

TO: Board Members

THROUGH: Les Trobman, General Counsel
Jeff Walker, Deputy Executive Administrator, Water Supply & Infrastructure

FROM: Kendal Payne, Assistant General Counsel
Tom Entsminger, State Programs Coordinator

DATE: October 22, 2015

SUBJECT: Rulemaking for Adoption of 31 Tex. Admin. Code § 354.4, Memorandum of Understanding with Texas Department of Agriculture

ACTION REQUESTED

Authorize adoption and publication of amendments to 31 Texas Administrative Code (TAC) §354.4 relating to amended Memorandum of Understanding (MOU) with the Texas Department of Agriculture (TDA).

BACKGROUND

The Texas Water Development Board (TWDB) and Texas Department of Agriculture (TDA) were required by the General Appropriations Act to adopt a Memorandum of Understanding (MOU) relating to the Economically Distressed Areas Program (EDAP) and to TDA's Colonia Fund. The purpose of the MOU is to "maximize delivery of funds and minimize administrative delay in their expenditure." The MOU was approved by the Board on August 26, 2015, and was executed by both parties on that date.

The TWDB is required by Water Code § 6.104 to "adopt by rule any memorandum of understanding between the board and any other state agency." The proposed rules were published in the *Texas Register* on September 11, 2015, and no public comments were received.

KEY ISSUES

None. These actions are required by law and no public comments were received.

RECOMMENDATION

Authorize adoption and publication of amendments to 31 Texas Administrative Code (TAC) §354.4 relating to the amended MOU between the TWDB and TDA.

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

Les Trobman
General Counsel

Attachment: Rule for publication in the Texas Register.

The Texas Water Development Board (TWDB) adopts with one minor, non-substantive change amendments to Title 31, Texas Administrative Code (TAC) §354.4, to incorporate into rule an amended memorandum of understanding (MOU) between the TWDB and the Texas Department of Agriculture, Office of Rural Affairs (TDA), as published in the September 11, 2015 issue of the *Texas Register* (40 TexReg 6305).

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

Pursuant to the General Appropriations Act, H.B. 1, 84th Leg., R.S., Rider 8, page VI-58 of the TWDB appropriation, and Rider 20, page VI-7 of the TDA appropriation, TWDB and TDA are required to enter into a MOU. The provisions require the TWDB to coordinate funds out of the Economically Distressed Areas Program (EDAP) administered by the TWDB and the Colonia Fund administered by the TDA as outlined in an MOU to maximize delivery of the funds and minimize administrative delay in their expenditure. The adopted amendments describe the revised MOU for the period from September 1, 2015 to August 31, 2017.

DISCUSSION OF THE AMENDMENTS.

The adopted MOU is essentially the same as the current MOU; the adopted amendments are discussed as follows.

Recitals: Citations to the General Appropriations Act (GAA) have been updated to reflect citation to the Appropriations Act relevant to this MOU.

Period of Performance: The period of performance has been revised to reflect the biennium covered by the GAA. The period of performance is September 1, 2015 through August 31, 2017.

Reporting Requirements: The deadline for the report has been revised in accordance with the language in the GAA.

Other non-substantive, typographical amendments to 31 TAC §354.4 have been adopted.

REGULATORY ANALYSIS

The board has reviewed the adopted 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 make conforming amendments based on the General Appropriations Act to an existing MOU between the TDA and TWDB and to adopt by rule the MOU as required by Texas Water Code §6.104.

Even if the adopted rule were a major environmental rule, Texas Government Code §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: 1) does not exceed any standard set by a 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 it is also proposed under authority of Texas Water Code §6.104. 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 adopt by rule the MOU between TDA and the TWDB as required by Texas Water Code §6.104.

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). Nevertheless, the board further evaluated this adopted rule and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this adopted rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted 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. Therefore, the adopted rule does not constitute a taking under Texas Government Code, Chapter 2007.

PUBLIC COMMENT

No comments were received.

STATUTORY AUTHORITY.

These amendments are adopted under Texas Water Code §6.104, which requires the TWDB to adopt by rule any memorandum of understanding between the TWDB and any other state agency and General Appropriations Act, SB 1, 83rd Leg., R.S., Rider 8, page VI-56 of the TWDB budget.

This adoption affects Texas Water Code §6.104.

§354.4. Memorandum of Understanding Between the Texas Department of Agriculture and the Texas Water Development Board

(a) SECTION I. RECITALS.

