

**TO:** Board Members

**THROUGH:** Jeff Walker, Executive Administrator  
Jessica Zuba, Deputy Executive Administrator  
Les Trobman, General Counsel

**FROM:** Jo Dawn Bomar, Director, Program Administration and Reporting  
Mark Wyatt, Manager, Program Administration  
Kendal Payne, Assistant General Counsel

**DATE:** May 31, 2016

**SUBJECT:** Rulemaking – 31 Texas Administrative Code Chapter 371 Relating to the Drinking Water State Revolving Fund

**ACTION REQUESTED**

Adopt and authorize publication of the new rules, amendments, and repeals to 31 Texas Administrative Code Chapter 371 relating to the Drinking Water State Revolving Fund (DWSRF).

**BACKGROUND**

The Texas Water Development Board (TWDB) authorized publication of proposed new rules, amendments, and repeals to 31 Texas Administrative Code Chapter 371 relating to the DWSRF on March 21, 2016. The proposed new rules, amendments, and repeals were published in the *Texas Register* on April 1, 2016 with a comment period that ended on May 2, 2016. In addition, the proposed rulemaking and comment period were posted on the TWDB’s website.

No comments were received and no changes have been made to the proposed rulemaking.

The agency undertook a comprehensive review of the program rules to incorporate additional program flexibility and to implement initiatives that respond directly to the needs of entities using the DWSRF program. For example, the recommended rules allow greater flexibility in establishing the interest rate savings and the administrative fee each year as part of the Intended Use Plan (IUP). Similarly, while all projects and activities eligible under federal law are listed, the specific projects and activities eligible for assistance under the DWSRF program for a particular funding year will be established annually in the IUP. The recommended rules respond to the needs of taxable and private entities, such as water supply corporations, by incorporating changes that will permit them to receive the same interest rate reduction as other entities. To

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assist systems needing to fund large projects over a period of time, the recommended rules incorporate multi-year commitments. Finally, the recommended rules incorporate initiatives designed to improve program operations and efficiency, while maintaining compliance with federal requirements.

### **KEY ISSUES**

The definition of “Disadvantaged Community” is revised to incorporate unemployment rates and population trends into the affordability criteria that currently consider only the income level.

Section 371.2 is revised to include a list of all eligible project categories, eligible project-related costs, and ineligible projects in accordance with the Federal Safe Drinking Water Act.

A new section 371.4 is added to discuss the federal requirements currently applicable to DWSRF projects. The applicability of the American Iron and Steel requirement currently established annually through the federal appropriations for the program will be specified in the IUP.

Section 371.14 is revised to make private and taxable entities, such as water supply corporations, eligible for the interest rate reduction. As part of the revision to clarify eligibility for the reduction, TWDB will revise the method of establishing the fixed rate scale and determining the amount of adjustment from the market interest rate. TWDB is not altering the interest rate reduction a borrower would have received under current program practices. In addition, references to the maximum reduction level have been removed to allow greater flexibility in establishing a significant interest rate reduction consistent with projections of the long-term financial health of the DWSRF. The interest rate reduction will instead be established annually in the DWSRF’s IUP.

Section 371.15 is revised to allow greater flexibility to make annual adjustments to the DWSRF program based on needs and projected financial conditions. To accomplish this, the amount of any administrative loan origination fee, up to the maximum specified amount, will be established in the DWSRF’s IUP.

Section 371.17 is revised to substitute “principal forgiveness” for “subsidies” in the title and text. Principal forgiveness is the type of additional subsidization offered in the program. The term “subsidy” now refers only to a reduction in the interest rate from the market interest rate rather than principal forgiveness.

Section 371.21 is revised to incorporate a new paragraph to discuss the selection process for urgent need financial assistance, including the ability to bypass higher rated projects to provide funding to urgent need projects.

Section 371.34 is revised to incorporate new statutory requirements. According to Section 16.0121(g), Water Code, a retail public utility providing potable water that receives financial assistance from the TWDB is required to use a portion of that financial assistance, or any additional financial assistance provided by TWDB, to mitigate the utility's system water loss if, based on a water audit filed by the utility, the water loss meets or exceeds the threshold established by TWDB rule. In accordance with Section 16.0121(g), Water Code, as amended by

H.B. 949, 84th Legislative Session, Section 371.34 is revised to allow the TWDB, at the request of the retail public utility, to waive this requirement if the TWDB finds that the utility is satisfactorily addressing the utility's system water loss.

Section 371.35 is revised to remove the commitment expiration timeframes from the rules and establish the expiration timeframes through the annual IUP applicable to the project in order to provide greater flexibility in administering the program. Section 371.35 will allow multiple extensions instead of one extension and the language would be revised to better instruct applicants on the procedure for requesting an extension.

Subchapter E, Environmental Reviews and Determinations (Sections 371.40 – 371.52), is revised to provide greater clarity on the environmental review process. It adds more details on which portions are prepared by the applicant versus the TWDB and the timing of preparing different environmental documents to provide greater clarity. Certain terminology is revised in order to avoid confusion between state and federal environmental documents.

Section 371.37 is added to implement multi-year commitments to provide a reliable source of capital based on a commitment structure that meets the annual capital requirements of the project. Multi-year commitments should assist entities that need to fund large projects over a period of time.

Section 371.72 is revised to eliminate the need for an environmental affirmation by the Board.

### **RECOMMENDATION**

The Executive Administrator recommends approval of this item.

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

#### Attachments:

1. Adoption of New Rules and Amendments for publication in the *Texas Register* – Chapter 371
2. Adoption of Repeals for publication in the *Texas Register* – Chapter 371

## Attachment 1

The Texas Water Development Board (“TWDB” or “Board”) adopts, with no changes, amendments to 31 Texas Administrative Code (“TAC”) §§371.1 – 371.4, 371.10 – 371.18, 371.20 – 371.24, 371.30 – 371.35, 371.40 – 371.42, 371.60 – 371.62, 371.70 – 371.74, 371.80 – 371.82, and 371.85 – 371.88, relating to the TWDB’s administration of the Drinking Water State Revolving Fund (“DWSRF”). New §§371.3, 371.4, 371.36, and 371.43 – 371.52 are adopted. Repeals of existing §§371.3, 371.4, and 371.43 – 371.51 are simultaneously adopted elsewhere in this issue of the *Texas Register*. These changes were proposed in the April 1, 2016 issue of the *Texas Register* (41 TexReg 2397).

### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED AMENDMENTS.

The TWDB adopts amendments to numerous provisions in 31 TAC Chapter 371. Various amendments are adopted to provide greater clarity in this chapter of TWDB rules or to update rule provisions pursuant to TWDB practice. The specific provisions being amended and the reasons for the amendments are discussed in more detail below.

### SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

#### *Subchapter A. General Program Requirements.*

##### *Section 371.1. Definitions.*

The definition of “Acquisition” is added to discuss eligible project costs and to describe a phase of the project.

The definition of “Applicant” is revised for clarity to focus on the repayment of the debt rather than ownership of the project.

The definition of “Application” is revised to expand the focus from solely ‘forms’ to ‘forms and other information’ that is submitted to the Board.

The definition of “Authorized representative” is revised to provide greater clarity.

The definition of “Bypass” is revised to incorporate the specific reasoning for passing over a higher ranked project in favor of lower ranked project.

The definition of “Commitment” is revised for clarity to refer directly to the Board resolution that constitutes the commitment rather than to the applicant’s fulfillment of the conditions.

The definition of “Commitment term” is deleted because it is no longer needed with the added definition of “Expiration date,” which provides more clarity.

The definition of “Construction” is deleted because it is no longer necessary.

The definition of “Construction phase” is added to provide greater clarity.

The definition of “Corporation” is deleted because it is not necessary.

The definition of “Design” is revised for clarity.

The definition of “Disadvantaged community” is revised to incorporate unemployment rates and population trends into the affordability criteria that currently consider only the income level.

The definition of “Disaster” is revised to add extreme heat.

The definition of “Eligible applicant” is revised to include a privately-owned community water system, which is currently eligible, as one of the eligible entities listed in the rule.

The definition of “Environmental affirmation” is deleted because it is no longer needed.

The definition of “Expiration date” is added to provide greater clarity regarding the Board’s offer of financial assistance and is used to clarify the timeframe allowed for the applicant to submit a request to extend the Board’s commitment.

The definition of “Financial assistance” is revised to provide greater clarity.

