

Texas Water Development Board



TO: Board Members

THRU: Kevin Patteson, Executive Administrator
Les Trobman, General Counsel
Jeff Walker, Deputy Executive Administrator, Water Supply & Infrastructure

FROM: Jennifer Kennedy, Management Analyst, Regional Water Planning & Development
Annette Lown Mass, Assistant General Counsel

DATE: March 12, 2015

SUBJECT: Proposed Rulemaking
31 TAC §371.42, §375.52 and §375.62, Types of Environmental Determinations: Categorical Exclusions

ACTION REQUESTED

Authorize publication of proposed amendments to 31 Texas Administrative Code (TAC) §371.42, §375.52, and §375.62 relating to Types of Environmental Determinations: Categorical Exclusions.

BACKGROUND

The Texas Water Development Board (TWDB) receives an annual capitalization grant from the Environmental Protection Agency (EPA) to administer the Clean Water and Drinking Water State Revolving Funds. The capitalization grant agreement requires the TWDB to ensure construction projects funded through these programs are compliant with the National Environmental Policy Act (NEPA). The Executive Administrator issues an environmental determination as the culmination of a project's NEPA-like environmental review.

A Categorical Exclusion is a type of environmental determination which applies to categories of actions that have been identified by the EPA not to have significant adverse effects on the quality of the human environment. The TWDB examines each project to determine: (1) if a project fits into one of the categories of actions that are exempt from a full environmental review, and (2) if an extraordinary circumstance associated with an individual project would disqualify the project for this type of exemption because of a significant adverse effect on the quality of the human environment.

PURPOSE AND EXPLANATION

The purpose of the proposed amendments is to update and clarify the TWDB's rules related to categorical exclusions and extraordinary circumstances. The proposed amendments will more closely track the federal language for the implementation of the NEPA. The amendments clarify

the circumstances under which a categorical exclusion may be available, the types of projects that are not eligible for categorical exclusions, and the extraordinary circumstances which may cause a project to be ineligible.

In general, the amendments will provide more latitude for the Executive Administrator to grant categorical exclusions, while still maintaining compliance with the federal law. For example, under the current rules, projects that affect the degree of treatment are not eligible for a categorical exclusion. Under the proposed amendments, these projects could possibly be eligible provided the projects do not require changes to the facility's discharge permit. In addition, the criteria relating to the construction of minor ancillary facilities has been broadened. Under the current rules, these types of facilities may be categorically excluded when installed on the same property as existing facilities but require a full environmental review if they are to be installed on property directly adjacent to existing facilities. Under the proposed amendments, construction of minor ancillary facilities on property directly adjacent to existing facilities could also be eligible for a categorical exclusion.

The amendments also modify the information that Applicants must provide to the Executive Administrator in order to demonstrate that the project is eligible for a categorical exclusion. The intent of this revision is to attain meaningful information from Applicants that may be used in the environmental review process.

RECOMMENDATION

Authorize publication of proposed amendments to 31 TAC §371.42, §375.52, and §375.62 relating to Types of Environmental Determinations: Categorical Exclusions.

This recommendation has been reviewed by legal counsel and the action requested is within the authority of the Board.

JNK/JW:cd

Attachment: Proposed rulemaking for publication in the Texas Register

The Texas Water Development Board (board) proposes an amendment to Chapter 371, Drinking Water State Revolving Fund, 31 TAC § 371.42, relating to the issuance of categorical exclusions pursuant to the National Environmental Policy Act, 42 U.S.C. Chapter 55; and more specifically, pursuant to 40 C.F.R., Ch.1, Subchapter A, Part 6, Procedures for Implementation.

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

The amendment will more precisely conform the board's rule to the federal procedures for implementation of the National Environmental Policy Act. The same amendment is being proposed in 31 TAC § 375.52 and 31 TAC § 375.62, relating to Types of Environmental Determinations: Categorical Exclusions in the board's Clean Water State Revolving Fund rules. In addition to the alignment of the board's rules to the federal procedures, the proposed amendments will make all of the board's state revolving fund rules related to categorical exclusions uniform.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Following the amendment as proposed, 31 TAC § 371.42 will more closely track the language related to categorical exclusions and extraordinary circumstances contained in the federal procedures for implementation of the National Environmental Policy Act. The amendment clarifies the circumstances under which a categorical exclusion may be available. The amendment also clarifies the types of projects that are not eligible for categorical exclusions and identifies extraordinary circumstances which may cause a project to be ineligible. In general, the amendment will provide more latitude for the executive administrator to grant categorical exclusions, while still maintaining compliance with the federal law. The amendment also modifies the information that Applicants must provide to the executive administrator in order to demonstrate that the project is eligible for a categorical exclusion. The intent of this revision is to attain meaningful information from Applicants that may be used in the environmental review process.

