

The Texas Water Development Board (“TWDB” or “board”) adopts the repeal of 31 TAC §§363.401 – 363.404 and new Subchapter D, 31 TAC §§363.401 – 363.409, relating to the establishment of flood financial assistance by recent statutory amendments to Chapter 15 and 16 of the Texas Water Code. The proposal is adopted with changes as published in the November 29, 2019, issue of the *Texas Register* (44 TexReg 7352).

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

Through Senate Bill 7 of the 86th Legislature, 2019, the Legislature created the Flood Infrastructure Fund (FIF) and the Texas Infrastructure Resiliency Fund (TIRF) to ensure financial assistance is available for flood control, drainage, and mitigation projects, including nature-based and nonstructural projects. The new flood financial assistance will be administered by the TWDB and is designed to make the implementation of flood projects more affordable for Texas communities and to meet the immediate needs for funding from political subdivisions.

The TWDB is adopting the present rules to implement the establishment of flood financial assistance by creating a new subchapter in Chapter 363, relating to Financial Assistance Programs. By placing the flood financial assistance rules into this chapter, the general provisions of Chapter 363 will apply. This will allow the board to use the procedures and practices common to many of the board’s existing financial programs rather than to recreate them separately in the flood financial assistance rules. Applicants will find the utilization of existing practices convenient and efficient, as opposed to having to navigate and understand new processes. To read and understand the rules in Chapter 363, Subchapter D that will apply to flood financial assistance, the rules must be read together with Subchapter A, relating to General Provisions.

The executive administrator envisions that the application process for flood financial assistance will be similar to the processes for the board’s financial programs, as modified by any process improvements. The board will solicit initial abridged applications and then a longer application at the appropriate time. The abridged application will allow the applicant to describe the proposed project and provide information about the issues the project will address. After the board receives the abridged applications, staff will rate and prioritize the projects. The executive administrator will recommend a prioritized list of applications based on the criteria specified in §363.405. The prioritized list of projects, as recommended by the executive administrator, will go to the board for deliberation and preliminary decision. The projects that are selected by the board for funding may be required to submit additional information by the board. The longer application will then be subject to the executive administrator’s traditional analysis for evaluating projects.

Prior to proposing these rules, the board engaged in an extensive effort of outreach for suggestions on flood planning and financing. TWDB staff traveled across the state and solicited input from stakeholders on how to implement the flood financial assistance program. The TWDB held a public hearing to receive public comments on the rules during the public comment period.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

The repeal of §§363.401 – 363.404 removes the current flood control provisions to allow for the implementation of the new flood financial assistance program.

Amendment to 31 TAC Chapter 363 by addition of a New Subchapter D (relating to Flood Financial Assistance)

31 TAC §363.401. Scope of Subchapter D.

Section 363.401 is adopted to specify the scope and coverage of Subchapter D. Subchapter D governs the board's new flood financial assistance program established by the Texas Water Code, Chapter 15, Subchapter I and Texas Water Code, Chapter 16, Subchapter L. The new section also clarifies that the provisions of Chapter 363, Subchapter A are applicable to the flood financial assistance program unless they are in conflict with Subchapter D.

31 TAC §363.402. Definitions.

Section 363.402 is adopted to clarify the definitions of words and terms used throughout Subchapter D.

In the adopted rule, the definitions of "drainage" and "flood control" were changed to clarify that these definitions include rehabilitation.

While the TWDB received public comments to revise the definition of "flood project" in §363.402(6), TWDB retained the statutory definition of "flood project" from Texas Water Code §§15.531 and 16.451. Although included in the statutory definition, at this time, the TWDB has not received appropriations to fund "a federally authorized project to deepen a ship channel affected by a flood event." The acquisition of necessary real estate and other ancillary interests may be eligible expenses of a project, as delineated in the Flood Intended Use Plan.

In the adopted rule, the definition of "nonstructural flood mitigation" was changed to clarify that watershed planning, flood mapping, and acquisition of conservation easements are included.

31 TAC §363.403. Flood Intended Use Plan.

Section 363.403 is adopted to outline the procedures for notice, comment, and adoption of a Flood Intended Use Plan. This document will contain details on the funding structure, prioritization, and criteria for each round of funding.

This section was added pursuant to public comments. Subsequent sections were renumbered from the proposed version accordingly.

31 TAC §363.404. Prioritization System.

Section 363.404 is adopted to provide a prioritization system for projects to be funded. The processing of applications and the steps in the prioritization system are similar to the

functioning of the prioritization for the current State Revolving Fund programs. However, the dates and timing of flood financial assistance will not be fixed by rule to give the board additional flexibility in the timing of when it will make funds available. The factors to be evaluated in the prioritization will be outlined in a Flood Intended Use Plan, which will identify the uses of the funds for flood projects.

In the adopted rule, further detail on which elements are required in the abridged application and the full application were added to provide clarity on the issue.

This section was numbered as 363.403 in the proposed rule.

31 TAC §363.405. Use of Funds.

Section 363.405 incorporates the restrictions on the use of funds provided by Texas Water Code Chapters 15 and 16, as related to providing financial assistance to applicants. The board expects that the terms of the financial assistance provided to applicants will be tailored to best fit the needs of the applicants. After the board adopts the initial state flood plan, the flood financial assistance funds will be used for projects in the state flood plan, as required by Texas Water Code §§15.5341 and 16.4545.