The definition of “Invited Projects List” is retitled “Initial Invited Projects List” to be consistent with the terminology used in the Board’s Intended Use Plan.

The definition of “Lending rate” is revised for greater clarity to distinguish between financial assistance, which must be repaid and accrues interest, and principal forgiveness, which is not repaid and does not accrue interest.

The definition of “Nonprofit noncommunity (NPNC water system)” is revised to focus on the operation of the system rather than ownership by a non-profit organization.

The definition of “Person” is revised to align more closely to the definition in Chapter 15, Subchapter J, of the Texas Water Code.

The definition of “Planning” is added to reference a particular phase or aspect of the project.

The definition of “Population” is revised to specify that the data used must be the latest data available from the U.S. Census Bureau, such as the American Community Survey data released annually, rather than the decennial census.

The definition of “Principal forgiveness” is added to specify the type of additional subsidization that is being offered for the program.

The definition of “Project” is revised to provide greater clarity.

The definition of “Project information form” is retitled as “Project Information Form (PIF)” and is revised to clarify that the information submitted must conform to the agency’s requirements.

The definition of “Project Priority List” is revised for clarity to reference the specific list found in the Intended Use Plan that contains the projects eligible for funding ranked according to their rating criteria score.

The definition of “Ready to proceed” is revised for clarification purposes.

The definition of “Subsidy” is revised to reference only a reduction in the interest rate from the market interest rate rather than principal forgiveness.

The definition of “Utility Commission” is added to delineate between the Public Utility Commission of Texas and the Texas Commission on Environmental Quality because of new powers and duties of the Public Utility Commission.

Other non-substantive, grammatical changes are made for clarification and grammatical purposes. Subsections are renumbered to reflect added and removed definitions.

*Section 371.2. Projects and Activities Eligible for Assistance.*

Section 371.2 is revised to include a list of all eligible project categories, eligible project-related costs, and ineligible projects in accordance with the Federal Safe Drinking Water Act (“FSDWA”) (42 U.S.C. §§300f *et seq.*). While all projects and activities eligible under federal law are listed, the specific projects and activities eligible for assistance under the Texas DWSRF program for a particular funding year will be established annually in the DWSRF’s Intended Use Plan. This will allow greater flexibility to adjust the program based on needs and capacity.

*Section 371.3. Other Authorized Activities: Source Water Protection and Technical Assistance.*

New section 371.3 is added. Language from previously numbered sections 371.3 and 371.4 is added and revised to align the language more closely to the federal regulations. The reference to limitations on the use of funds for these purposes includes the percentages specified in the federal regulations.

*Section 371.4. Federal Requirements.*

A new section 371.4 is added to discuss the federal requirements currently applicable to DWSRF projects. The applicability of the American Iron and Steel requirement currently established annually through the federal appropriations for the program will be specified in the Intended Use Plan.

*Subchapter B. Financial Assistance.*

*Section 371.10. Type of Financial Assistance.*

Section 371.10 is revised to state that the executive administrator shall determine the type of financial assistance in accordance with the types of financial assistance authorized by the Act.

*Section 371.11. Financing of Planning, Acquisition, and Design Phases.*

Section 371.11 is revised to reflect a change in terminology regarding the phases of projects. It is revised to state that applicants may request financial assistance for planning, acquisition, and design without a determination that the project is ready to proceed. It also deletes the reference to applicants who have completed the planning, acquisition, and design for a proposed project within three years of the closing date for financial assistance receiving priority for construction

phase funding of the project in the next available IUP if the project is ready to proceed. This priority is retained elsewhere in Section 371.21(d). The title is revised from “Planning, Acquisition, and Design Funding” to “Financing of Planning, Acquisition, and Design Phases.”

*Section 371.12. Construction Phase Funding.*

Section 371.12 is revised to reflect a change in terminology regarding the phases of projects. The title is revised from “Construction Funding” to “Construction Phase Funding.”

*Section 371.13. Pre-Design Funding Option.*

Section 371.13 is revised to reflect a change in terminology regarding the phases of projects.

*Section 371.14. Lending Rates.*

Section 371.14 is revised to make private and taxable entities eligible for the interest rate reduction. As part of the revision to clarify eligibility for the reduction, TWDB is revising the method of establishing the fixed rate scale and determining the amount of adjustment from the market interest rate. TWDB is not altering the interest rate reduction a borrower would have received under the current program practices. For consistency, the point in time for determining the total fixed lending rate reduction will be set at 30 days from the proposed date the application will be presented to the Board for approval. Other wording changes were made to provide greater clarity. In addition, references to the maximum reduction level have been removed to allow greater flexibility in establishing a significant interest rate reduction consistent with projections of the long-term financial health of the DWSRF. The interest rate reduction will instead be established annually in DWSRF’s Intended Use Plan.

*Section 371.15. Fees for Financial Assistance.*

Section 371.15 is revised to allow greater flexibility to make annual adjustment to the DWSRF program based on needs and projected financial conditions. To accomplish this, the amount of any administrative loan origination fee, up to the maximum specified amount, will be established in the DWSRF’s Intended Use Plan. The title is revised from “Fees of Financial Assistance” to “Fees for Financial Assistance.”

*Section 371.16. Term of Financial Assistance.*

Section 371.16 is revised to incorporate a reference to the Federal Safe Drinking Water Act with respect to the expected design life of extended term financing offered to a disadvantaged community and extended financing through the purchase of debt obligations of a municipality.

*Section 371.17. Principal Forgiveness.*

Section 371.17 is revised to substitute “principal forgiveness” for “subsidies” in the title and text. As explained under Definitions, principal forgiveness is a type of additional subsidization offered in the program. The term “subsidy” now refers only to a reduction in the interest rate

from the market interest rate rather than principal forgiveness.

*Subchapter C. Intended Use Plan.*

*Section 371.20. Submission of Project Information Forms.*

Section 371.20 is revised to clarify the requirements for submission of project information forms. It specifically references submission of Project Information Forms to be included on an amended Project Priority List within the Intended Use Plan. It also establishes that the required information that must be in a Project Information Form will be specified in Board guidance. It clarifies that a registered engineer must properly affix the engineer's seal, signature, and date of execution to the project information form if the amount requested from the program is equal to or greater than \$100,000.

*Section 371.21. Rating Process.*

Section 371.21 is revised to incorporate a consideration of effective management in the rating factors for the program. A new subsection (f) is added to discuss the selection process for urgent need financial assistance, including the ability to bypass higher rated projects to provide funding to urgent need projects.

*371.22. Public Notice.*

Section 371.22 is revised to better reflect TWDB processes whereby the executive administrator, not the Board members, hold public hearings. The rule will state that the executive administrator may make amendments to the Project Priority List after a 14-day public comment period without any public hearing.

*Section 371.23. Criteria and Methods for Distribution of Funds.*

Section 371.23 is revised to reflect a change in terminology and to provide greater clarity. It revises "Subsidy" or "subsidies" to "principal forgiveness" and "Invited Projects List" to "Project Priority List" to be consistent with other sections as well as the terminology in the Intended Use Plan. The reference to small communities is clarified to mean small water systems.

*Section 371.24. Changes to Project.*

Section 371.24 is revised to adjust permitted changes in a proposed project listed in the Intended Use Plan without requiring a re-ranking of the project. First, the applicant for a proposed project may change provided the project itself does not change. Second, the fundable amount of a proposed project may not increase by more than 10% of the amount listed in the approved IUP. The rule is revised to allow the executive administrator to waive the 10% limit to not only incorporate additional elements to the project, but also increased project costs. Further, the section is revised to specify that any principal forgiveness awarded may not exceed the amount in the original Intended Use Plan.

*Subchapter D. Application for Assistance.*

*Section 371.30. Pre-Application Conferences.*

Section 371.30 is revised to allow individuals to participate in the conference without being in attendance.

*Section 371.31. Timeliness of Application and Required Application Information.*

Section 371.31 is revised to base the due date for curing a deficiency on the date of the notice to the applicant rather than the date the applicant receives the notice. This will allow enhanced tracking for program administration. This section specifies that the application must include a copy of any actual or proposed contracts covering revenues for the project for a duration specified by the agency. To allow additional flexibility to the agency, the rule will permit an alternative method of establishing a reliable accounting of the financial records of the applicant if approved by the executive administrator. The rule will clarify the listing within the application of all the funds used for the project. This section is revised to require private applicants to submit an affidavit stating that the decision to apply for financial assistance was done so in accordance with the Applicant's bylaws or charter, instead of submitting an affidavit stating the Applicant sent written, 72-hour notice to all customers, to allow Applicants to follow their established notice requirements. The provisions regarding required documentation from private applicants are revised to also cover sole proprietorships. Other non-substantive and grammatical changes were made for clarification purposes.