(1) WHEREAS, pursuant to the General Appropriations Act, H.B. 1, 84th Leg., R.S., Rider 8, page VI-58, of, the Texas Water Development Board's (TWDB) appropriation, and Rider 20, page VI-7 of the Texas Department of Agriculture's (TDA) appropriation, TWDB and TDA are required to enter into this Memorandum of Understanding (MOU);

(2) WHEREAS, the TDA administers the Colonia Set-Aside Program described in the General Appropriations Act, H.B. 1, 84th Leg., R.S., Rider 20, page VI-8 of the TDA budget;

(3) WHEREAS, the TDA and the TWDB are required to continue to coordinate funds as outlined in this MOU to ensure that none of the funds appropriated therein are expended in a manner that aids the proliferation of colonias or are otherwise used in a manner inconsistent with the intent of the Economically Distressed Areas Program (EDAP) administered by the TWDB, and maximize delivery of the funds and minimize administrative delay in their expenditure.

(4) NOW THEREFORE, the TDA and the TWDB hereby enter into this MOU for the purposes set forth herein.

(b) SECTION II. PARTIES. This MOU is made and entered into between the TDA, an agency of the State of Texas, and the TWDB, also an agency of the State of Texas.

(c) SECTION III. PURPOSE. The purpose of this MOU is to ensure that none of the funds appropriated under the Colonia Fund are expended in a manner that aids the proliferation of colonias or are otherwise used in a manner inconsistent with the intent of the EDAP operated by the TWDB and to use the Colonia Set Aside program for residential service lines, hookups and plumbing improvements, so as to maximize delivery of the funds and minimize administrative delay in their expenditure.

(d) SECTION IV. PERIOD OF PERFORMANCE. The obligations under this MOU shall be in force beginning on September 1, 2015, and terminating on August 31, 2017.

(e) SECTION V. PERFORMANCE. Each party to this MOU shall coordinate with the other in delivering water and sewer service lines, hook-ups, and plumbing improvements to residents of selected colonias in order to connect those residents' housing units to EDAP-funded water and sewer systems.

(1) TDA RESPONSIBILITIES. The TDA shall be responsible for the following functions:

(A) develop an application process for projects submitted by eligible units of local government;

(B) determine whether projects meet applicable federal requirements;

(C) select projects to receive funding and make Colonia Economically Distressed Areas Program (CEDAP) grant awards from the Colonia Fund for selected projects on an as-needed basis;

(D) prepare and execute contracts with units of general local government (Contractor localities);

(E) provide oversight and guidance to Contractor localities regarding applicable federal and state laws and program regulations (environmental, labor, acquisition of real property, relocation, procurement, financial management, fair housing, equal employment opportunity, etc.);

(F) review, approve, process, and honor valid reimbursement requests from Contractor localities;

(G) monitor each project prior to contract completion to ensure compliance with applicable federal and state laws and program regulations; and

(H) consult with the TWDB regarding specific projects on an as-needed basis.

(2) TWDB RESPONSIBILITIES. The TWDB shall be responsible for the following functions:

(A) at the beginning of each fiscal year, or quarterly upon request, provide the TDA with descriptions of and schedules for EDAP-funded projects that need Colonia Fund assistance to provide connections and plumbing improvements;

(B) provide a list of projects for the TDA's eligibility review for joint funding; and

(C) provide assistance with technical project-related concerns brought forward by Contractor localities or the TDA during the course of the project.

(f) SECTION VI. LIMITATIONS. Eligible applicants shall be those counties eligible under both the TDA's CEDAP and TWDB's EDAP. Non-entitlement cities located within eligible counties are also eligible applicants. Eligible projects shall be located in unincorporated colonias identified by the TWDB and ineligible cities that annexed the colonia where improvements are to be made within five years after the effective date of the annexation, or are in the process of annexing the colonia where improvements are to be made. Eligibility shall be denied to any project in a county that has not adopted or is not enforcing the Model Subdivision Rules established pursuant to §16.343 of the Texas Water Code. If there are an insufficient number of TWDB EDAP projects ready for CEDAP funding, the CEDAP funds may be transferred at the TDA's discretion as stated within the current Community Development Block Grant action plan.

(g) SECTION VII. REPORTING REQUIREMENTS. No later than September 15, 2016, the parties to this MOU agree to submit a joint report to the Legislative Budget Board describing and analyzing the effectiveness of projects funded as a result of coordinated CEDAP/EDAP efforts, including an estimate of savings gained from reducing duplicative efforts for each party.

(h) SECTION VIII. TERMINATION. This MOU shall terminate upon ten (10) days written notice by either party to the other party in this MOU.