In the adopted rule, statute language was added to clarify that the Board may make transfers to the Research and Planning Fund.

This section was numbered as 363.404 in the proposed rule. Subsection (c) was moved from Section 363.404 (numbered 363.403 in the proposed rule).

31 TAC §363.406. Terms of Financial Assistance.

Section 363.406 is adopted to clarify when deferrals for principal and interest payments may be made and to outline the terms that applicants will follow when receiving flood financial assistance.

This section was numbered as 363.405 in the proposed rule.

31 TAC §363.407. Findings Required.

Section 363.407 is adopted to state the findings that are required prior to approval of an application for flood financial assistance, pursuant to Texas Water Code §15.536. This rule does not require that all eligible political subdivisions substantially affected by the flood project be co-applicants. The statutory language on the required board finding is further described by a reference to the contents of the complete application contained in the Section 363.408.

This section was numbered as 363.406 in the proposed rule.

31 TAC §363.408. Complete Application Requirements.

Section 363.408 is adopted to outline the requirements applicants will follow when submitting the full, complete application for flood financial assistance after prioritization. If an applicant proposes a flood control project, and the project watershed is partially located outside the political subdivision making the application, the applicant will be required to submit a memorandum of understanding that includes all of the eligible political subdivisions. This requirement is from Texas Water Code §§15.005, 15.535, and 15.536. Applicants will have to submit an affidavit demonstrating that they have acted cooperatively with the public and other political subdivisions in the area, recognizing that an applicant may fulfill this requirement by providing ample notice and opportunity to participate to others. The affidavit will fulfill the purposes of Texas Water Code §15.535, which requires political subdivisions to demonstrate their cooperation. This language was changed from the proposed rule pursuant to public comment.

Language in subsection (b)(4) was moved from the definition of “project watershed.”

In the adopted rule, further detail on which elements are required in the abridged application and the full application were added to provide clarity on the issue.

This section was numbered as 363.407 in the proposed rule.

31 TAC §363.409. Investment and Administration of Funds.

Section 363.409 is adopted to implement the requirement from Texas Water Code §§15.537 and 16.460, which require that the board outline the investment and administration of funds.

This section was numbered as 363.408 in the proposed rule.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The board 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 legislation and create a new flood financial assistance program.

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 a standard set by 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 is adopted under the authority of Texas Water Code §§15.537 and 16.460. Therefore, this adopted rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The board evaluated this adopted rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to implement legislation and create a new flood financing program. The adopted rule would substantially advance this stated purpose by adopting new rules for flood financial assistance and guide applicants in the application process.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this adopted rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that provides financial assistance for flood mitigation and flood control projects.

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 adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, the adopted rules do not constitute a taking under Texas Government Code, Chapter 2007.

PUBLIC COMMENTS

General Comments:

Various comments stressed the need for TWDB to strengthen public input requirements in the administration of the FIF by adopting rules similar to those governing the State Revolving Fund programs, which have clear public notice requirements for adoption and amendment of their annual Intended Use Plans. The comments urged TWDB to adopt rule language stating the executive administrator will hold public hearings for review and comment on the Flood Intended Use Plan and Prioritization List, as well as on any substantive amendments resulting therefrom.

(Commenters: Sierra Club-Lone Star Chapter, National Wildlife Federation, Galveston Bay Foundation, and Hill Country Alliance (Texas Living Waters Project); Bayou Land Conservancy; Texas Land Trust Council; Katy Prairie Conservancy; Bayou Preservation Association)

Response: The TWDB appreciates these comments. Pursuant to these comments, a new section 363.403 was added to outline the public input requirements for the Flood Intended Use Plan.

Bexar Regional Watershed Management commented in support of the proposed rules' watershed approach.

Response: The TWDB appreciates this comment.

Senator Charles Perry commented that it is critical to assist rural communities where the application process may be a burden or fall short of qualifications. Hidalgo County Drainage District #1 requested a fund to assist communities with developing applications.

Response: The TWDB appreciates this comment. The TWDB appreciates this comment and would like to remind all applicants that the costs of preparing an application are an eligible expense for FIF program financing. The TWDB will also hold financial assistance workshops to help communities in navigating the application process.

Senator Zaffirini, Senator Campbell, and Representative Kuempel voiced their support for comments submitted by the Guadalupe Blanco River Authority.

Response: The TWDB appreciates this comment. It was considered as the TWDB reviewed the comments submitted by the Guadalupe Blanco River Authority.

The Texas Concrete Pipe Association suggested adding a resiliency standard for materials in order to be eligible for funding.

Response: The TWDB appreciates this comment. No changes were made to the rules pursuant this comment.

Comments on 31 TAC §363.401: Scope of Subchapter D

The Cities of Brookshire, Clute, and Lake Jackson stated that Section 363.401 of the draft rules provides that Subchapter D governs programs related to the FIF and the TIRF, but many of the rules appear to only consider the FIF.

Response: The TWDB appreciates these comments. These rules are only intended to govern the TWDB's provision of financial assistance to communities for flood projects. The language from Texas Water Code, Chapter 16, Subchapter L that was not addressed in these rules relates to programs administered by other agencies or money to be directly spent by the TWDB.

