

**TO:** Board Members

**THROUGH:** Kevin Patteson, Executive Administrator  
Robert E. Mace, Ph.D., P.G., Deputy Executive Administrator, Water  
Science & Conservation  
Les Trobman, General Counsel

**FROM:** John Sutton, Manager, Municipal Water Conservation  
Jessica Kohlrenken, Assistant General Counsel

**DATE:** April 21, 2016

**SUBJECT:** Adoption of Rulemaking 31 Texas Administrative Code Section 358.6,  
Water Loss Audits

## **ACTION REQUESTED**

Adoption of and authorization to publish amendments to 31 Texas Administrative Code (TAC) Section 358.6 relating to Water Loss Audits.

## **BACKGROUND**

In 2015, the 84th Texas Legislature passed House Bill 949, amending Section 16.0121(g) of the Texas Water Code. The legislation allows the Texas Water Development Board (TWDB), on the request of a retail public utility, to waive the requirement that the utility use a portion of, or any additional, financial assistance to mitigate the utility's water loss if the TWDB finds that the utility is satisfactorily addressing its water loss. To make a determination that the utility is satisfactorily addressing its water loss, the amendment to 31 TAC Section 358.6(f) requires the utility that is identified as meeting or exceeding the thresholds set by agency rule, and which requests a waiver, to provide the Executive Administrator of the TWDB information regarding the planned activities to mitigate their water loss and their source of funding for that mitigation.

House Bill 949 also deletes reference to the effective date of January 1, 2015, currently present in 31 TAC Section 358.6(g).

## **KEY ISSUES**

The TWDB authorized publication of the proposed amendment in the Texas Register at the January 19, 2016 board meeting. Comments on proposed rulemaking were accepted for 30 days following publication on February 5, 2016. One comment was received and is addressed in

Attachment 1: Recommended Rule for Publication in the Texas Register. No changes to the proposed rule were made in response to this comment.

**RECOMMENDATION**

Adopt and authorize publication of amendments to 31 Texas Administrative Code Section 358.6 relating to Water Loss Audits.

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

Attachment 1: Recommended Rule for Publication in the Texas Register

## Recommended Rule for Publication in the Texas Register

The Texas Water Development Board (TWDB) adopts amendments to Chapter 358, State Water Planning Guidelines, §358.6, relating to Water Loss Audits. The proposal is adopted without changes as published in the February 5, 2016, issue of the *Texas Register* (41 TexReg 944).

## DISCUSSION OF THE ADOPTED AMENDMENTS.

In 2013, the 83rd Texas Legislature passed House Bill (H.B.) 3605 amending Texas Water Code §16.0121 regarding the water loss audit that is required of all retail public utilities providing potable water. H.B. 3605 required a retail public utility providing potable water that receives financial assistance from the TWDB to use a portion of that, or any additional, financial assistance to mitigate the utility's system water loss if the utility's system water loss met or exceeded a threshold established by agency rule.

In late 2014, the TWDB adopted 31 TAC §358.6 (relating to Water Loss Audits), which establishes water loss thresholds for retail public utilities providing potable water that apply for financial assistance from the TWDB. The thresholds were developed based on industry performance indicators for both apparent loss (including meter inaccuracies, billing adjustments, and theft) and for real loss (actual loss of water from leaks and breaks and also loss from unknown and unreported sources).

In 2015, the 84th Texas Legislature passed H.B. 949, amending §16.0121(g) of the Water Code allowing the TWDB, on the request of a retail public utility, to waive the requirement that the utility use the financial assistance to mitigate water loss if the TWDB finds that the utility is satisfactorily addressing its water loss.

The adopted amendment to 31 TAC §358.6(f) requires a utility that is identified as meeting or exceeding the thresholds, and which requests a waiver, to provide the Executive Administrator of the TWDB with information regarding the activities or programs it has, or is planning to have, and the source of funding for their water loss program.

The adopted amendment also deletes 31 TAC §358.6(g) because it is no longer applicable.

## SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

Section 358.6(f) is revised for consistency with §16.0121(g) of the Texas Water Code, as amended.

Section 358.6(g) has been deleted because it is unnecessary and is no longer applicable.