*Section 371.32. Review of Applications for Financial Assistance.*

Section 371.32(c) is deleted because it is no longer necessary. New subsection 371.32(c) is added to establish commitment timeframes for projects that qualify and have been designated to receive principal forgiveness. Due to the high demand and limited availability of subsidized funding, it is imperative that applicants offered principal forgiveness proceed in a timely manner.

*Section 371.33. Refinancing.*

Section 371.33 is revised to require the project to meet programmatic requirements.

*Section 371.34. Required Water Conservation Plan and Water Loss Audit.*

Section 371.34 is revised to incorporate new statutory requirements. According to Section 16.0121(g), Water Code, a retail public utility providing potable water that receives financial assistance from the TWDB is required to use a portion of that financial assistance, or any additional financial assistance provided by TWDB, to mitigate the utility's system water loss if, based on a water audit filed by the utility, the water loss meets or exceeds the threshold established by TWDB rule. In accordance with Section 16.0121(g), Water Code, as amended by H.B. 949, 84th Legislative Session, Section 371.34 is revised to allow the TWDB, at the request of the retail public utility, to waive this requirement. TWDB rules regarding this waiver

are located in 31 TAC §358.6.

*Section 371.35. Board Approval of Funding.*

Section 371.35 is revised to remove the commitment expiration timeframes from the rules and establish the expiration timeframes through the annual Intended Use Plan applicable to the project in order to provide greater flexibility in administering the program. Section 371.35 will allow multiple extensions instead of one extension and the language is revised to better instruct applicants on the procedure for requesting an extension.

*Section 371.36. Multi-year Commitments.*

New section 371.36 is added to implement multi-year commitments to provide a reliable source of capital based on a commitment structure that meets the annual capital requirements of the project. In order to provide a reliable source of capital based on a commitment structure that meets the annual capital requirements of the project, the TWDB may offer multi-year commitments. Multi-year commitments should assist entities that need to fund large projects over a period of time. Further, to assist in providing for long-term financial planning, the minimum interest rate reduction for the multi-year commitments will be established and locked for the five year period based on the interest rate reduction prescribed in the IUP for the first year's commitment.

*Subchapter E. Environmental Reviews and Determinations.*

Subchapter E is revised to provide greater clarity on the environmental review process through a reorganization of this subchapter. Repeals of existing §§371.43 – 371.51 are simultaneously adopted elsewhere in this issue of the *Texas Register*.

*Section 371.40. Definitions.*

The definition of “Affected community” is revised to clarify its meaning in the context of its use within the subchapter.

The definitions of “Categorical Exclusion,” “Environmental Assessment,” “Environmental Impact Statement,” “Environmental Information Document,” “Finding of No Significant Impact,” “Record of Decision,” and “Statement of Finding” are added to provide greater clarity on what is included in these various documents, which party prepares the documents, and their use.

The definitions of “Federal Environmental Cross-cutters” and “Human environment” are added to clarify terminology utilized within the subchapter.

The definition of “Mitigation” is revised to better reflect the federal definition by adding fuller explanations of the avoidance, minimization, and rectification aspects of mitigation. Therefore, because it is no longer necessary to retain separate definitions of “Avoidance” and “Minimization,” they have been deleted.

The definition of “Emergency Relief Project” is revised to include natural disasters as an emergency condition or incident.

*Section 371.41. Environmental Review Process.*

Section 371.41 is revised to delete references to avoidance and minimization, which are both included in the definition of mitigation. In addition, disbursement of funds information was removed as this information is already provided in Section 371.72, relating to Disbursement of Funds. Section 371.41 is further revised to add more details on the timing and preparation of different environmental documents in order to provide greater clarity. Certain terminology is revised in order to avoid confusion between state and federal environmental documents. Other non-substantive and grammatical changes are made for clarification purposes.

*Section 371.42. Board’s Environmental Finding: Categorical Exclusions.*

The title of Section 371.42 is revised from “Types of Environmental Determinations: Categorical Exclusion” to “Board’s Environmental Finding: Categorical Exclusion” in order to provide greater clarity on which party is responsible for evaluating eligibility and issuing the Categorical Exclusion. It is further revised to clarify when a project can be categorically excluded from a full environmental review. Subsection (f) is deleted in order to move this information to new Section 371.43 in order to further separate and clarify Applicant versus TWDB responsibilities.

*Section 371.43. Applicant Requirements: Categorical Exclusions.*

New section 371.43 is added in order to delineate between the Applicant’s and the TWDB’s responsibilities regarding a Categorical Exclusion. New section 371.43 contains the Applicant’s responsibilities. This change was made to provide greater clarity.

*Section 371.44. Board’s Environmental Finding: Finding of No Significant Impact.*

New Section 371.44 is added to reorganize and revise previous provisions on the Finding of No Significant Impact in order to provide greater clarity on each party’s responsibilities regarding this document. Language from previous Section 371.43 is added here and is revised to remove the statement that an environmental assessment is required for proposed projects involving new construction. This is because some minor new construction elements are eligible for a CE, which does not require an environmental assessment. The previous language is further revised to reflect the fact that an environmental assessment is not required if the action is categorically excluded or if the executive administrator has decided that an environmental impact statement is required. It is revised to require that all contracts, plans, specifications, or other applicable documents used during the design and construction of the project include reference to or descriptions of the mitigation measures. References to avoidance and minimization were deleted because both are included in the definition of mitigation. Other minor revisions were made to provide greater clarity.

*Section 371.45. Applicant Requirements: Environmental Information Document.*

New Section 371.45 is added to reorganize and revise previous provisions on the Environmental Information Document in order to provide greater clarity on each party's responsibilities regarding this document. Language from previous Section 371.44 is added here and revised to provide greater clarity. An Applicant must prepare an Environmental Information Document for projects that have potential environmental impacts and the significance of those impacts is unknown. New Section 371.45 provides greater clarity on when an Environmental Information Document is needed, which party prepares the document, and what the document must include.

*Section 371.46. Environmental Impact Statements.*

New Section 371.46 is added here to reorganize Subchapter E for greater clarity. The language from previous Section 371.47 is added here and non-substantive changes to that language are made for clarity purposes.

*Section 371.47. Decision to Prepare an Environmental Impact Statement: Notice of Intent.*

New Section 371.47 is added here to reorganize Subchapter E for greater clarity. The language from previous Section 371.45 is added here and non-substantive changes to that language are made for clarity purposes.

*Section 371.48. Board's Environmental Finding: Record of Decision.*

New Section 371.48 is added here to reorganize Subchapter E for greater clarity. The language from previous Section 371.46 is added here and non-substantive changes to that language are made for clarity purposes. That language is revised to delete references to avoidance and minimization because both are included in the definition of mitigation. The language is further revised to clarify that the TWDB may provide written notification regarding the outcome of the mitigation measures rather than issue a statement of findings.

*Section 371.49. Applicant Requirements: Environmental Impact Statement.*

New Section 371.49 is added here to reorganize Subchapter E for greater clarity. The language from previous Section 371.48 is added here and non-substantive changes to that language are made for clarity purposes.

*Section 371.50. Proposed Project Alterations.*

New Section 371.50 is added here to reorganize Subchapter E for greater clarity. The language from previous Section 371.49 is added here and revised to state that the executive administrator's review of proposed project alterations may result in a notation to the file when the alterations are minor. It is further revised for clarity to explain the process of confirming that project alterations are within the scope of the original environmental finding.

*Section 371.51. Use of Previously Prepared Environmental Findings.*

New Section 371.51 is added here to reorganize Subchapter E for greater clarity. The language from previous Section 371.50 is added here and revised to allow the executive administrator to adopt previous environmental findings issued by other agencies, not just federal agencies, provided that the finding is compliant with NEPA. It is also revised to clarify that only mitigation measures from the previous findings that are applicable to the proposed project components will be applied as conditions of the financial assistance. It is revised to state that the executive administrator may provide written notification of the outcome of the mitigation measure proposed in an environmental finding to interested agencies and public groups. References to avoidance and minimization were deleted because both are included in the definition of mitigation. Certain wording from previous language is revised in order to provide greater clarity.