The Orange County Drainage District commented that the draft rules and Flood IUP prevent some areas from accessing grant funds although they would be considered rural by standards outlined in other sections of the Water Code, particularly those that happen to be located within MSAs.

Response: The TWDB appreciates this comment. The comment will be addressed in the Flood Intended Use Plan.

Comments on 31 TAC §363.402: Definitions

The North Central Texas Council of Governments commented that the definition of an “Eligible Political Subdivision” indicates that Councils of Government are not eligible and seeks clarification.

Response: The TWDB appreciates this comment. No changes were made pursuant to this comment as the term is explicitly defined in statute. Councils of Governments may be eligible for flood funding other than the FIF or TIRF. This issue is further addressed in the Flood Intended Use Plan.

The Texas Water Conservation Association, Guadalupe Blanco River Authority, and Trinity River Authority recommend including acquisition within the definition of “flood project.” El Paso County also commented that the Flood IUP refers to the use of funds for land acquisition, but the rules do not include acquisition. El Paso County commented that the rules should state that funds may be used where buyout costs are lower than constructing infrastructure.

Response: The TWDB appreciates these comments. No changes were made to the rules pursuant to these comments, but the eligibility of acquisition necessary for a project will be further clarified in the Flood Intended Use Plan.

The Harris County Flood Control District suggests the definition of “flood control” should include references to improvements made to the flow of water.

Response: The TWDB appreciates these comments. No changes were made pursuant to this comment.

The Harris County Flood Control District recommends changing “Project Watershed” to “Service Area.”

Response: The TWDB appreciates this comment. No changes were made pursuant to this comment as relevant statutes refer to the “watershed” of the project.

The Harris County Flood Control District suggests including improvements to ancillary systems such as local drainage and underground conduits needed to bring stormwater to the receiving stream or bayou in the definition of structural flood mitigation.

Response: The TWDB appreciates this comment. No changes were made to the rule pursuant to this comment but eligibility of ancillary systems will be further clarified in TWDB guidance and the Flood Intended Use Plans.

The City of Houston commented that special purpose districts within Harris County should not be considered eligible political subdivisions.

Response: The TWDB appreciates this comment. No changes were made pursuant to this comment as the term is explicitly defined in statute.

Parkhill Smith & Cooper commented that the definition of “project watershed” may be unnecessarily cumbersome if it means requiring modeling of no implementation alternates downstream to demonstrate downstream benefits. This could greatly increase the cost of modeling for entities located in rural areas that do not already have downstream modeling. They also request clarification of “substantially affected.”

Response: The TWDB appreciates this comment. No changes were made pursuant to this comment. As the financial assistance program is further developed, “substantially affected” may be further clarified.

The American Society of Civil Engineers suggests adjustments to definitions of drainage, flood control, flood mitigation, flood project, and nonstructural flood mitigation to help define project eligibility and more clearly articulate the types of projects eligible to receive assistance.

Response: The TWDB appreciates this comment. No changes were made pursuant to this comment.

The Guadalupe Blanco River Authority commented that the definitions of drainage, flood mitigation, and flood control are overlapping and do not define each project type.

Response: The TWDB appreciates this comment. No changes were made pursuant to this comment.

The Guadalupe Blanco River Authority, Texas Water Conservation Association, and Trinity River Authority propose clarified definitions of nonstructural and structural flood mitigation, with “rehabilitation” and “a federally authorized project to deepen a ship channel affected by a flooding event” included under the definition of “structural flood mitigation.”

Response: The TWDB appreciates this comment. Clarification on the eligibility of rehabilitation has been added to the rule text. No changes were made pursuant to comments regarding deepening a ship channel, as that language is explicitly included in the statute. Points related to deepening a ship channel are further clarified in the Section by Section Analysis.

The Texas Living Waters Project, Texas Land Trust Council, Bayou Land Conservancy, and Katy Prairie Conservancy commented recommending that §363.402(6)(F) of the proposed rules be deleted. The comment states that such projects are eligible under the Texas Infrastructure Resiliency Fund created by Article 3 of Senate Bill 7 but are not included in the definition of “flood project” found in Article 2 of Senate Bill 7, which created the Flood Infrastructure Fund (FIF). The Harris County Flood Control District suggested including criteria allowing ship channel improvements only to the extent that the improvement project has defined, measurable flood risk reduction benefits.

Response: The TWDB appreciates these comments. No changes were made pursuant to these comments as the statute explicitly includes “a federally authorized project to deepen a ship channel” in the definition of “flood project.” Points related to deepening a ship channel are further clarified in the Section by Section Analysis. These rules are intended to apply to both the FIF and the TIRF.

The Texas Water Conservation Association, Trinity River Authority, and Guadalupe Blanco River Authority recommend clarifying changes, including the addition of “rehabilitation” in several subsections, “reservoirs” in the definition of “flood control,” land rights acquisition in the definition of “flood project” and a modified definition of “nonstructural flood mitigation.”

Response: The TWDB appreciates these comments. Clarification on the eligibility of rehabilitation has been added to the rule text. The definition of “flood control” was changed to

include structural mitigation that retains water. No changes were made to the rules pursuant to the comments related to land rights acquisition, but the eligibility of acquisition necessary for a project will be further clarified in Flood Intended Use Plan. The definition of “nonstructural flood mitigation” was changed to explicitly include watershed planning, mapping, and acquisition of conservation easements.