Specifically, under the proposed amendments, the construction of new minor ancillary facilities that affect the degree of treatment or the capacity of the works may be eligible for a categorical exclusion provided that they do not involve a new or relocated discharge to surface or ground water, a substantial increase in the volume or loading of pollutant to the receiving water, and do not provide capacity to serve a population 30% greater than the existing population. In addition, the rule has been broadened to include as eligible for a categorical exclusion, the construction of new minor ancillary facilities on property located directly adjacent to existing facilities. These modifications align the board's rule with the federal rule.

Another substantive change in the proposed amendments regards extraordinary circumstances which may cause a project to be ineligible for a categorical exclusion: the cost effectiveness of a project has been removed from this list of excluding factors. The executive administrator has determined that this is a program eligibility requirement not an environmental constraint used to evaluate a project's eligibility for a categorical exclusion. To satisfy the programmatic requirement regarding a project's cost effectiveness, Texas Water Development Board engineers currently conduct: (1) a preliminary review of project costs based on information submitted in the financial assistance application, and (2) a thorough cost effectiveness analysis during review of a project's Engineering Feasibility Report.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Amanda Landry, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed amendment. For the first five years this rule is in effect, there is no expected additional cost to state or local governments resulting from their administration.

This rule is not expected to result in reductions in costs to either state or local governments. There is no change in costs because there are no direct costs associated with the proposed amendment. This rule is not expected to have any impact on state or local revenues. The rule does not require any increase in expenditures for state or local governments as a result of

administering the rule. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from the rule.

PUBLIC BENEFITS AND COSTS

Ms. Landry also has determined that for each year of the first five years the proposed amendment is in effect, the public will benefit from the proposed rule as it ensures that the level of environmental review is commensurate with the potential adverse impacts of the project.

LOCAL EMPLOYMENT IMPACT STATEMENT

The executive administrator has determined that a local employment impact statement is not required because the proposed amendment will not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The executive administrator also has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this proposed rule. The executive administrator also has determined that there is no anticipated economic cost to persons who are required to comply with the rule as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The executive administrator has reviewed the proposed amendment pursuant to Texas Government Code § 2001.0225, which requires a regulatory analysis of major environmental rules. 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. This proposed amendment to the rule does not constitute a major environmental rule because although the intent of the amendment is to protect the environment or reduce risks to human health from environmental exposure, the amendment will not 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 specific

intent of the rulemaking is to more closely align the board's rules related to categorical exclusions to the federal rule related to the same.

Even if the proposed 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 the National Environmental Policy Act or any other 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 Texas Water Code Chapter 15, Section J. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code, § 2001.0225.

The executive administrator invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT

The executive administrator evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed amendment is to more closely align the board's rules related to categorical

exclusions to the federal rule related to the same. The proposed rule would substantially advance this stated purpose by incorporating applicable language from the federal rule.

The executive administrator'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 imposed by the National Environmental Policy Act, which is exempt under Texas Government Code, § 2007.003(b)(4). The board is an agency that must perform environmental reviews in accordance with the National Environmental Policy Act.

Nevertheless, the executive administrator further evaluated this proposed 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 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 regulation. In other words, this rule requires compliance with the evaluation and determination of whether categorical exclusions from full environmental review is appropriate under the National Environmental Policy Act. This will not burden, restrict, or limit an owner's right to property. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

SUBMISSION OF COMMENTS

Comments on the proposed rulemaking will be accepted for 30 days following publication in the Texas Register and may be submitted to Mr. Les Trobman, Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, rulescomments@twdb.texas.gov, or by fax at (512) 475-2053.

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code § 6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board.