*Section 371.52. Emergency Relief Project Procedures.*

New Section 371.52 is added here to reorganize Subchapter E for greater clarity. The language from previous Section 371.51 is added here and non-substantive changes to that language are made for clarity purposes. Certain references to the Board are removed to provide greater flexibility in the emergency relief project procedures.

*Subchapter F. Engineering Review and Approval.*

*Section 371.60. Engineering Feasibility Report.*

Section 371.60 is revised to require the engineering feasibility report to show how the project will remedy the drinking water issues and problems instead of simply that they will remedy the problems and issues. Other non-substantive changes are made for clarity purposes.

*Section 371.61. Contract Documents: Review and Approval.*

Section 371.61 is revised to provide greater clarity on what the term “contract documents” include for the purposes of this section and to reference the TWDB’s authority to audit project files.

*Section 371.62. Advertising and Awarding Construction Contracts.*

Section 371.62 is revised to extend the required notification period for pre-construction conferences from five to ten days to ensure TWDB staff will be able to attend if desired.

*Subchapter G. Loan Closings and Availability of Funds.*

*Section 371.70. Financial Assistance Secured by Bonds or Other Authorized Securities.*

Section 371.70 is revised to require the ordinance or resolution adopted by the governing body authorizing the issuance of debt to be sold to the Board to include a statement that all payments,

including the origination fee, are made to the Board via wire transfer at no cost to the Board. Further, Section 371.70(a)(5) is revised to still require assurances that the Applicant will comply with any special conditions specified by the Board’s environmental finding, but to delete the requirement that this assurance last until all financial obligations to the state have been discharged. Subsection (d) is added to provide greater clarity on which documents are required and which are not in the case of 100 percent principal forgiveness. Other non-substantive and grammatical changes are made for clarification purposes.

*Section 371.71. Financial Assistance Secured by Promissory Notes and Deeds of Trust.*

Section 371.71 is revised to clarify that a deed of trust, security agreement, and title insurance policy is not required in the situation of 100 percent principal forgiveness. It is also revised to change “Commission” to “Utility Commission” because of new powers and duties of the Public Utility Commission.

*Section 371.72. Disbursement of Funds.*

Section 371.72 is revised to eliminate the environmental affirmation by the Board but still require the environmental review to be completed before release of funds for design.

*Section 371.73. Remaining Unused Funds.*

Section 371.73 is revised to use “unused funds” instead of “surplus funds” for consistency.

*Section 371.74. Surcharge.*

Section 371.74 is revised to remove “as those terms are defined” because those terms are not defined. It is also revised to reflect new powers and duties of the Public Utility Commission.

*Subchapter H. Construction and Post-Construction Requirements.*

*Section 371.80. Inspection During Construction.*

Section 371.80 is revised to eliminate the reference to “sound engineering principles” for consistency with Section 17.185 of the Texas Water Code. Further, on-site observations were added to the scope of inspections as part of TWDB’s actions to confirm ongoing compliance with all applicable requirements. Other minor revisions were made to provide greater clarity.

*Section 371.81. Alterations During Construction.*

Section 371.81 is revised to include the requirement in Section 17.186 of the Texas Water Code that the Texas Commission on Environmental Quality must give its approval before any substantial or material changes are made in any previously approved plans for facilities required to have commission approval of plans and specifications.

*Section 371.85. Final Accounting.*

Section 371.85 is revised to specify that remaining surplus funds may be used as specified in any applicable bond ordinance for certain purposes.

*Section 371.87. Release of Retainage.*

Section 371.87 is revised to clarify that the TWDB must issue a Certificate of Approval prior to approving the full release of retainage on a contract.

Non-substantive or grammatical changes are made to the following sections for clarification and grammatical purposes: §§371.18, 371.82, 371.86, and 371.88.

## REGULATORY IMPACT ANALYSIS

The Board 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 provide greater clarity regarding the DWSRF and to follow federal and state requirements for that fund.

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 the Federal Safe Drinking Water 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 adopted solely under the general powers of the agency, but rather it is also adopted under authority of Texas Water Code §15.605. 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 make clarifying changes that align with state statutes and federal requirements related to the DWSRF. The adopted rule would substantially advance this stated purpose by clarifying rules related to the DWSRF, incorporating applicable language from state and federal laws and rules, and reflecting the current state and federal requirements for the DWSRF.

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 federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The Board is the agency that administers the DWSRF for the State of Texas.

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. In other words, this rule requires compliance with state and federal laws and rules regarding the DWSRF. These requirements will not burden, restrict, or limit an owner's right to property. Therefore, the adopted rule does not constitute a taking under Texas Government Code, Chapter 2007.

## PUBLIC COMMENT

No comments were received.

## STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §15.605.

The adopted rulemaking affects Chapter 15 of the Texas Water Code.

## SUBCHAPTER A. GENERAL PROGRAM REQUIREMENTS.

### §371.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in Chapter 15 of the Texas Water Code and not defined here shall have the meanings provided by Chapter 15.

(1) Acquisition--The Applicant obtaining interests in land for the purposes of locating eligible project components.

- (2) Act--The Federal Safe Drinking Water Act, 42 U.S.C. §§300f et seq.
- (3) Applicant--The entity applying for financial assistance from the DWSRF including:
- (A) the entity that receives the financial assistance and
  - (B) the entity legally responsible to repay the debt.
- (4) Application--The information and supporting documentation submitted by or on behalf of the Applicant that may be used for commitment for financial assistance from the DWSRF or that the executive administrator determines must be completed for consideration for financial assistance from the DWSRF.
- (5) Authorized representative--The signatory agent authorized and directed by the Applicant's governing body to file the application and to sign documents relating to the project, on behalf of the Applicant.
- (6) Board--The Texas Water Development Board.
- (7) Bonds--All bonds, notes, certificates of obligation, and book-entry obligations authorized to be issued by any political subdivision.
- (8) Bypass--To pass over a higher ranked project in favor of a lower ranked project to ensure that funds available are utilized in a timely manner, to select an interrelated project, or to meet statutory and capitalization grant requirements as delineated in the applicable IUP.
- (9) Capitalization grant--The federal grant funds awarded annually by the EPA to the State for capitalization of the DWSRF.
- (10) Certification of Trust--An instrument executed by a home-rule municipality pursuant to Chapter 104, Local Government Code, governing the management of the financial assistance proceeds in accordance with §114.086, Texas Property Code.
- (11) Closing--The exchange of the Applicant's approved debt instruments for DWSRF financial assistance.
- (12) Commission--The Texas Commission on Environmental Quality.
- (13) Commitment--An offer by the Board to provide financial assistance to an Applicant as evidenced by a Board resolution.
- (14) Community water system--A public water system that:
- (A) serves at least 15 service connections used by year-round residents of the area served by the system; or

(B) regularly serves at least 25 year-round residents.

(15) Consolidation--Any one of the following activities:

(A) a public water system acquiring another public water system;

(B) a public water system providing retail service to another public water system; or

(C) a public water system providing wholesale service, which may include operation of the system, to another public water system.

(16) Construction account--A separate account created and maintained for the deposit of financial assistance and utilized by the Applicant to pay eligible expenses for the project.

(17) Construction phase--The erection, acquisition, alteration, remodeling, rehabilitation, improvement, extension, or other man-made change necessary for an eligible project or activity.

(18) Contaminant--Any physical, chemical, biological, or radiological substance present in water.

(19) Contract documents--The engineering documentation relating to the project including engineering drawings, maps, technical specifications, design reports, instructions, and other contract conditions and forms that are in sufficient detail to allow contractors to bid on the work.

(20) Davis-Bacon Act--The federal statute at 40 U.S.C. §§3141 et seq. and in conformance with the U.S. Department of Labor regulations at 29 CFR Part 5 (Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction) and 29 CFR Part 3 (Contractors and Subcontractors on Public Work Financed in Whole or in Part by Loans or Grants from the United States).

(21) Debt--All bonds or other documents issued or to be issued by any political subdivision or eligible Applicant pledging repayment of the Board's financial assistance.

(22) Design--The project phase during which the project design documents are prepared by the Applicant. Documents may include design surveys, plans, working drawings, specifications, and any procedures and protocols to be used during the construction of the project.