The Trinity River Authority, Guadalupe Blanco River Authority, and Texas Water Conservation Association suggests defining “rural area.”

Response: The TWDB appreciates this comment. No changes were made pursuant to this comment as the term is not used in the rules.

The Texas Water Infrastructure Network commented that TWDB should clarify what constitutes an “educational campaign,” stating that utilization of FIF funds for activities such as public relations and advertising should be explicitly prohibited.

Response: The TWDB appreciates this comment. No changes were made pursuant to this comment as detailed eligibility requirements such as this will be and analyzed on a project-by-project basis.

Ken Kramer commented in support of considering Annual Median Household Income and the Social Vulnerability Index in project eligibility and prioritization but suggests defining them in this section.

Response: The TWDB acknowledges and appreciates this comment. No changes were made pursuant to this comment as the terms are not used in the rules. These indexes are addressed in the Flood Intended Use Plan.

The Greater Houston Partnership and Houston Stronger suggested adding “necessary real estate interests” to the definition of flood project. The Harris County Flood Control District suggested including the ability to acquire property needed to construct the flood project as a permissible grant expense under 363.402(6)(C).

Response: The TWDB appreciates these comments. No changes were made to the rules pursuant to these comments, but the eligibility of acquisition necessary for a project will be further clarified in the Flood Intended Use Plan.

Environment Texas commented that TWDB should guarantee that at least 20% of FIF funds are set aside for nature-based projects.

Response: The TWDB appreciates this comment. No changes were made pursuant to this comment.

Comments on 31 TAC §363.403: Prioritization System (renumbered to 363.404)

The Harris County Flood Control District commented that if the Board decides to limit grant funds for any particular entity, that entity should be notified immediately in writing.

Response: The TWDB appreciates this comment. The TWDB staff will work to maintain open lines of communication with all applicants, borrowers, and grantees at all times.

Comments on 31 TAC §363.404: Use of Funds (renumbered to 363.405)

The Cities of Brookshire, Clute, and Lake Jackson commented that this section only lists the authorized use of funds included in Chapter 15, Subchapter I and does not include the list found under Chapter 16, Subchapter L.

Response: The TWDB appreciates these comments. No changes were made pursuant to these comments as the rules are intended to only apply to the Board's flood-related financial assistance programs, not other funding sources used directly by the TWDB or through other means.

The Texas Water Conservation Association suggests modifying Section 363.403(6) to clarify that program funds may be advanced to match "flood projects funded partially by federal money."

Response: The TWDB appreciates this comment. No changes were made pursuant to this comment as the language matches that used in statute.

Comments on 31 TAC §363.405: Terms of Financial Assistance (renumbered to 363.406)

The Cities of Brookshire, Clute, and Lake Jackson commented that Section 363.405 incorporates the 10-year deferral of payments on loans as set forth in Water Code section 15.534(b) for loans provided under FIF, and the same limitation is also present in Water Code section 16.454(g), related to the Hurricane Harvey subaccount administered by TDEM. Water Code section 16.453, however, does not include the same limitation on deferral of loan payments for loans under the Floodplain Management Account.

Response: The TWDB appreciates these comments. No changes were made pursuant to this comment as these rules are only intended to cover the TWDB's flood-related financial assistance programs, not those administered by TDEM or funds used directly by the TWDB.

The Cities of Brookshire, Clute, and Lake Jackson requested additional clarification on the manner in which TWDB will determine the amount and form of financial assistance and amount and form of repayment will be conveyed, in accordance with 363.405(b).

Response: The TWDB appreciates these comments. Further clarification on the amount and form of financial assistance and repayment is included in the Flood Intended Use Plan.

Comments on 31 TAC §363.406: Findings Required (renumbered to 363.407)

The Texas Water Conservation Association, Trinity River Authority, and Guadalupe Blanco River Authority suggest Sections 363.406(2) and (3) should incorporate the project watershed as the standard for regional engagement by the applicant. These suggestions were echoed by El Paso County.

Response: The TWDB appreciates these comments. No changes have been made to the rules as the language tracks the statute language.

The Texas Water Conservation Association, Trinity River Authority, and Guadalupe Blanco River Authority commented that TWDB should tailor Section 363.406 such that it does not

apply to applications for watershed planning, flood mapping, and immediate life-saving measures. GBRA further commented that these requirements should not apply to flood warning systems or educational campaigns.

Response: The TWDB appreciates these comments. No changes were made pursuant to these comments as the statute states that the requirements apply to all applications.

The Texas Water Conservation Association and Trinity River Authority commented that these findings should clarify that all substantially affected eligible political subdivisions do not need to be co-applicants on the application.

Response: The TWDB appreciates these comments. No changes were made pursuant to these comments, but clarifications have been made to the Section by Section Analysis.

The Texas Water Conservation Association and Trinity River Authority commented that the findings should not require actual participation by all political subdivisions in the event that an eligible political subdivision elects not to participate.

Response: The TWDB appreciates these comments. Pursuant to these comments, the adopted rules recognize that providing adequate notice and ample opportunity to eligible political subdivisions that elect not to participate further would fulfill the requirement to have all substantially affected eligible political subdivisions participate in the process of developing a proposed flood project. This change will be made to new section §363.408(b)(2)(B) (§363.407(2)(B) in the proposed rules).