Texas Water Development Board
31 Tex. Admin. Code § 371.42
Drinking Water State Revolving Fund – Environmental Determinations: Categorical Exclusion

The proposal is also proposed under the authority of Texas Water Code § 15.605, which authorizes the board to adopt necessary rules to carry out Subchapter J of Texas Water Code Chapter 15, relating to Financial Assistance for Water Pollution Control.

The proposed rulemaking affects Texas Water Code, Chapter 15.

§371.42. Types of Environmental Determinations: Categorical Exclusions

(a) ~~[Projects eligible for categorical exclusions.]~~ Categorical Exclusions may be ~~[are generally]~~ available for projects that will not result in significant impacts on the quality of the human environment and that do not involve extraordinary circumstances, as listed in subsections (d)(1) through (d)(9) of this section.

(b) Projects that may be eligible for a categorical exclusion (CE) include the following actions on existing systems:

(1) those that involve upgrades that are minor; ~~[include only minor upgrading or]~~

(2) minor expansion of system capacity;

(3) ~~(2)~~ the rehabilitation, including or functional replacement of the existing system and system components [such as distribution lines located within existing right-of-ways and easements]; and

(4) ~~(3)~~ the construction of new minor ancillary facilities located adjacent to or on the same property as existing facilities, [that do not affect the degree of treatment or the capacity of the works; and]

~~(4) the construction of facilities that will provide a capacity increase to serve a population of no greater than 30% the size of the existing population.~~

(c) ~~(b)~~ Projects not eligible for a CE include: [are:]

(1) projects [Projects] that would otherwise be eligible for a CE but due to extraordinary circumstances, as listed in subparagraphs (d)(1) through (d)(9) of this section, are not eligible for a CE;

(2) projects that involve new or relocated discharges to surface or ground water;

(3) projects that will likely result in the substantial increase in the volume or the loading of a pollutant to the receiving water;

(4) projects that will provide capacity to serve a population 30% greater than the existing population;

(5) projects that are not supported by the state, or other regional growth plan or strategy; and

(6) projects that directly or indirectly involve or relate to upgrading or extending infrastructure systems primarily for the purposes of future development.

~~[(2) the construction of new distribution lines;]~~

~~[(3) actions not supported by the State or Regional Water Plan; and]~~

~~[(4) projects needed primarily to serve future growth.]~~

~~(d) (e) Extraordinary circumstances.~~ Extraordinary circumstances may become known at any time during the planning, design or construction of a project and may cause the project to be ineligible for a CE. Extraordinary circumstances include, but are not limited to, the following known or expected impacts:

(1) potentially significant environmental impacts on the quality of the human environment either individually or cumulatively over time;

(2) disproportionately high and adverse human health or environmental effects on any community, including minority communities, low-income communities, or federally-recognized Indian tribal communities [~~tribes~~];

(3) a significant effect on federal or state-listed threatened or endangered species or their critical habitat;

(4) a significant effect on national or state natural landmarks or property with nationally significant [~~national~~] or state historic, architectural, prehistoric, archeological or cultural value;

(5) a significant effect on environmentally important natural resource areas such as wetlands, floodplains, significant agricultural lands, aquifer recharge zones, coastal zones, barrier islands, wild and scenic rivers and significant fish or wildlife habitat;

(6) a significant adverse air quality effect [~~effects~~];

(7) a significant effect on the pattern and type of land use or growth and distribution of population including altering the character of existing residential areas, or may not be consistent with state or local government, or federally-recognized Indian tribe approved land use plans or federal land management plans;

(8) significant public controversy about a potential environmental impact of the proposed project; and

Texas Water Development Board
31 Tex. Admin. Code § 371.42
Drinking Water State Revolving Fund – Environmental Determinations: Categorical Exclusion

~~[(9) the cost-effectiveness of the project; and]~~

(9) [(10)] [any] conflict with [existing] federal, state, or local government, or federally-recognized Indian tribe environmental, resource [resources] protection or land-use laws or [and] regulations.

(e) [(d)] Upon the discovery of extraordinary circumstances, the executive administrator may deny a CE or rescind an existing CE.