## REGULATORY IMPACT ANALYSIS

The TWDB 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 more closely align the TWDB's rules related to water loss audits to the Texas Water Code 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 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 § 16.0121 of the Texas Water Code. Therefore, this rulemaking does not fall under any of the applicability criteria in Texas Government Code, § 2001.0225.

## TAKINGS IMPACT ASSESSMENT

The TWDB evaluated this adopted rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the rulemaking is to more closely align the TWDB's rules related to water loss audits to the Texas Water Code related to the same. The rulemaking would substantially advance this stated purpose by incorporating applicable language from the Texas Water Code.

The TWDB's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking because this is an action that is reasonably taken to fulfill an obligation imposed by state law under Chapter 16 of the Texas Water Code, which is exempt under Texas Government Code, § 2007.003(b)(4). The TWDB is an agency that must coordinate the submission of the required water loss audit, and must compile information included in the water loss audit and determine the utility's use of financial assistance from the TWDB to mitigate system water loss in accordance with § 16.0121 of the Texas Water Code.

Nevertheless, the TWDB further evaluated this adopted rulemaking and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this rulemaking 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 submission of a water loss as required by state law unless a waiver is appropriately requested by a retail public utility. This will not burden, restrict, or limit an

owner's right to property. Therefore, the adopted rulemaking does not constitute a taking under Texas Government Code, Chapter 2007.

## PUBLIC COMMENT

One written comment from the Lone Star Chapter of the Sierra Club was received.

## RESPONSE TO COMMENTS

### Comment

The Lone Star Chapter of the Sierra Club expressed their agreement with the TWDB's basic approach concerning the amendments to Chapter 358. However, they stated that the amendments needed further specificity and should be complemented by TWDB guidance, with input from stakeholders and perhaps the Water Conservation Advisory Council, to assist retail public utilities applying for financial assistance, the general public, and TWDB staff in evaluating what constitutes a demonstration that a utility is satisfactorily addressing its water loss.

They also recommended the following language on items to be included by a utility in its request for waiver be added:

*its water loss reduction targets, the timetable for meeting those targets, and the schedule for reporting to the board on the utility's progress in meeting those targets,*

### Response

As defined by 31 TAC §358.6(a)(7), mitigation includes action taken by the utility, not necessarily a volume of water. Information provided by the utility about its activities to mitigate its water loss could be considered its target. The information provided by a utility, as well as the anticipated completion date of the funded project, serve as a timetable for implementation. Finally, every utility with an active financial obligation with TWDB is required to submit a water loss audit annually. This information will be used by TWDB to track the utility's progress in mitigating its water loss. TWDB Conservation staff plans to prepare guidance to assist in evaluating whether a utility is satisfactorily addressing its water loss as part of the application for financial assistance process. No changes to the proposed rule were made in response to this comment.

## STATUTORY AUTHORITY

The amendments 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 Texas Water Code and other laws of the State, and also under the authority of Texas Water Code §16.0121, which authorizes the TWDB to waive the water loss mitigation requirements under specified conditions.

This rulemaking affects Texas Water Code, Chapter 16.

§358.6. Water Loss Audits.

(a) Definitions. Unless otherwise indicated, in this section the following terms shall have the meanings assigned.

(1) Allowed apparent loss--A unique number for allowable apparent loss calculated for each utility.

(2) Annual real loss--A unique number calculated for each utility based on the utility's real loss on an annualized basis.

(3) Apparent loss--Unauthorized consumption, meter inaccuracy, billing adjustments, and waivers.

(4) Average system operating pressure--System operating pressure in pounds per square inch calculated using a weighted average approach as identified in the American Water Works Association M36 Manual.

(5) Category or Categories--A category of retail public utility as listed in Texas Water Code §16.0121(c).

(6) Executive Administrator--The executive administrator of the Board.

(7) Mitigation--An action or actions taken by a retail public utility to reduce the amount of total water loss in a system. Mitigation may include a detailed water loss assessment, pipe or meter replacement, or addition or improvement of monitoring devices to detect water loss.

(8) Real loss--Loss from main breaks and leaks, storage tank overflows, customer service line breaks, and line leaks.