The City of Brenham submitted a comment seeking clarification of the term “Board Rules.”

Response: The term “Board Rules” means the rules located at 31 Texas Administrative Code Part 10. As applicable to how this term is used in the adopted rules, this means 31 Texas Administrative Code Chapter 363, Subchapters A and Subchapter D.

The Texas Water Conservation Association, Trinity River Authority, and Guadalupe Blanco River Authority commented that the finding in 363.406(2) appears to be broader than what is required in statute. GBRA recommends changing this section to more closely track with Water Code Section 15.535(1) and adding a new section that tracks with Water Code Section 15.535(2). GBRA’s comment recommends exempting nonstructural flood mitigation projects that will be immediately effective in protecting life and property from certain application requirements to remove impediments.

Response: The TWDB appreciates these comments. The adopted rules recognize that providing adequate notice and ample opportunity to eligible political subdivisions that elect not to participate further would fulfill the requirement to have all substantially affected eligible political subdivisions participate in the process of developing a proposed flood project. No changes have been made pursuant to the rules to exempt certain requirements explicitly required by statute for all applications.

Comments on 31 TAC §363.407: Application Requirements (renumbered to 363.408)

Numerous comments addressed the required Memorandum of Understanding (MOU) between political subdivisions in a project watershed. Senators Perry, Creighton, and Kolkhorst were among those recommending that TWDB revise the requirement, with several comments suggesting changes to better match Water Code section 15.005, which requires an agreement between all governing bodies of political subdivisions in a watershed. Various comments suggested that the MOU requirement would delay projects and that the timeline was too short. Comments submitted by the Texas Living Waters Project and Katy Prairie Conservancy suggest TWDB should have the ability to waive the requirement when an applicant can demonstrate that it creates an undue impediment to pursuing a meritorious project. Comments submitted by the City of Corpus Christi suggest a means by which political subdivisions may opt out. Numerous commenters acknowledged the requirement is well-intended and support a watershed approach.

(Commenters: Sen. Perry; Sen. Kolkhorst; Sen. Creighton, Representative Toth, Representative Middleton, Gordy Bunch and Bruce Rieser (The Woodlands), Mark Keough (Montgomery County), Jimmy Sylvia (Chambers County), Mark Henry (Galveston County). Jeff Branick (Jefferson County); Walter Simms, Montgomery County MUD 84; Bexar Regional Watershed Management; Houston Stronger; Greater Houston Partnership; Harris County Flood Control District; City of Brookshire; City of Clute; City of Lake Jackson; Trinity River Authority; Texas Water Conservation Association; Maria Susana Dias; Texas Living Waters Project; Woodlands Water; City of Corpus Christi; Guadalupe Blanco River Authority)

Response: The TWDB appreciates these comments and has made changes pursuant to the comments. The adopted language will match the statutory language, as suggested in the comments. The adopted language will include the term “eligible political subdivisions.” No changes have been made to the rule text pursuant to requests to allow a waiver, as this text does not appear in the statute language related to the MOU requirement.

Senator Perry suggested the MOU requirement be limited to entities affected directly by the project’s footprint and to those entities that participate in flood control activities.

Response: The TWDB appreciates this comment. The adopted language will include the term “eligible political subdivisions” to limit the requirement to those entities eligible to receive financial assistance for flood control activities. The requirement is also limited to those entities within the project watershed.

The City of Houston commented that an MOU should not be required when evidence of successful partnership for project implementation has been or is displayed and that municipal staff acknowledgement could be an alternative to a formal MOU.

Response: The TWDB acknowledges and appreciates this comment. No changes were made pursuant to this comment as the statute explicitly requires an MOU in certain situations.

The Guadalupe Blanco River Authority commented that an MOU is only required if a portion of the project is located outside the political boundaries of the applicant and in the boundaries of another political subdivision. They suggest clarifying that the requirement only applies to “eligible political subdivisions” with “authority to engage in drainage, flood mitigation, and flood control activities” and who will be substantially affected by the flood project.

Response: The TWDB appreciates this comment and has made changes pursuant to the comment. The adopted language will match the statutory language, as suggested in the comment. The adopted language will include the term “eligible political subdivisions” to limit the requirement to those entities eligible to apply for financial assistance for flood projects. No changes have been made to the rule text pursuant to requests to further limit the requirement to those entities with authority to engage in drainage, flood mitigation, and flood control, as this text does not appear in the statute language related to the MOU requirement.

The Harris County Flood Control District suggested allowing a governing body’s delegate to sign the MOU.

Response: The TWDB appreciates this comment. No changes were made pursuant to this comment as the statute language explicitly requires the governing body to execute the MOU.

The Greater Houston Partnership and Houston Stronger commented that the MOU requirement should only apply to political subdivisions “substantially affected” by the project.

Response: The TWDB appreciates this comment. No changes were made pursuant to this comment as this language does not appear in the statute language.

The Hidalgo County Drainage District No. 1 and the Texas Living Waters Project suggested the MOU requirement should only apply to “eligible political subdivisions.”

Response: The TWDB appreciates this comment and the suggested changes were made.

The Guadalupe Blanco River Authority recommended that nonstructural flood mitigation projects that will be immediately effective in protecting life and property be exempt from the MOU requirement.