(f) [(e) Applicant requirements.] An Applicant shall submit sufficient information to demonstrate [clearly describe] why the project is eligible for a CE including, but not [necessarily] limited to the following documentation:

(1) a brief but complete description of the project;

~~[(2) an alternatives analysis demonstrating the cost-effectiveness of the project;]~~

(2) [(3)] plan maps or maps of the project depicting the location of all construction areas, the planning area boundaries, and any known environmentally important natural areas;

~~[(4) the names of widely-circulated, local newspapers serving the community affected by the project;]~~

(3) [(5)] information regarding the eligibility of the project [a discussion of the project's eligibility] for a CE under the criteria listed in subsection (b) [(a)] of this section; and

(4) [(5)] any information that may be helpful to determine whether any extraordinary circumstances, as listed in subsection (d)(1) through (d)(9) of this section, apply to the project. [a statement explaining why no extraordinary circumstances, as listed in subsection (e) of this section, apply to the proposed action.]

(g) [(f) Review of proposed project eligibility for CE.] The executive administrator shall review the information submitted and may request additional information as needed to complete the determination regarding the eligibility of a proposed project for a categorical exclusion.

(h) [(g) Public notice.] The executive administrator's determination relating to a CE shall be subject to public notice which shall be published either in a newspaper of general circulation in the county or counties of the affected community or on the agency's website and referenced in a public notice in a newspaper of general circulation in the county or counties of the affected community.

Texas Water Development Board
31 Tex. Admin. Code § 375.52 and § 375.62
Clean Water State Revolving Fund – Categorical Exclusions for State and Federal Projects

The Texas Water Development Board (board) proposes amendments to Chapter 375, Clean Water State Revolving Fund, 31 TAC § 375.52 and 31 TAC § 375.62, relating to the issuance of categorical exclusions pursuant to the National Environmental Policy Act, 42 U.S.C. Chapter 55; and more specifically, pursuant to 40 C.F.R., Ch.1, Subchapter A, Part 6, Procedures for Implementation. Section 375.52 pertains to environmental reviews and determinations for state projects. Section 375.62 pertains to environmental reviews and determinations for federal projects.

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

These amendments will more precisely conform the board's rules to the federal procedures for implementation of the National Environmental Policy Act. The same amendment is being proposed in 31 TAC § 371.42, relating to Types of Environmental Determinations: Categorical Exclusions in the board's Drinking Water State Revolving Fund rules. In addition to the alignment of the board's rules to the federal procedures, the proposed amendments will make all of the board's state revolving fund rules related to categorical exclusions uniform.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Section 375.52, Types of Environmental Determinations: Categorical Exclusions.

This rule is applicable to projects receiving state funds or non-equivalent funds through the Clean Water State Revolving Fund. The proposed amendment to § 375.52 will more closely track the language related to categorical exclusions and extraordinary circumstances contained in the federal procedures for implementation of the National Environmental Policy Act. The amendment clarifies the circumstances in which a categorical exclusion may be available. The amendment also clarifies the types of projects that are not eligible for categorical exclusions and identifies extraordinary circumstances which may cause a project to be ineligible. In general, the amendment will provide more latitude for the executive administrator to grant categorical exclusions, while still maintaining compliance with the federal law. The amendment also modifies the information that Applicants must provide to the executive administrator in order to demonstrate that the project is eligible for a categorical exclusion. The intent of this

Texas Water Development Board
31 Tex. Admin. Code § 375.52 and § 375.62
Clean Water State Revolving Fund – Categorical Exclusions for State and Federal Projects

revision is to attain meaningful information from Applicants that may be used in the environmental review process.

Specifically, under the proposed amendments, the construction of new minor ancillary facilities that affect the degree of treatment or the capacity of the works may be eligible for a categorical exclusion provided that they do not involve a new or relocated discharge to surface or ground water, a substantial increase in the volume or loading of pollutant to the receiving water, and do not provide capacity to serve a population 30% greater than the existing population. In addition, the rule has been broadened to include as eligible for a categorical exclusion, the construction of new minor ancillary facilities on property located directly adjacent to existing facilities. These modifications align the board's rule with the federal rule.

Another substantive change in the proposed amendments regards extraordinary circumstances which may cause a project to be ineligible for a categorical exclusion: the cost effectiveness of a project has been removed from this list of excluding factors. The executive administrator has determined that this is a program eligibility requirement not an environmental constraint used to evaluate a project's eligibility for a categorical exclusion. To satisfy the programmatic requirement regarding a project's cost effectiveness, Texas Water Development Board engineers currently conduct: (1) a preliminary review of project costs based on information submitted in the financial assistance application, and (2) a thorough cost effectiveness analysis during review of a project's Engineering Feasibility Report.