(23) Disadvantaged community--A community that meets the affordability criteria based on income, unemployment rates, and population trends. Specifically, the service area of an eligible applicant, the service area of a community that is located outside the entity's service area, or a portion within the entity's service area if the proposed project is providing new service to existing residents in unserved areas; and meets the following affordability criteria: (a) has an annual median household income that is no more than 75 percent of the state median household income using an acceptable source of socioeconomic data, and (b) the household cost factor that considers income, unemployment rates, and population trends must be greater

than or equal to one percent if only water or sewer service is provided or greater than or equal to two percent if both water and sewer service are provided. The required data and calculations of the household cost factor are specified in the IUP under which the project would receive funding.

(24) Disaster--The occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, extreme heat, other public calamity requiring emergency action, or energy emergency as defined in Texas Government Code §418.004.

(25) Drinking Water State Revolving Fund (DWSRF)--The financial assistance program authorized by Texas Water Code, Chapter 15, Subchapter J in accordance with the Act.

(26) Eligible Applicant--Any of the following entities:

(A) a nonprofit noncommunity water system;

(B) a nonprofit community water system;

(C) a political subdivision that is a municipality, intermunicipal, interstate or state agency, or a nonprofit water supply corporation created and operating under Chapter 67 of the Texas Water Code;

(D) privately-owned community water system; or

(E) any other entity eligible under federal law to receive funds from the DWSRF.

(27) Engineering feasibility report--Those necessary plans and studies that directly relate to the project and that are needed in order to assure compliance with the enforceable requirements of the Act and state statutes.

(28) EPA--The United States Environmental Protection Agency or a designated representative.

(29) Escrow account--A separate account maintained by an escrow agent until such funds are eligible for release to the construction account.

(30) Escrow agent--Any of the following:

(A) a state or national bank designated by the comptroller as a state depository institution in accordance with Government Code, Chapter 404, Subchapter C;

(B) a custodian of collateral as designated in accordance with Government Code, Chapter 404, Subchapter D; or

(C) a municipal official responsible for managing the fiscal affairs of a home-rule municipality in accordance with Local Government Code, Chapter 104.

(31) Executive administrator--The executive administrator of the Board or a designated representative.

(32) Expiration date--The date on which the Board's offer of financial assistance is no longer open or valid and by which a Closing must occur.

(33) Financial assistance--Funding made available to eligible Applicants as authorized in 40 CFR §35.3525, including principal forgiveness.

(34) Force majeure--Acts of god, strikes, lockouts, or other industrial disturbances, acts of the public enemy, war, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, droughts, tornadoes, hurricanes, arrests and restraints of government and people, explosions, breakage or damage to machinery, pipelines or canals, and any other incapacities of either party, whether similar to those enumerated or otherwise, and not within the control of the party claiming such inability, which by the exercise of due diligence and care such party could not have avoided.

(35) Green project--A project or components of a project that, when implemented, will result in energy efficiency, water efficiency, green infrastructure, or environmental innovation that is characterized as a green project either categorically or by utilizing a business case as approved by the executive administrator.

(36) Green project reserve--A federal directive requiring a specified portion of the capitalization grant to be used for green projects.

(37) Initial Invited Projects List--That portion of the Project Priority List listing the eligible projects ranked according to their rating that will initially be invited to submit applications in accordance with procedures and deadlines as detailed in the applicable IUP.

(38) Intended Use Plan (IUP)--A document prepared annually by the Board, after public review and comment, which identifies the intended uses of all DWSRF program funds and describes how those uses support the overall goals of the DWSRF program.

(39) Lending rate--The rate of interest applicable to financial assistance that must be repaid.

(40) Market interest rates--Interest rates comparable to those attained for securities in an open market offering.

(41) Municipality--A city, town, or other public body created by or pursuant to state law.

(42) Nonprofit organization--Any legal entity that is recognized as a tax exempt organization by the Texas Comptroller of Public Accounts pursuant to 34 Texas Administrative Code, Part 1, Chapter 3, Subchapter O (relating to State and Local Sales and Use Taxes).

(43) Nonprofit noncommunity (NPNC) water system--A public water system that is not operated for profit, is owned by a political subdivision or nonprofit entity, and is not a community water system.

(44) Outlay report--The Board's form used to report costs incurred on the project.

(45) Permit--Any permit, license, registration, or other legal document required from any local, regional, state, or federal government for construction of the project.

(46) Person--An individual, corporation, partnership, association, State, municipality, commission, or political subdivision of the State, or any interstate body, as defined by 33 U.S.C. §1362, including a political subdivision as defined by Chapter 15, Subchapter J, of the Texas Water Code, if the person is eligible for financial assistance under the Act.

(47) Planning--The project phase during which the Applicant identifies and evaluates potential alternatives to meet the needs of the proposed project. It includes the environmental review described in Subchapter E of this Chapter and preparation of the engineering feasibility report as described in Subchapter F of this Chapter.

(48) Political subdivision--A municipality, intermunicipal, interstate, or state agency, any other public entity eligible for assistance, or a nonprofit water supply corporation created and operating under Texas Water Code Chapter 67.

(49) Population--The number of people who reside within the territorial boundaries of or receive wholesale or retail water service from the Applicant based upon data that is acceptable to the executive administrator and which includes the following:

(A) acceptable demographic projections or other information in the engineering feasibility report or the latest official data available from the U.S. Census Bureau for an incorporated city; or

(B) information on the population for which the project is designed, where the Applicant is not an incorporated city or town.

(50) Primary drinking water regulation--Regulations promulgated by EPA which:

(A) apply to public and private water systems;

(B) specify contaminants which, in the judgment of the EPA, may have any adverse effect on the health of persons;

(C) specify for each such contaminant either:

(i) a maximum contaminant level if, in the judgment of the EPA, it is economically and technologically feasible to ascertain the level of such contaminant in water in public water systems; or

(ii) if, in the judgment of the EPA, it is not economically or technologically feasible to ascertain the level of such contaminant, each treatment technique known to the EPA which leads to a reduction in the level of such contaminant sufficient to satisfy the requirements of the Act; and

(D) contain criteria and procedures to assure a supply of drinking water which dependably complies with such maximum contaminant levels including quality control and testing procedures to insure compliance with such levels and to ensure the proper operation and maintenance of the system, and requirements as to:

(i) the minimum quality of water which may be taken into the system; and

(ii) the siting of new facilities for public water systems.

(51) Principal forgiveness--A type of additional subsidization authorized by 42 U.S.C. §300j-12(d) or federal appropriations acts, as detailed in the Intended Use Plan and principal forgiveness agreement or bond transcript applicable to the project.

(52) Private Placement Memorandum (PPM)--A document functionally similar to an "official statement" used in connection with an offering of municipal securities in a private placement.

(53) Project--The planning, acquisition, environmental review, design, construction, and other activities designed to accomplish the objectives, goals, and policies of the Act.

(54) Project engineer--The engineer retained by the Applicant to provide professional engineering services during any phase of a project.

(55) Project Information Form (PIF)--The form that the executive administrator determines must be submitted by Applicants for rating and ranking on an IUP.

(56) Project Priority List--A listing found in the IUP of projects eligible for funding, ranked according to their rating criteria score and that may be further prioritized as described in the applicable IUP.

(57) Public water system--

(A) In General. A system that provides water to the public for human consumption through pipes or other constructed conveyances, if such system has at least 15 service connections or regularly serves at least 25 individuals. Such term includes:

(i) any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system; and

(ii) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.

(B) Connections. A connection to a system that delivers water by a constructed conveyance

other than a pipe shall not be considered a connection, if:

(i) the water is used exclusively for purposes other than residential use (consisting of drinking, bathing, cooking, or other similar uses);

(ii) the EPA or the Commission determines that alternative water to achieve the equivalent level of public health protection provided by the applicable national primary drinking water regulation is provided for residential or similar uses for drinking and cooking; or

(iii) the EPA or the Commission determines that the water provided for residential or similar uses for drinking, cooking, and bathing is centrally treated or treated at the point of entry by the provider, a pass-through entity, or the user to achieve the equivalent level of protection provided by the applicable national primary drinking water regulations.

(C) Irrigation districts. An irrigation district in existence prior to May 18, 1994, that provides primarily agricultural service through a piped water system with only incidental residential or similar uses shall not be considered to be a public water system if the system or the residential or similar users of the system comply with subparagraph (B)(ii) and (iii) of this paragraph.