Response: The TWDB appreciates this comment. The requirement only applies to “flood control projects,” as defined in the rules as “the construction or rehabilitation of structural mitigation or anything that retains, diverts, redirects, impedes, or otherwise modifies the flow of water.”

The American Society of Civil Engineers commented that the legislative intent can be achieved without the MOU requirement as currently written. They suggest requiring specific coordination steps at different stages of the application process, with an MOU included in loan closing documents. They suggest that this MOU should outline how state funding will be used and how project implementation will be shared among the participating political subdivisions.

Response: The TWDB appreciates this comment. No changes were made pursuant to this comment because the statute explicitly requires the MOU to be executed before the Board may consider an application.

Dr. Matthew Berg commented asking whether an MOU is sufficient evidence of cooperation and collaborative processes and inquiring how TWDB defines these terms. The Harris County Flood Control District suggested deleting the affidavit requirements in 363.407(2)(A) – (D) and only requiring the MOU to address cooperation and collaborative processes.

Response: The TWDB appreciates this comment. No changes were made pursuant to this comment in order to closely track the statute language.

The Texas Water Conservation Association and Trinity River Authority commented that the affidavit requirements of 363.407(2)(A) – (C) should only apply to eligible political subdivisions in the project watershed. Additionally, the TRA suggested this be further limited to only “substantially affected” political subdivisions. The Guadalupe Blanco River Authority also suggested use of “substantially affected” for (A) and (B) and “project watershed” for (B) and (C).

Response: The TWDB appreciates these comments. No changes were made pursuant to these comments as the rule matches the statute language.

The Texas Water Conservation Association and Trinity River Authority suggested that the requirements in 363.407(2) and (3) should not apply to watershed planning, flood mapping, and measures immediately effective in protecting life and property. The Guadalupe Blanco River Authority echoed this comment as applicable to nonstructural flood mitigation projects.

Response: The TWDB appreciates these comments. No changes were made pursuant to these comments as the statute explicitly requires these elements for all applications.

The Texas Water Conservation Association and the Trinity River Authority commented suggesting that submittal of an updated description of the project watershed should only be required if the project results in the watershed increasing or decreasing in area by greater than 10%.

Response: The TWDB appreciates these comments. No changes were made to the rule as all changes will be assessed as part of project reviews.

Dr. Matthew Berg commented concern that a superficial consideration of technical requirements for 363.407(2)(D) could lead to the selection of suboptimal projects. He suggested clarification on the metrics to determine completeness and accuracy of a comparison.

Response: The TWDB appreciates this comment. No changes were made to the rules as the technical requirements will be further addressed in guidance on Engineering Feasibility Reports. As the program is further developed over time, this point may be clarified further.

The Harris County Flood Control District commented that studies previously conducted by the applicant should satisfy the requirement for an analysis of whether the proposed project could use floodwater capture techniques for water supply purposes.

Response: The TWDB appreciates this comment. As long as all statutory and rule elements are satisfied for the analysis required, the TWDB will not require new studies if studies have already been conducted.

The City of Brenham commented seeking clarification of the term “administratively complete.”

Response: The TWDB appreciates this comment. An application is administratively complete when all elements are met and all questions answered fully.

Dr. Matthew Berg commented that TWDB should consider clarifying which requirements are needed at which time (i.e. abridged vs. full application.) The City of Sugarland commented requested clarification on whether the MOU must be submitted at the time of the abridged application or full application.

Response: The TWDB appreciates these comments. Further clarification has been added to the rules.

The Cities of Brookshire, Clute, and Lake Jackson suggested that the FIF application requirements conflict with the general application requirements found in Water Code chapter 15, subchapter A and rules chapter 363, subchapter A. These comments suggested using the language from Water Code §15.535 instead of §15.005.

Response: The TWDB appreciates these comments. Changes have been made to the rules to further clarify when the MOU is required.

The Cities of Brookshire, Clute, and Lake Jackson pointed out that public hearings are required for FIF projects but not for TIRF and suggested modifying language to specify this is only for flood control projects funded under FIF.

Response: The TWDB appreciates these comments. No changes were made pursuant to these comments as the rules are intended to only apply to the Board's flood-related financial assistance programs, not other funding sources used directly by the TWDB or through other means.

Comments submitted by the Texas Living Waters Project recommend additional requirements for applications to be determined Administratively Complete (with support from comments by the Texas Conservation Alliance and Katy Prairie Conservancy): (1) an analysis of how the proposed project will benefit those census tracts within the jurisdiction of the political subdivision that have an AMHI less than or equal to 75% of the statewide AMHI; (2) the Social Vulnerability Index (SVI) for each of the census tracts within the area of the political subdivision that will be affected by the implementation of the proposed flood project;" (3) if the application is for a structural flood mitigation project which does not incorporate nonstructural flood mitigation features into the project or as a complement to the project, an analysis that shows that reasonable nonstructural alternatives were explored and evaluated, including an explanation of why nonstructural features or components were not selected for the project;" and (4) an analysis of whether the project provides benefits additional to that of flood control or mitigation, including but not limited to water quality protection, fish and wildlife habitat maintenance or enhancement, public recreational opportunities, or some combination thereof."

Also recommended is an extension of proposed §363.407(3), with the additional suggested language in italics below: "(3) an analysis of whether the proposed flood project could use floodwater capture techniques for water supply purposes, including floodwater harvesting, detention or retention basins, *enhanced groundwater recharge*, or other methods of capturing storm flow or unappropriated flood flow."