Section 375.62, Types of Environmental Determinations: Categorical Exclusions.

This rule is applicable to projects receiving federal funds or equivalent funds through the Clean Water State Revolving Fund. The proposed amendment to § 375.62 will more closely track the language related to categorical exclusions and extraordinary circumstances contained in the federal procedures for implementation of the National Environmental Policy Act. The amendment clarifies the circumstances under which a categorical exclusion may be available. The amendment also clarifies the types of projects that are not eligible for categorical exclusions and identifies extraordinary circumstances which may cause a project to be

Texas Water Development Board
31 Tex. Admin. Code § 375.52 and § 375.62
Clean Water State Revolving Fund – Categorical Exclusions for State and Federal Projects

ineligible. In general, the amendment will provide more latitude for the executive administrator to grant categorical exclusions, while still maintaining compliance with the federal law. The amendment also modifies the information that Applicants must provide to the executive administrator in order to demonstrate that the project is eligible for a categorical exclusion. The intent of this revision is to attain meaningful information from Applicants that may be used in the environmental review process.

Specifically, under the proposed amendments, the construction of new minor ancillary facilities that affect the degree of treatment or the capacity of the works may be eligible for a categorical exclusion provided that they do not involve a new or relocated discharge to surface or ground water, a substantial increase in the volume or loading of pollutant to the receiving water, and do not provide capacity to serve a population 30% greater than the existing population. In addition, the rule has been broadened to include as eligible for a categorical exclusion, the construction of new minor ancillary facilities on property located directly adjacent to existing facilities. These modifications align the board's rule with the federal rule.

Another substantive change in the proposed amendments regards extraordinary circumstances which may cause a project to be ineligible for a categorical exclusion: the cost effectiveness of a project has been removed from this list of excluding factors. The executive administrator has determined that this is a program eligibility requirement not an environmental constraint used to evaluate a project's eligibility for a categorical exclusion. To satisfy the programmatic requirement regarding a project's cost effectiveness, Texas Water Development Board engineers currently conduct: (1) a preliminary review of project costs based on information submitted in the financial assistance application, and (2) a thorough cost effectiveness analysis during review of a project's Engineering Feasibility Report.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Amanda Landry, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed amendments. For the

first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration.

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs because there are no direct costs associated with the proposed amendments. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

PUBLIC BENEFITS AND COSTS

Ms. Landry also has determined that for each year of the first five years the proposed amendments are in effect, the public will benefit from the proposed rule as it ensures that the level of environmental review is commensurate with the potential adverse impacts of the project.

LOCAL EMPLOYMENT IMPACT STATEMENT

The executive administrator has determined that a local employment impact statement is not required because the proposed amendments will not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The executive administrator also has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this proposed rule. The executive administrator also has determined that there is no anticipated economic cost to persons who are required to comply with the rule as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The executive administrator has reviewed the proposed amendments pursuant to Texas Government Code § 2001.0225, which requires a regulatory analysis of major environmental rules. A "major environmental rule" is defined as a rule with the specific intent to protect the

Texas Water Development Board
31 Tex. Admin. Code § 375.52 and § 375.62
Clean Water State Revolving Fund – Categorical Exclusions for State and Federal Projects

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 proposed rule does not constitute a major environmental rule because although the intent of the amendments is to protect the environment or reduce risks to human health from environmental exposure, the amendments will not 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 specific intent of the rulemaking is to more closely align the board's rules related to categorical exclusions to the federal rule related to the same.

Even if the proposed 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 the National Environmental Policy Act or any other 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 Texas Water Code Chapter 15, Section J. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code, § 2001.0225.

The executive administrator invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination

may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT

The executive administrator evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed amendments is to more closely align the board's rules related to categorical exclusions to the federal rule related to the same. The proposed rule would substantially advance this stated purpose by incorporating applicable language from the federal rule.

The executive administrator'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 imposed by the National Environmental Policy Act, which is exempt under Texas Government Code, § 2007.003(b)(4). The board is an agency that must perform environmental reviews in accordance with the National Environmental Policy Act.