(D) Transition period. A water supplier that would be a public water system only as a result of modifications made shall not be considered a public water system until two years after August 6, 1996. If a water supplier does not serve 15 service connections or 25 people at any time after the conclusion of the two-year period, the water supplier shall not be considered a public water system.

(58) Ready to proceed--A project for which available information indicates that there are no significant permitting, land acquisition, social, contractual, environmental, engineering, or financial issues that would keep the project from proceeding in a timely manner to the construction phase of the project.

(59) Release of funds--The sequence and timing for Applicant's release of financial assistance funds from the escrow account to the construction account.

(60) Secondary drinking water regulation--Regulations promulgated by EPA which apply to public water systems and which specify the maximum contaminant levels which, in the judgment of the EPA, are necessary to protect the public welfare. Such regulations may vary according to geographic and other circumstances and may apply to any contaminant in drinking water:

(A) which may adversely affect the odor or appearance of such water and consequently may cause a substantial number of the persons served by the public water system providing such water to discontinue its use; or

(B) which may otherwise adversely affect the public welfare.

(61) Small water system--A system that serves ten thousand persons or fewer.

(62) State--The State of Texas.

(63) Subsidy--A reduction in the interest rate from the market interest rate.

(64) Utility Commission--The Public Utility Commission of Texas.

(65) Water conservation plan--A report outlining the methods and means by which water conservation may be achieved within a particular facilities planning area.

(66) Water conservation program--A comprehensive description and schedule of the methods and means to implement and enforce a water conservation plan.

#### §371.2. Projects and Activities Eligible for Assistance.

(a) Eligible projects. Projects that address or prevent violations of health-based drinking water standards. These include projects needed to maintain compliance with existing national primary drinking water regulations for contaminants with acute and chronic health effects. Projects to replace aging infrastructure are eligible for assistance if they are needed to maintain compliance or further the public health protection objectives of the Act. The specific projects and activities eligible for assistance for a particular funding year will be established annually in the IUP based on the eligible project categories and eligible project-related costs in (b) and (c) of this section, as authorized by the Act.

#### (b) Eligible Project Categories.

(1) Treatment. Examples of projects include, but are not limited to, installation or upgrade of facilities to improve the quality of drinking water to comply with primary or secondary standards and point of entry or central treatment under 42 U.S.C. §300f(4)(B)(i)(III).

(2) Transmission and distribution. Examples of projects include, but are not limited to, installation or replacement of transmission and distribution pipes to improve water pressure to safe levels or to prevent contamination caused by leaks or breaks in the pipes.

(3) Source. Examples of projects include, but are not limited to, rehabilitation of wells or development of eligible sources to replace contaminated sources.

(4) Storage. Examples of projects include, but are not limited to, installation or upgrade of eligible storage facilities, including finished water reservoirs, to prevent microbiological contaminants from entering a public water system.

(5) Consolidation. Eligible projects are those needed to consolidate water supplies where, for example, a supply has become contaminated or a system is unable to maintain compliance for technical, financial, or managerial reasons.

(6) Creation of new systems. Eligible projects are those that, upon completion, will create a community water system to address existing public health problems with serious risks caused

by unsafe drinking water provided by individual wells or surface water sources. Eligible projects are also those that create a new regional community water system by consolidating existing systems that have technical, financial, or managerial difficulties. Projects to address existing public health problems associated with individual wells or surface water sources must be limited in scope to the specific geographic area affected by contamination. Projects that create new regional community water systems by consolidating existing systems must be limited in scope to the service area of the systems being consolidated. A project must be a cost-effective solution to addressing the problem. The applicant must have given sufficient public notice to potentially affected parties and must have considered alternative solutions to addressing the problem. Capacity to serve future population growth cannot be a substantial portion of a project.

(7) Green Projects. Projects that qualify as green projects, in accordance with EPA definitions, based upon information provided within the submitted project information form, the application, and if necessary, the business case.

(c) Eligible project-related costs. In addition to costs needed for the project itself, the following project-related costs are eligible for assistance:

(1) Pre-project costs for planning and design.

(2) Costs for the acquisition of land only if needed for the purposes of locating eligible project components. The land must be acquired from a willing seller.

(3) Costs for restructuring systems that are in significant noncompliance with any national primary drinking water regulation or variance or that lack the technical, financial, and managerial capability to ensure compliance with the requirements of the Act, unless the systems are ineligible under paragraph (d)(2) or (d)(3) of this section.

(d) Ineligible projects. Assistance from the Fund may not be provided to:

(1) Federally-owned public water systems or for-profit noncommunity water systems.

(2) Systems that lack the technical, financial, and managerial capability to ensure compliance with the requirements of the Act, unless the assistance will ensure compliance and the owners or operators of the systems agree to undertake feasible and appropriate changes in operations to ensure compliance over the long term.

(3) Systems that are in significant noncompliance with any national primary drinking water regulation or variance, unless:

(i) The purpose of the assistance is to address the cause of the significant noncompliance and will ensure that the systems return to compliance; or

(ii) The purpose of the assistance is unrelated to the cause of the significant noncompliance and the systems are on enforcement schedules (for maximum contaminant level and treatment

technique violations) or have compliance plans (for monitoring and reporting violations) to return to compliance.

(e) Ineligible projects. The following projects are ineligible for assistance:

- (1) Dams or rehabilitation of dams.
- (2) Water rights, except if the water rights are owned by a system that is being purchased through consolidation as part of a capacity development strategy.
- (3) Reservoirs or rehabilitation of reservoirs, except for finished water reservoirs and those reservoirs that are part of the treatment process and are on the property where the treatment facility is located.
- (4) Projects needed primarily for fire protection.
- (5) Projects needed primarily to serve future population growth. Projects must be sized only to accommodate a reasonable amount of population growth expected to occur over the useful life of the facility.
- (6) Projects that have received assistance from the national set-aside for Indian Tribes and Alaska Native Villages under 42 U.S.C. §300j-12(i).

(f) Ineligible project-related costs. The following project-related costs are ineligible for assistance from the Fund:

- (1) Laboratory fees for routine compliance monitoring.
- (2) Operation and maintenance expenses.

#### §371.3. Other Authorized Activities: Source Water Protection and Technical Assistance.

(a) DWSRF financial assistance is available to eligible Applicants for:

- (1) implementation of local, voluntary source water protection measures to protect source water of the system from contamination and to ensure compliance with national primary drinking water regulations applicable to the community water system;
- (2) assistance in the development of voluntary local incentive-based partnerships to reduce the presence of contaminants, to provide financial, managerial, or technical assistance, and to develop recommendations for voluntary, long-term source water protection strategies;
- (3) a capacity development strategy to assist public water systems in developing and maintaining adequate technical, financial, and management capacity; and
- (4) establishment and implementation of wellhead protection programs.

(b) Limitation. For each fiscal year, the total amount of financial assistance provided for activities under this section may not exceed 15 percent of the amount of the capitalization grant received for that year and may not exceed 10 percent of the amount of the capitalization grant for that year for any one of the following activities:

- (1) acquisition of land or conservation easements;
- (2) implementation of voluntary, incentive-based source water quality protection measures;
- (3) creation of a capacity development strategy;
- (4) delineation or assessment of source water protection areas; and
- (5) establishment and implementation of wellhead protection programs.

(c) Acquisition of land or of conservation easements from a willing seller or grantor is eligible for financial assistance for source water protection only if the purpose of the acquisition is to protect the source water of a public water system from contamination to maintain or achieve compliance with national primary drinking water regulations.

#### §371.4. Federal Requirements.

(a) Davis-Bacon Act Prevailing Wage Provision. The Applicant must comply with the requirements of section 1450(e) of the Act (42 U.S.C. §300j-9(e)) in all procurement contracts and sub-grants, and require that loan recipients, procurement contractors, and sub-grantees include such a term and condition in subcontracts and other lower tiered transactions. The Davis Bacon prevailing wage requirements, as provided in 40 U.S.C. §§3141 et seq. and the Department of Labor's implementing regulations, apply to any construction project funded by the DWSRF.

(b) National Environmental Policy Act-like environmental review. The National Environmental Policy Act provisions apply to projects receiving DWSRF assistance. The requirements are specified in Subchapter E of this title.

(c) Signage. Projects must comply with the EPA signage requirements implemented to enhance public awareness of DWSRF projects.

(d) American Iron and Steel requirements. As delineated in the applicable IUP, assistance recipients may be required to use only iron and steel products that are produced in the United States for projects for the construction, alteration, maintenance, or repair of a public water system.