Response: The TWDB appreciates these comments. No changes were made to the rules in order to closely align with the statute language. The Flood Intended Use Plan does include

additional consideration of elements such as the Social Vulnerability Index and AMHI of an applicant.

Comments on 31 TAC §363.408: Investment and Administration of Funds (renumbered to 363.409)

No public comments were received on this topic.

<rule>

31 TAC §§363.401 - 363.404 STATUTORY AUTHORITY

The repeals 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.

Chapters 15 and 16 of the Texas Water Code are affected by this repeal.

Subchapter D. Flood Control.

§363.401. Scope of Subchapter.

§363.402. Definitions of Terms.

§363.403. Projects Eligible.

§363.404. Flood Control.

31 TAC §§363.401 - 363.409 STATUTORY AUTHORITY

This rulemaking 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 Texas Water Code §§15.537 and 16.460, which require that the TWDB adopt rules necessary to carry out the affected subchapters.

Chapters 15 and 16 of the Texas Water Code are affected by this rulemaking.

<rule>

Subchapter D. Flood Financial Assistance

§363.401. Scope of Subchapter D.

This subchapter shall govern the board's programs of flood financial assistance under the programs established by the Texas Water Code, Chapter 15, Subchapter I and Texas Water Code, Chapter 16, Subchapter L. Unless in conflict with the provisions in this subchapter, the provisions of Subchapter A of this chapter (relating to General Provisions) shall apply to projects under this subchapter.

§363.402. Definitions.

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

- (1) Drainage--includes, but is not limited to, the construction or rehabilitation of bridges, catch basins, channels, conduits, creeks, culverts, detention ponds, ditches, draws, flumes, pipes, pumps, sloughs, treatment works, and appurtenances to those items, whether natural or artificial, or using force or gravity, that are used to draw off surface water from land, carry the water away, collect, store, or treat the water, or divert the water into natural or artificial watercourses.
- (2) Eligible political subdivision--a district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, a district or river authority that is subject to Chapter 49 of the Texas Water Code and participates in cooperative flood control planning, a municipality, or a county.
- (3) Flood control—the construction or rehabilitation of structural mitigation or anything that retains, diverts, redirects, impedes, or otherwise modifies the flow of water.
- (4) Flood mitigation--the implementation of actions, including both structural and nonstructural solutions, to reduce flood risk to protect against the loss of life and property.
- (5) Flood Intended Use Plan--a document adopted by the board that identifies the uses of the funds for flood projects.
- (6) Flood project--a drainage, flood mitigation, or flood control project, including:
 - (A) planning and design activities;
 - (B) work to obtain regulatory approval to provide nonstructural and structural flood mitigation and drainage;
 - (C) construction of structural flood mitigation and drainage projects, including projects that use nature-based features to protect, mitigate, or reduce flood risk;
 - (D) construction and implementation of nonstructural projects, including projects that use nature-based features to protect, mitigate, or reduce flood risk;
 - (E) nonstructural or natural flood control strategies; and
 - (F) a federally authorized project to deepen a ship channel affected by a flooding event.
- (7) Nonstructural flood mitigation--includes, but is not limited to, measures such as acquisition of floodplain land for use as public open space, acquisition and removal of buildings located in a floodplain, relocation of residents of buildings removed from a floodplain, flood warning

systems, educational campaigns, land use planning policies, watershed planning, flood mapping, and acquisition of conservation easements.

(8) Metropolitan statistical area--an area so designated by the United States Office of Management and Budget.

(9) Project Watershed--the area upstream and downstream substantially affected by the proposed flood project, as documented in the project application and sealed by a Professional Engineer or Professional Geoscientist.

(10) Structural flood mitigation--includes, but is not limited to, measures such as construction of storm water retention basins, enlargement of stream channels, modification or reconstruction of bridges, coastal erosion control measures, or beach nourishment.

§363.403. Flood Intended Use Plan.

(a) Periodically, the board will adopt a Flood Intended Use Plan to determine the use of funds for applicable application periods. The Flood Intended Use Plan will include:

(1) eligibility criteria;

(2) structure of financial assistance, including any subsidies; and

(3) criteria to be used by the executive administrator in prioritization of applications.

(b) Before the board adopts a Flood Intended Use Plan or any substantive amendments thereto, the executive administrator will provide 30 days' notice and opportunity to comment.

§363.404. Prioritization System.

(a) The board will establish deadlines for application submittals. The executive administrator will provide the prioritization of those abridged applications to the board for approval as soon thereafter as practicable. The executive administrator will develop and provide an abridged application to gather information necessary for prioritization. To be considered for prioritization, an applicant must provide in the abridged application adequate information to establish that the applicant qualifies for funding, to describe the project comprehensively, and to establish the cost of the project, as well as any other information requested by the executive administrator. If an applicant submits an abridged application for prioritization purposes, the applicant must submit a complete application to the board by the deadline established by the executive administrator, or the project will lose its priority ranking and the board may commit to other projects consistent with the prioritization.