Nevertheless, the executive administrator further evaluated this proposed 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 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 regulation. In other words, this rule requires compliance with the evaluation and determination of whether categorical exclusions from full environmental review is appropriate under the National Environmental Policy Act. This will not burden, restrict, or limit an owner's right to property. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

SUBMISSION OF COMMENTS

Comments on the proposed rulemaking will be accepted for 30 days following publication in the Texas Register and may be submitted to Mr. Les Trobman, Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, rulescomments@twdb.texas.gov, or by fax at (512) 475-2053.

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code § 6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board. The proposal is also proposed under the authority of Texas Water Code § 15.605, which authorizes the board to adopt necessary rules to carry out Subchapter J of Texas Water Code Chapter 15, relating to Financial Assistance for Water Pollution Control.

Chapter 375 Clean Water State Revolving Fund
Subchapter E, Environmental Reviews and Determinations
Division I, State Projects

§375.52. Types of Environmental Determinations: Categorical Exclusions [~~(CE)~~]

(a) [~~Projects eligible for categorical exclusions.~~] Categorical exclusions [CE's] may be [~~are generally~~] available for projects that will not result in significant impacts on the quality of the human environment and that do not involve extraordinary circumstances, as listed in subsections (d)(1) through (d)(9) of this section. [~~preventing use of a CE~~].

(b) Projects that may be eligible for a categorical exclusion [~~(CE)~~] include the following actions on existing systems:

(1) those that involve upgrades that are minor; [~~include only minor upgrading or~~]

(2) minor expansion of system capacity;

Texas Water Development Board
31 Tex. Admin. Code § 375.52 and § 375.62
Clean Water State Revolving Fund – Categorical Exclusions for State and Federal Projects

(3) [(2)] the rehabilitation, including [or] functional replacement of the existing system and system components [such as collection lines, interceptor sewers, or force mains located within their existing right of ways and easements]; and

(4) [(3)] the construction of new minor ancillary facilities located adjacent to or on the same property as existing facilities, [that do not affect the degree of treatment or the capacity of the works; and]

~~[(4) the construction of facilities that will provide a capacity increase to serve a population of no greater than 30% the size of the existing population.]~~

(c) [(b)] Projects not eligible for a CE include:

(1) [Projects] projects that would otherwise be eligible for a CE but due to extraordinary circumstances, as listed in subsections (d)(1) through (d)(9), [detailed in subsection (e)] of this section are not eligible for a CE;

(2) projects that involve new or relocated discharges to surface or ground water; [the construction of new collection lines, interceptor sewers, or force mains;]

(3) projects that will likely result in the substantial increase in the volume or the loading of a pollutant to the receiving water; [a new discharge or relocation of an existing discharge;]

(4) projects that will provide capacity to serve a population 30% greater than the existing population; [a substantial increase in the volume or loading of pollutants; and]

(5) projects that are not supported by the state, or other regional growth plan or strategy; and [projects needed primarily to serve future growth by providing capacity for a population 30% greater than the existing population.]

Texas Water Development Board
31 Tex. Admin. Code § 375.52 and § 375.62
Clean Water State Revolving Fund – Categorical Exclusions for State and Federal Projects

(6) projects that directly or indirectly involve or relate to upgrading or extending infrastructure systems primarily for the purposes of future development.

~~(d) [(e) Circumstances preventing use of categorical exclusion.]~~ Extraordinary circumstances ~~[Circumstances]~~ may become known at any time during the planning, design or construction of a project and may cause the project to be ineligible for a CE. Extraordinary ~~[These]~~ circumstances include, but are not limited to, the following known or expected impacts:

(1) potentially significant environmental impacts on the quality of the human environment either individually or cumulatively over time;

(2) disproportionately high and adverse human health or environmental effects on any community, including minority communities, low-income communities, or federally-recognized Indian [tribes] tribal communities;

(3) a significant ~~[an]~~ effect on ~~[or potential taking of a]~~ federal or state-listed threatened or endangered species or their critical habitat;

(4) a significant effect on national or state natural landmarks or property with nationally significant ~~[national]~~ or state historic, architectural, prehistoric, archeological or cultural value;

(5) a significant effect on environmentally important natural resource areas such as wetlands, floodplains, ~~[water of the United States,]~~ significant agricultural lands, aquifer recharge zones, coastal zones, barrier islands, wild and scenic rivers and significant fish or wildlife habitat;