(9) Retail public utility or utility--A retail public utility as defined by Texas Water Code §13.002.

(10) Service connection density--The number of a retail public utility's connections on a per mile basis.

(11) Total water loss--The sum of a utility's real loss and apparent loss.

(12) Unavoidable annual real loss--A unique number calculated for each utility based on the number of connections, miles of distribution lines, and operating pressure.

(b) A retail public utility that provides potable water shall perform a water loss audit and file with the executive administrator a water loss audit computing the utility's system water loss during the preceding calendar year, unless a different 12-month period is allowed by the executive administrator. The water loss audit may be submitted electronically.

(1) Audit required annually. The utility must file the water loss audit with the executive administrator annually by May 1st if the utility:

(A) has more than 3,300 connections; or

(B) is receiving financial assistance from the board, regardless of the number of connections. A retail public utility is receiving financial assistance from the board if it has an outstanding loan, loan forgiveness agreement, or grant agreement from the board.

(2) Audit required every five years. The utility must file the water loss audit with the executive administrator by May 1, 2016, and every five years thereafter by May 1st if the utility has 3,300 or fewer connections and is not receiving financial assistance from the board.

(3) The water loss audit shall be performed in accordance with methodologies developed by the executive administrator based on the population served by the utility and taking into consideration the financial feasibility of performing the water loss audit, population density in the service area, the retail public utility's source of water supply, the mean income of the service population, and any other factors determined by the executive administrator. The executive administrator will provide the necessary forms and methodologies to the retail public utility.

(c) The executive administrator shall determine if the water loss audit is administratively complete. A water loss audit is administratively complete if all required responses are provided. In the event the executive administrator determines that a retail public utility's water loss audit is incomplete, the executive administrator shall notify the utility.

(d) A retail public utility that provides potable water that fails to submit a water loss audit or that fails to correct a water loss audit that is not administratively complete within the timeframe provided by the executive administrator is ineligible for financial assistance for water supply projects under Texas Water Code, Chapter 15, Subchapters C, D, E, F, G, H, J, O, Q, and R; Chapter 16, Subchapters E and F; and Chapter 17, Subchapters D, I, K, and L. The retail public utility will remain ineligible for financial assistance until a complete water loss audit has been filed with and accepted by the executive administrator.

(e) The following thresholds shall apply to the indicated categories of retail public utility:

(1) For a retail public utility with a population of more than 10,000:

(A) Apparent loss expressed as gallons per connection per day must be less than the utility's allowed apparent loss.

(B) Real loss expressed as gallons per connection per day must be less than three times the utility's unavoidable annual real loss.

(2) For a retail public utility with a population of 10,000 or fewer and a service connection density more than or equal to 32 connections per mile:

(A) Apparent loss expressed as gallons per connection per day must be less than the utility's allowed apparent loss.

(B) Real loss expressed as gallons per connection per day must be less than 50 gallons per connection per day.

(3) For a retail public utility with a population of 10,000 or fewer and a service connection density less than 32 connections per mile:

(A) Apparent loss expressed as gallons per connection per day must be less than the utility's allowed apparent loss.

(B) Real loss expressed as gallons per mile per day must be less than 1,600 gallons per mile per day.

(4) For a utility that has a volume of wholesale water sales that flow through the retail water distribution system:

(A) Apparent loss expressed as gallons per connection per day, determined using a modified calculation that includes the wholesale volume, must be less than the utility's allowed apparent loss.

(B) Real loss, expressed as gallons per connection per day and including a wholesale factor that takes into account the wholesale water volume, must be less than three times the utility's unavoidable annual real loss.

(f) If a retail public utility's total water loss meets or exceeds the threshold for that utility, the retail public utility must use a portion of any financial assistance received from the board for a water supply project to mitigate the utility's water loss. Mitigation will be in a manner determined by the retail public utility and the executive administrator in conjunction with the project proposed by the utility and funded by the board. On the request of a retail public utility, the board may waive the requirements of this subsection if the board finds that the utility is satisfactorily mitigating the utility's system water loss. The request for waiver should be addressed to the executive administrator and include information about the utility's current or planned activities to mitigate their water loss and their source of funding for that mitigation.