(b) For each abridged application that the executive administrator has determined has adequate information and is administratively complete for prioritization purposes and prior to each board meeting at which abridged applications may be considered for prioritization, the executive administrator shall:

- (1) prioritize the applications by the criteria identified in the Flood Intended Use Plan; and
 - (2) provide to the board a prioritized list of all abridged applications as recommended by the executive administrator, the amount of funds requested, and the priority of each application received.
- (c) The board will identify the amount of funds available for new applications, establish the structure of financing and the terms of any subsidy, and will consider applications in accordance with this title.

§363.405. Use of Funds.

(a) The board may use the funds for financial assistance to eligible political subdivisions as follows:

- (1) to make a loan to an eligible political subdivision at or below market interest rates for a flood project;
- (2) to make a grant or loan at or below market interest rates to an eligible political subdivision for a flood project to serve an area outside of a metropolitan statistical area in order to ensure that the flood project is implemented;
- (3) to make a loan at or below market interest rates for planning and design costs, permitting costs, and other costs associated with state or federal regulatory activities with respect to a flood project;
- (4) to make a grant to an eligible political subdivision to provide matching funds to enable the eligible political subdivision to participate in a federal program for a flood project;
- (5) to make a grant to an eligible political subdivision for a flood project if the board determines that the eligible political subdivision does not have the ability to repay a loan;
- (6) to meet matching requirements for projects funded partially by federal money; and
- (7) to make a loan to an eligible political subdivision below market interest rates and under flexible repayment terms, including a line of credit or loan obligation with early repayment terms, to provide financing for the local share of a federally authorized ship channel improvement project.

(b) The board may also use the fund to make transfers to the research and planning fund created under Texas Water Code Section 15.402, which may be used to provide money for flood control planning, as described in Texas Water Code Chapter 15, Subchapter F and 31 Texas Administrative Code Chapter 355.

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

§363.406. Terms of Financial Assistance.

- (a) Principal and interest payments on loans at or below market interest rates for planning and design costs, permitting costs, and other costs associated with state or federal regulatory activities with respect to a flood project may be deferred for not more than 10 years or until construction of the flood project is completed, whichever is earlier.
- (b) The board shall determine the amount and form of financial assistance and the amount and form of repayment.
- (c) The board shall determine the method of evidence of debt.
- (d) If the board determines non-performance on the terms of the grant, 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.

§363.407. Findings Required.

On review and recommendation by the executive administrator, the board may approve an application only if the board finds:

- (1) the application and the assistance applied for meet requirements of this subchapter and board rules;
- (2) the application demonstrates a sufficient level of cooperation among eligible political subdivisions and includes all of the eligible political subdivisions substantially affected by the flood project, as described in Section 363.408(b)(1) and (2), as applicable;
- (3) the taxes or other revenue, or both the taxes and other revenue, pledged by the applicant will be sufficient to meet all the obligations assumed by the eligible political subdivision; and
- (4) other findings as required in the Flood Intended Use Plan.

§363.408. Complete Application Requirements.

- (a) This section applies to complete applications submitted to the executive administrator after prioritization.
- (b) In addition to the general application requirements of Subchapter A of this chapter (relating to General Provisions), the following are required to be considered an administratively complete application:
 - (1) if the project is a flood control project and the project watershed is partially located outside the political subdivision making the application, the applicant must submit a memorandum of understanding relating to management of the project watershed. The memorandum of understanding must be approved and signed by all governing bodies of eligible political

subdivisions located in the project watershed. The memorandum of understanding at a minimum, must contain a requirement that all political subdivisions in the project watershed agree to work cooperatively;

(2) an affidavit attesting to the following:

(A) that the applicant has acted cooperatively with other political subdivisions to address flood control needs in the area in which the eligible political subdivisions are located;

(B) that all eligible political subdivisions substantially affected by the proposed flood project have participated in the process of developing the proposed flood project, recognizing that providing adequate notice and ample opportunity to any such eligible political subdivision that elects not to participate further would fulfill this requirement, provided evidence of notification is included in the application;

(C) that the eligible political subdivisions, separately or in cooperation, have held public meetings to accept comment on proposed flood projects from interested parties; and

(D) that the technical requirements for the proposed flood project have been completed and compared against any other potential flood projects in the same area. This statement is not required for applications for assistance for planning and design costs, permitting costs, and other costs associated with state or federal regulatory activities with respect to a flood project;

(3) an analysis of whether the proposed flood project could use floodwater capture techniques for water supply purposes, including floodwater harvesting, detention or retention basins, or other methods of capturing storm flow or unappropriated flood flow;

(4) a description of the Project Watershed sealed by a Professional Engineer or Professional Geoscientist. The Project Watershed shall be estimated using the best available data with analysis performed in accordance with sound engineering principles and practices. Revisions to the Project Watershed may be necessary with additional data, development of more refined modeling tools, refinement of design criteria, or other factors. The applicant must provide the executive administrator with updates of the description of the Project Watershed as it is modified. If a revision to the Project Watershed results in a portion of the project watershed being partially outside of the political subdivision boundaries of the Applicant, , the Applicant must provide the executive administrator with additional memoranda of understanding necessary to include all eligible political subdivisions located in the project watershed; and

(5) additional information as needed to allow the board to comply with its responsibility to act as a clearinghouse for information about flood planning and its reporting requirements.

§363.409. Investment and Administration of Funds.

The investment and administration of funds shall be managed in accordance with the Board's investment policy, in accordance with State of Texas Comptroller guidelines, and the Public Funds Investment Act, Texas Government Code, Chapter 2257.