(6) a significant adverse air quality effect ~~[effects]~~;

(7) a significant effect on the pattern and type of land use or growth and distribution of population including altering the character of existing residential areas, or may not be

Texas Water Development Board
31 Tex. Admin. Code § 375.52 and § 375.62
Clean Water State Revolving Fund – Categorical Exclusions for State and Federal Projects

consistent with state or local government, or federally-recognized Indian tribe approved land use plans or federal land management plans;

(8) significant public controversy about a potential environmental impact of the proposed project; and

~~[(9) the cost effectiveness of the project; and]~~

(9) [(10)] [any] conflict with [existing] federal, state, or local government, or federally-recognized Indian tribe environmental, resource- [resources] protection or land-use laws or [and] regulations.

(e) [(d)] Upon the discovery of extraordinary circumstances, the executive administrator may deny a CE or rescind an existing CE.

(f) [(e) Applicant Requirements.] An Applicant shall submit sufficient information to demonstrate why the project is eligible for a CE including, but not [necessarily] limited to the following documentation [in the Engineering Feasibility report]:

(1) a brief but complete description of the project;

~~[(2) an alternatives analysis demonstrating the cost effectiveness of the project;]~~

(2) [(3)] plan maps or maps of the project depicting the location of all construction areas, the planning area boundaries, and any known environmentally important natural areas;

~~[(4) the names of widely circulated, local newspapers serving the community affected by the project;]~~

Texas Water Development Board
31 Tex. Admin. Code § 375.52 and § 375.62
Clean Water State Revolving Fund – Categorical Exclusions for State and Federal Projects

~~(3)(5)~~ information regarding the eligibility of the project [~~a discussion of the project's eligibility~~] for a CE under the criteria listed in subsection (b) [~~(a)~~] of this section; and

~~(4) (6)~~ any information that may be helpful to determine whether any extraordinary circumstances, as listed in subsection (d)(1) through (d)(9) of this section, apply to the project. [~~a statement explaining why no extraordinary circumstances, as listed in subsection (e) of this section, apply to the proposed action.~~]

~~(g) (f) Review of proposed project eligibility for CE.~~ The executive administrator shall review the information submitted and may request additional information as needed to complete the determination regarding the eligibility of a proposed project for a categorical exclusion.

~~(h) (g) Public notice.~~ The executive administrator's determination relating to a CE shall be subject to public notice which shall be published either in a newspaper of general circulation in the county or counties of the affected community or on the agency's website and referenced in a public notice in a newspaper of general circulation in the county or counties of the affected community.

Chapter 375, Clean Water State Revolving Fund
Subchapter E, Environmental Reviews and Determinations
Division 2, Federal Projects

§375.62. Types of Environmental Determinations: Categorical Exclusions.

(a) [~~Projects eligible for categorical exclusions.~~] Categorical Exclusions may be [~~are generally~~] available for projects that will not result in significant impacts on the quality of the human environment and that do not involve extraordinary circumstances, as listed in subparagraphs (d)(1) through (d)(9) of this section.

(b) Projects that may be eligible for a categorical exclusion [~~(CE)~~] include the following actions on existing systems:

(1) those that involve upgrades that are minor; [~~include only minor upgrading or minor expansion of system capacity;~~]

(2) minor expansion of system capacity;

Texas Water Development Board
31 Tex. Admin. Code § 375.52 and § 375.62
Clean Water State Revolving Fund – Categorical Exclusions for State and Federal Projects

~~(3) [(2)] the rehabilitation, including [or] functional replacement of the existing system and system components [such as collection, interceptor, or pressure lines located within existing right-of-ways and easements]; and~~

~~(4) [(3)] the construction of new minor ancillary facilities located adjacent to or on the same property as existing facilities, [that do not affect the degree of treatment or the capacity of the works; and]~~

~~[(4) the construction of facilities that will provide a capacity increase to serve a population of no greater than 30% the size of the existing population.]~~

~~(c) [(b)] Projects not eligible for a CE include [are]:~~

~~(1) projects [Projects] that would otherwise be eligible for a CE but due to extraordinary circumstances, as listed in subparagraphs (d)(1) through (d)(9) of this section, are not eligible for a CE;~~

