas Administrative Code (TAC) Chapter 363 by adding new §§363.1401, 363.1402, 363.1403, 363.1404, 363.1405, 363.1406, 363.1407, and 363.1408. The proposal is adopted with changes as published in the November 22, 2024, issue of the *Texas Register* (49 Tex. Reg. 9489).

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

The 88th Texas Legislature enacted Senate Bill 28, amending Texas Water Code Chapter 15, Texas Water Assistance Program, to add a new subchapter creating the New Water Supply Fund for Texas. The new legislation directs the Board, by rule, to finance projects through the fund that will lead to seven million acre-feet of new water supplies by December 31, 2033.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

Subchapter N is added to 31 Texas Administrative Code Chapter 363.

Section 363.1401. Scope

The adopted new section provides that the programs of financial assistance under Texas Water Code, Chapter 15, Subchapter C-1 will be governed by this subchapter and, unless in conflict with this subchapter, the provisions of 31 TAC Chapter 363 Subchapter A will be applied to the financial assistance and projects under this subchapter.

Section 363.1402. Definition of Terms

The adopted new section includes new definitions for terms commonly used in the Subchapter to provide clarity of the terms in the context used.

Section 363.1403. Use of Funds

The adopted new section provides the ways that the Board may or may not use the Fund.

Section 363.1404. Determination of Availability

The adopted new section provides the methods by which the Board will obtain the amount within the Fund and how the Board will seek New Water Supply projects.

Section 363.1405. Complete Application Requirements

The adopted new section provides what information must be included in a project application under the Fund.

Section 363.1406. Consideration of Applications

The adopted new section lists what the Board may consider when evaluating an application.

Section 363.1407. Findings

The adopted new section identifies what the Board must find when granting financial assistance for an application and the process for placing the application before the Board for approval.

Section 363.1408. Terms of Financial Assistance

The adopted new section provides what the Board must determine when granting financial assistance and limits the term length to up to 30 years.

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 establish the procedures by which the TWDB will implement the New Water Supply for Texas Fund.

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 §15.154. Therefore, this adopted 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 rule is to establish the procedures by which the TWDB will implement the New Water Supply for Texas Fund. The rule would substantially advance this stated purpose by providing the procedures and requirements associated with TWDB’s implementation of the New Water Supply for Texas Fund.

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 is directed to implement the New Water Supply for Texas Fund.

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 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 establishes the procedures by which the TWDB will implement the Fund. Therefore, the adopted rule does not constitute a taking under Texas Government Code, Chapter 2007.

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

The following comments were received from the National Wildlife Federation, Sierra Club Lone Star Chapter, The Nature Conservancy Texas, Hill Country Alliance, Bayou City Waterkeeper, and Galveston Bay Foundation (National Wildlife Federation, et al.) provided joint comments and the Sierra Club Lone Star Chapter provided additional comments on its own.

Regarding

§363.1402. Definition of Terms.

Comment

The National Wildlife Federation, et al. commented that there appears to be a typographical error in subpart headings listed at 363.1402(3)(E) and the rule should read: The development of infrastructure to transport water that is made available by a project listed in (A) - (D).

Response

TWDB agrees with this comment and the error has been addressed.

Comment

The National Wildlife Federation, et al. and the Sierra Club Lone Star Chapter commented that the proposed definition of "water conservation" has no actual role in the rules, therefore the definition should be removed.

Response

TWDB agrees with these comments and the definition for Water Conservation has been removed from the rule.

Comment

The Sierra Club Lone Star Chapter commented that the definition for "New Water Supply" be broadened to include water reuse, and conjunctive use of ground and surface water.

Response

TWDB appreciates the comment to broaden the definition for “New Water Supply”, but it has determined that the recommended change is not appropriate as the current definition aligns with the water supply project types listed at Tex. Water Code 15.153 (b)(1). No changes were made in response to this comment.

Regarding

§363.1403. Use of Funds.

Comment

The Sierra Club Lone Star Chapter commented that subparts should be added to the rule to prioritize environmentally sustainable projects and to ensure equity for disadvantaged communities in fund distribution.

Response

TWDB appreciates the comment. TWDB has determined that the recommended change is not appropriate as Tex. Water Code Ch. 15 Subchapter C-1 does not authorize or direct TWDB to prioritize environmentally sustainable projects or ensure equity for disadvantaged communities in fund distribution. There are other TWDB programs, such as the Economically Distressed Areas Program that are authorized to address issues pertaining to economically less advantaged areas of the state. No changes were made in response to this comment.

Regarding

§363.1405. Complete Application Requirements.

Comment

The Sierra Club Lone Star Chapter commented that the TWDB should include requirements for environmental compliance and equity in the list of application requirements.

Response

TWDB appreciates the comment to include requirements for environmental compliance and equity in the list of application requirements, but it has determined that the recommended changes are not needed as the changes would be redundant when taken into the consideration the General Application Procedures under 31 Tex. Admin. Code Ch.363 Subchapter A, which already provide for environmental review, or would be beyond the TWDB’s authority to administer the fund under Tex. Water Code Ch. 15 Subchapter C-1. No changes were made in response to this comment.

Regarding

§363.1406. Consideration of Applications.

Comment

The National Wildlife Federation, et al. commented that a new subpart should be added to allow for additional information not included in the application for the board's consideration.

Response

TWDB agrees and has added language that aligns more with language used in subchapter A of the same chapter.

Comment

The Sierra Club Lone Star Chapter commented that TWDB should consider environmental impacts in the project evaluation criteria.

Response

TWDB appreciates the comment to consider environmental impacts in the project evaluation criteria, but it has determined that the recommended change is beyond what Tex. Water Code § 15.154 (b) authorizes the TWDB to consider. TWDB currently does an environmental assessment for projects under 31 TAC § 363.14 and the projects will still be subject to all applicable environmental protection laws. No changes were made in response to this comment.