(e) Other Federal Requirements. Other federal statutory, regulatory, executive order, and/or guidance and policy authority may apply. Federal requirements are further detailed in the IUP under which a project was funded.

## SUBCHAPTER B. FINANCIAL ASSISTANCE.

### §371.10. Type of Financial Assistance.

The executive administrator shall determine the type of financial assistance available to the Applicant based on the evaluation of the project information forms, the application, and the availability of funds in accordance with the types of assistance authorized in the Act.

### §371.11. Financing of Planning, Acquisition, and Design Phases.

Applicants may request financial assistance for the planning, acquisition, and design for a proposed project without a readiness to proceed determination.

### §371.12. Construction Phase Funding.

This type of financial assistance is available for the construction phase of an eligible project that is ready to proceed.

### §371.13. Pre-Design Funding Option.

This type of financial assistance is available for the planning, design, acquisition, and construction phase of a project. This option allows the commitment of construction funding where planning and design are not yet completed. This option is available only when the executive administrator recommends it to the Board based on a finding that the project is ready to proceed.

### §371.14. Lending Rates.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Average life--The number determined by dividing the sum of all payment periods by the total principal amount.

(2) Borrower--Each eligible Applicant that has received a commitment from the Board.

(3) Interest rate--The individual interest rate for each maturity in an amortized debt schedule as identified by the executive administrator under this chapter.

(4) Market rate--The individual interest rate for each maturity in an amortized debt schedule payment that is the borrower's market cost of funds based on the MMD scale for the borrower as identified under subsection (c)(1) of this section.

(5) MMD--Thomson Reuters Municipal Market Data Range of Yield Curve Scales.

(6) Payment period--The number determined by multiplying the total principal amount due for

an individual maturity as set forth in the debt instrument by the standard period for the debt instrument.

(7) Standard period--The number identified by determining the number of days between the date of delivery of the funds to a borrower and the date of the maturity of a bond or loan payment pursuant to which the funds were provided calculated on the basis of a 360-day year composed of twelve 30-day periods and dividing that number by 360.

(8) Term--For bonds, the length of time between when the bond is issued and the final maturity in the debt instrument; for loans, the period of time any principal is outstanding.

(b) Procedure for setting fixed interest rates

(1) The executive administrator will set fixed interest rates as described in the IUP and further determined in this section, on a date that is:

(A) no earlier than five business days prior to the adoption of the political subdivision's bond ordinance or resolution or the execution of a loan agreement; and

(B) not more than 45 days before the anticipated closing of a commitment from the Board.

(2) After 45 days from the assignment of the interest rate, rates may be extended only with the executive administrator's approval.

(c) Fixed rates. The fixed interest rates for financial assistance under this chapter will be determined as provided in this subsection. The executive administrator will identify the market rate for the borrower, determine the amount of adjustment from the market interest rate scale appropriate for the borrower pursuant to paragraph (2) of this subsection, apply the identified interest rate adjustment to the market rate for each year of the borrower's scale to determine the interest rate, and apply the interest rate to the proposed principal schedule, as more fully set forth in this subsection.

(1) Identifying the market rate for eligible borrowers.

(A) for borrowers that have a rating by a recognized bond rating entity and will not have bond insurance, the executive administrator will rely on the higher of the appropriate MMD scale for the current bond rating of the borrower or the appropriate MMD BAA scale; or

(B) for borrowers with no rating by a recognized bond rating entity or for borrowers with a rating that is less than investment grade as determined by the executive administrator, the executive administrator will rely on the appropriate MMD BAA scale.

(2) The fixed rate scale shall be established for each borrower using individual coupon rates for each maturity of the proposed debt based on the appropriate scale.

(3) The program is designed to provide borrowers with an interest rate reduction from the fixed

rate scale applicable to the borrower based on a level debt service schedule, or if applicable, the reduction is set at the total basis points below the fixed rate scale for borrowers as derived under paragraph (3) of this subsection. Notwithstanding the foregoing, in no event shall the interest rate as determined under this section be less than zero.

(4) For loans and bond commitments with an average life in excess of 16 years for a term of up to 20 annual maturities or years or an average life in excess of 20 years for a term of up to 30 annual maturities or years (or a pro-rata calculation for terms between 20 and 30 annual maturities or years), and at the discretion of the Board for loans and bond commitments that have debt schedules that produce a total fixed lending rate reduction in excess of a standard loan or bond commitment structure (defined as a debt service schedule in which the first year of the maturity schedule is interest-only followed by principal maturing on the basis of level debt service), the following procedures will be used to determine the total fixed lending rate reduction:

(A) The interest rate component of level debt service will be determined by using the 15th year (19th year for 30-year terms) coupon rate of the appropriate scale of the MMD scales that corresponds to the 15th year (19th year for 30-year terms) of principal of the standard loan or bond commitment structure and that is measured 30 days from the date that application is proposed to be presented to the Board for approval.

(B) Level debt service will be calculated using the 15th year (19th year for 30-year terms) MMD Scale coupon rate as described in subparagraph (A) of this paragraph and the par amount of the loan or bond commitment according to a standard loan or bond commitment structure. For a loan or bond commitment that has been proposed for a term of years equal to a standard loan or bond commitment structure, the dates specified in the application shall be used for interest and principal calculation. For a loan or bond commitment that has been proposed for a term of years less than a standard loan or bond commitment structure or longer than a standard loan or bond commitment structure, level debt service will be calculated beginning with the dated date, will be based upon the principal and interest dates specified in the application, and will continue for the term of a standard loan or bond commitment structure.

(C) A calculation will be made to determine how much a borrower's interest would be reduced if the loan or bond commitment had been made according to the total fixed lending rate reduction provided in paragraph (3) of this subsection and based upon the principal payments calculated in subparagraph (B) of this paragraph.

(D) The Board will establish a total fixed lending rate reduction for the loan or bond commitment that will achieve the interest savings in subparagraph (C) of this paragraph based upon the principal schedule proposed by the borrower.

(5) To determine the interest rate, the following procedures will apply:

(A) Unless otherwise requested by the borrower under subparagraph (B) of this paragraph, the interest rate will be determined based on a debt service schedule that provides interest only to be paid in the first year of the debt service schedule and in which the remaining annual debt

service payments are level, as determined by the executive administrator. The executive administrator will identify the appropriate MMD scale for the borrower and identify the market rate for the maturity due each year. The executive administrator will reduce that market rate of each year by the number of basis points applicable according to paragraph (2) of this subsection and thereby identify a proposed interest rate scale. The proposed interest rate scale will be applied to the proposed principal repayment schedule. If the resulting debt service schedule is level to the satisfaction of the executive administrator, then the proposed interest rate will be the interest rate for the commitment. If the resulting debt service schedule is not level to the satisfaction of the executive administrator, then the executive administrator may adjust the interest rate for any or all of the maturities to identify the interest rate that as closely as possible achieves the interest savings applicable according to paragraph (2) of this subsection while maintaining the principal schedule proposed by the borrower.

(B) A borrower may request a debt service schedule in which the annual debt service payments are not level through the term of the amortized debt schedule, as determined by the executive administrator. From the level debt service schedule, the executive administrator will determine the amount of the subsidy applicable to the debt service schedule provided. The executive administrator will then identify the interest rate that as closely as possible provides the borrower the identified subsidy amount for the principal schedule requested by the borrower.

(d) Variable rates. The interest rate for DWSRF variable rate debt under this chapter will be set at a rate equal to the actual interest cost paid by the Board on its outstanding variable rate debt plus the cost of maintaining the variable rate debt in the DWSRF. Variable rate debt is required to be converted to long-term fixed rate financing within 90 days of project completion unless an extension is approved in writing by the executive administrator. Within the time limits set forward in this subdivision, borrowers may request to convert to a long-term fixed rate at any time, upon notification to the executive administrator and submittal of a resolution requesting such conversion. The fixed lending rate will be calculated under the procedures and requirements of subsections (b) and (c) of this section.

(e) NPNC borrowers. NPNC borrowers that issue tax-exempt obligations and that operate community/non-community water systems will receive interest rates pursuant to subsections (b) - (d) of this section.

(f) Adjustments. The executive administrator may adjust a borrower's interest rate at any time prior to closing as a result of a change in the borrower's credit rating.