~~(2) projects that involve new or relocated discharges to surface or ground water;~~

~~(3) projects that will likely result in the substantial increase in the volume or the loading of a pollutant to the receiving water;~~

~~(4) projects that will provide capacity to serve a population 30% greater than the existing population;~~

~~(5) projects that are not supported by the state, or other regional growth plan or strategy; and~~

~~(6) projects that directly or indirectly involve or relate to upgrading or extending infrastructure systems primarily for the purposes of future development.~~

~~[(2) the construction of new collection, interceptor, or pressure lines;]~~

~~[(3) actions not supported by the State or Regional Water Plan; and]~~

~~[(4) projects needed primarily to serve future growth.]~~

~~(d) [(e)] [Extraordinary circumstances:]~~ Extraordinary circumstances may become known at any time during the planning, design or construction of a project and may cause the project to be ineligible for a CE. Extraordinary circumstances include, but are not limited to, the following known or expected impacts:

(1) potentially significant environmental impacts on the quality of the human environment either individually or cumulatively over time;

Texas Water Development Board
31 Tex. Admin. Code § 375.52 and § 375.62
Clean Water State Revolving Fund – Categorical Exclusions for State and Federal Projects

- (2) disproportionately high and adverse human health or environmental effects on any community, including minority communities, low-income communities, or federally-recognized Indian tribal communities [~~tribes~~];
- (3) a significant effect on federal or state-listed threatened or endangered species or their critical habitat;
- (4) a significant effect on national or state natural landmarks or property with nationally significant [~~national~~] or state historic, architectural, prehistoric, archeological or cultural value;
- (5) a significant effect on environmentally important natural resource areas such as wetlands, floodplains, significant agricultural lands, aquifer recharge zones, coastal zones, barrier islands, wild and scenic rivers and significant fish or wildlife habitat;
- (6) a significant adverse air quality effect [~~effects~~];
- (7) a significant effect on the pattern and type of land use or growth and distribution of population including altering the character of existing residential areas, or may not be consistent with state or local government, or federally-recognized Indian tribe approved land use plans or federal land management plans;
- (8) significant public controversy about a potential environmental impact of the proposed project; and
[~~(9) the cost effectiveness of the project; and~~]
- (9) [~~(10)~~] [~~any~~] conflict with [~~existing~~] federal, state, or local government, or federally-recognized Indian tribe environmental, resource- [~~resources~~] protection, or land-use laws or [~~and~~] regulations.
- (e) [~~(d)~~] Upon the discovery of extraordinary circumstances, the executive administrator may deny a CE or rescind an existing CE.
- (f) [~~(e)~~] [~~Applicant requirements.~~] An Applicant shall submit sufficient information to demonstrate [~~clearly describe~~] why the project is eligible for a CE including, but not [~~necessarily~~] limited to the following documentation:
- (1) a brief but complete description of the project;
- [~~(2) an alternatives analysis demonstrating the cost effectiveness of the project;~~]
- (2) [~~(3)~~] plan maps or maps of the project depicting the location of all construction areas, the planning area boundaries, and any known environmentally important natural areas;

Texas Water Development Board
31 Tex. Admin. Code § 375.52 and § 375.62
Clean Water State Revolving Fund – Categorical Exclusions for State and Federal Projects

~~[(4) the names of widely circulated, local newspapers serving the community affected by the project;]~~

(3) [(5)] information regarding the eligibility of the project [a discussion of the project's eligibility] for a CE under the criteria listed in subsection (b) [(a)] of this section; and

(4) any information that may be helpful to determine whether any extraordinary circumstances, as listed in subsection (d)(1) through (d)(9) of this section, apply to the project.

~~[(6) a statement explaining why no extraordinary circumstances, as listed in subsection (e) of this section, apply to the proposed action.]~~

(g) [(f) Review of proposed project eligibility for CE.] The executive administrator shall review the information submitted and may request additional information as needed to complete the determination regarding the eligibility of a proposed project for a categorical exclusion.

(h) [(g) Public notice.] The executive administrator's determination relating to a CE shall be subject to public notice which shall be published either in a newspaper of general circulation in the county or counties of the affected community or on the agency's website and referenced in a public notice in a newspaper of general circulation in the county or counties of the affected community.