Regarding

§363.1407. Findings Required.

Comment

The National Wildlife Federation, et al. commented that a new subpart be added stating the section does not limit what the board may take into consideration when making a finding on an application for financial assistance.

Response

TWDB appreciates the comment, but it has determined that the recommended change is not appropriate. The current language regarding specific required findings by the board is taken from Tex. Water Code 15.154 (c). The statute further provides the board may consider "other relevant factors" before approving an application. No changes were made in response to this comment.

Comment

The Sierra Club Lone Star Chapter commented that TWDB should incorporate evaluations of environmental impacts when deciding on granting applications.

Response

TWDB appreciates the comment to incorporate evaluations of environmental impacts when deciding on granting applications, but it has determined that the recommended change would be adding language that is not currently present in Tex. Water Code § 15.154 (c). TWDB currently does an environmental assessment for projects under 31 TAC § 363.14 and the projects will still be subject to all applicable environmental protection laws. No changes were made in response to his comment.

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

The new rules are 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 §15.154.

This rulemaking affects Texas Water Code, Chapter 15.

SUBCHAPTER N. NEW WATER SUPPLY FOR TEXAS FUND.

§363.1401. Scope of Subchapter N.

This subchapter shall govern the board's programs of financial assistance under Texas Water Code, Chapter 15, Subchapter C-1. Unless in conflict with the provisions of this subchapter, the provisions of Subchapter A of this chapter (relating to General Provisions) apply to projects under this subchapter.

§363.1402. Definition of Terms.

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

(1) Fund--The New Water Supply for Texas Fund.

(2) Brackish--Water above 1,000 milligrams per liter of total dissolved solids (TDS).

(3) New Water Supply--means only:

(A) Marine and Brackish water desalination projects;

(B) Produced water treatment projects, other than projects that are only for purposes of disposal of or supply of water related to oil and gas exploration;

(C) Aquifer storage and recovery projects;

(D) Water supply projects of any type, that result in the acquisition or delivery of water from states other than Texas to locations within Texas; and

(E) The development of infrastructure to transport water that is made available by a project listed in (A) - (D).

(4) Water Need--Has the meaning assigned by §357.10 of this Title.

(5) Water User Group-- Has the meaning assigned by §357.10 of this Title.

§363.1403. Use of Funds.

(a) The board may use the Fund for financial assistance to an eligible political subdivision for a New Water Supply project.

(b) The board may use the Fund to make transfers to eligible programs.

(c) The board reserves the right to limit the amount of financial assistance available to an individual entity.

(d) Financial assistance may not be used for expenses associated with the maintenance or operation of a New Water Supply project.

§363.1404. Determination of Availability.

(a) Periodically, or at the request of the board, the executive administrator will present to the board:

(1) a statement of the total money available to the Fund; and

(2) a recommendation identifying the amount of money from the Fund that may be made available to eligible applicants for financial assistance, including any subsidies.

(b) The board may approve the final allocations of money from the Fund for different purposes;

(c) Upon the approval of the board, the executive administrator will publish notice requesting applications for projects, which will identify the timing for mandatory preapplication meetings, and must include:

(1) the funds available for New Water Supply projects;

(2) the types of projects for which applications are being solicited;

(3) eligibility criteria;

(4) structure of financial assistance;

(5) the method and criteria for evaluation and approval of applications by the board;

(6) any requirements to be applied to the use of financial assistance in addition to the requirements set forth in this chapter; and

(7) the date by which the application must be submitted to the executive administrator.

§363.1405. Complete Application Requirements.

(a) All applications must include:

(1) Evidence the applicant has conducted, with appropriate notice, a public hearing concerning the project;

(2) Information, sufficient for the board's consideration of the application, regarding the intended end users of the water supply, the needs of the area to be served by the project, the expected benefit of the project to the area, the relationship of the project to the water supply needs of this state overall, and the relationship of the project to the state water plan; and

(3) The total cost of the project, the total volume of annual water supply, the unit cost of the water supply, the reliability of the water supply, the timeline for development, and the potential impacts of the project, all of which must be developed and provided by the applicant as part of the application in accordance with all requirements of §357.34(e) of this Title (related to Identification and Evaluation of Potentially Feasible Water Management Strategies and Water Management Strategy Projects) and associated guidance.

(b) Applications may include letters of support from regional water planning groups, wholesale or retail water suppliers, customers, or any other member of the public that would be affected by the project.

§363.1406. Consideration of Applications.

When evaluating applications the board may consider:

(1) The sponsor of the project;

(2) The availability of money or revenue to the political subdivision from all sources for the ultimate repayment of the cost of the project, including all interest;

(3) The Water User Groups to be served by the project and the volume of water supply allocated to each;

(4) The identified Water Needs of the benefitting Water User Groups to be served by the project;

(5) The expected water supply benefit relative to the Water Needs associated with the Water User Group beneficiaries;

(6) The relationship of the project to the Water Needs of the state overall as defined by §357.10;.

(7) The relationship of the project to the state water plan;

(8) Any information contained in the application; and

(9) Any additional information requested by the executive administrator as necessary to complete the financial, legal, engineering, and environmental reviews.

§363.1407. Findings Required.

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

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

(1) The public interest is served by state assistance for the project; and

(2) For an application for financial assistance for which repayment is expected, the money or revenue pledged by the political subdivision will be sufficient to meet all obligations assumed by the political subdivision during the term of the financial assistance.

§363.1408. Terms of Financial Assistance.

(a) The board must determine the amount and form of financial assistance and the amount and form of repayment.

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

(c) Financial assistance from the Fund may provide for repayment terms of up to 30 years, in the board's discretion.