#### §371.15. Fees for Financial Assistance.

(a) General. The Applicant will be assessed charges for the purpose of recovering administrative costs of all projects receiving DWSRF financial assistance. However, no fees or costs shall be assessed on the portion of the project that receives principal forgiveness as detailed in the IUP.

(b) Origination fee. An administrative fee not to exceed 2.25 percent of the project costs will be assessed, as a one-time non-refundable charge. Project costs upon which the fee will be

assessed do not include the origination fee or those project costs that are funded through principal forgiveness. The fee is due and payable at the time of closing and may be financed as a part of the financial assistance.

§371.16. Term of Financial Assistance.

(a) The Board may offer financial assistance up to 20 years for the planning, acquisition, design and/or construction of a project, in accordance with the Act and the IUP under which the project received funding.

(b) In accordance with the Act and notwithstanding the terms in subsection (a) of this section, the Board may offer financial assistance in excess of 20 years, up to 30 years for:

(1) a disadvantaged community, provided that the financial assistance does not exceed the expected design life of an eligible project; or

(2) the purchase of bonds issued by a municipality, provided the financial assistance does not exceed the useful life of the underlying asset.

§371.17. Principal Forgiveness.

(a) The Board may provide principal forgiveness for financial assistance for:

(1) an entity that meets the affordability criteria established in this chapter and in the IUP for a Disadvantaged Community; or

(2) an entity that meets the criteria established in the IUP for other subsidies allowed under the federal appropriations law or the capitalization grant.

(b) Total amount of principal forgiveness. The total amount of principal forgiveness may not exceed the percentages established by federal law or by the capitalization grant.

§371.18. Financial Guarantees for Political Subdivision Bonds.

(a) Financial guarantees. The Board will consider accepting surety bonds in lieu of required cash reserve deposits and insurance policies for political subdivision bonds. At the time of commitment and at closing, only those financial guarantors that have been approved by the Board are authorized to underwrite financial guarantee policies on political subdivision bonds approved by the Board.

(b) Criteria for authorized list. The Board will maintain a list of authorized financial guarantors. In order to be considered for placement on the list, a guarantor must meet the following minimum criteria:

(1) the financial guarantor must be a nationally-recognized provider of municipal bond insurance and must have a triple-A stable insurer financial strength rating with Standard &

Poor's, Moody's Investors Service, Inc. and Fitch, Inc.; and

(2) the financial guarantor must have a triple-A insurer financial enhancement rating with Standard & Poor's.

(c) Review of policies. The executive administrator shall review all policies of insurance submitted by authorized financial guarantors and may reject any policy of insurance or surety bond that does not protect the interests of the Board's financial program or that subrogates the Board's rights.

(d) Removal from authorized list. The executive administrator may remove a financial guarantor from the authorized list at any time that a change in status would cause the financial guarantor to fail to meet the minimum criteria.

#### SUBCHAPTER C. INTENDED USE PLAN.

##### §371.20. Submission of Project Information Forms.

(a) Eligible Applicants may submit a project information form for rating and ranking on the applicable IUP. To be included in the IUP and on the initial Project Priority List, Applicants must submit a complete and accurate project information form by the date included in the notice. As further detailed in the applicable IUP, applicants may also submit a project information form after the date included on the notice for a project to be considered for inclusion on an amended Project Priority List published after the initial IUP has been approved. The required information will be specified in Board guidance and will include, but will not be limited, to the following:

(1) a detailed description of the proposed project;

(2) a county map(s) showing the location of the service area;

(3) an estimated total project cost which:

(A) for an estimated financial assistance amount greater than \$100,000, the project information form shall be sealed by a registered professional engineer; or

(B) for an estimated financial assistance amount less than \$100,000, the project information form shall be accompanied by a statement signed by the system operator establishing the basis for the estimate;

(4) an estimated project schedule;

(5) the population currently served by the Applicant;

(6) the status of the Applicant's water conservation plan;

(7) signature of the Applicant's authorized representative; and

(8) additional information, as detailed within the solicitation for project information forms, needed to establish the priority rating score.

(b) The Applicant's failure to submit all of the information requested may result in a failure to include the project in the IUP.

#### §371.21. Rating Process.

(a) Projects in an IUP will be rated based upon the information, and any accompanying supporting documentation, submitted by the Applicant on the project information form.

(b) Projects will be rated based on the following factors:

(1) Health and compliance. Factors regarding public health concerns/issues or violations of maximum contaminant levels pursuant to 40 CFR Part 141.

(2) Effective management. Whether an entity has adopted or plans to prepare an Asset Management Plan and provide training to the Applicant's governing body and employees, whether the project addresses water conservation and energy efficiency, and whether the project implements a state or regional water plan.

(3) Eligibility as Disadvantaged Community. Projects located in disadvantaged communities, as defined in Subchapter A of this Chapter.

(4) Additional factors as designated within the applicable IUP and determined by the executive administrator.

(c) Source Water Protection projects are rated and ranked according to the criteria and procedures within the applicable IUP.

(d) Previously funded projects. Planning, acquisition, or design projects, completed within three years from the closing of the financial assistance will receive a priority for construction phase funding if there are no significant changes that affect the original project rating and the project is ready to proceed.

(e) If any changes are proposed to the nature of the improvements of a proposed project, or in the number of participants in a consolidation project which would result in a change to the combined rating factor as determined in the IUP, the projects must be re-ranked. In this case, the project's ranking will be determined based on the revised combined rating factor.

(f) Urgent Need. The Board may offer urgent need financial assistance to address situations that require immediate attention to protect public health and safety as prescribed in the IUP. The executive administrator may bypass projects to provide funding to urgent need projects.

§371.22. Public Notice.

(a) In accordance with the Act, the executive administrator shall hold public hearings and allow a period for public review and comment before the Board considers the adoption and approval of the IUP and the Project Priority List.

(b) For any substantive amendments thereto, the executive administrator shall hold a public hearing and allow a period of public review and comment in accordance with the Act. The executive administrator may make amendments to the Project Priority List after a 14-day public comment period without any public hearing.

§371.23. Criteria and Methods for Distribution of Funds.

(a) Amount of available funds. Annually, the executive administrator will determine the amount of funds available for water system improvements and other projects for the fiscal year.

(b) Principal forgiveness limits. The total amount of principal forgiveness in any fiscal year may not exceed the percentages established by federal law or by the capitalization grant.

(c) Project Priority List. Available program funds will be applied to the list of projects designated to receive funding. The methods used for ranking include:

(1) Project costs. Project costs will be determined by cost estimates contained in the project information form if the executive administrator deems those costs reasonable and acceptable; the costs will also be reflected in the applicable IUP.

(2) Tie-breakers. If two or more projects receive the same rating, then the executive administrator will use the tie-breaker procedures listed in the applicable IUP.

(3) Bypass procedure. The executive administrator may bypass higher rated and ranked projects if:

(A) an incomplete application is submitted as described in §371.31 of this title (relating to Timeliness of Application and Required Application Information); or

(B) a bypass is necessary to fund certain types of projects as detailed in the applicable IUP or as required by capitalization grant conditions.

(d) Small water systems. Projects with identical combined rating scores, including rating scores of zero, will be listed in order of population. Projects serving smaller populations will be listed above those projects serving larger populations.

(1) To the extent eligible Applicants are available, a minimum of 15 percent of the funds will be made available to small water systems.

(2) If small community projects listed in priority order on the Invited Projects List are less than

15 percent, then the executive administrator may bypass projects for systems serving larger populations to ensure inclusion of small water systems projects for at least 15 percent of available funds.

(e) Projects submitted for financing will be screened for eligibility, scored, ranked, and listed on a Project Priority List. Applicants with projects on the Initial Invited Projects List will be invited to submit applications in accordance with the procedures and deadlines as detailed in the applicable IUP. The project selection is subject to subsections (a) - (d) of this section. The Project Priority List will be reviewed periodically and additional invitations will be extended until all of the annual DWSRF funding amount is committed.

(f) Utilization of remaining funds. If there are insufficient applications for financial assistance to obligate available funds for the funding year, then the executive administrator shall utilize the remaining funds during the next funding year or at any time in combination with other Board financial assistance programs.

(g) Fund shortages. When the amount of funds required to fund all complete applications for financial assistance exceeds the amount of funds available in the funding year, a shortage of funds exists. In such an instance, the Board will fund Applicants until all funds have been utilized. The Board shall fund projects prioritized by the date and time of receipt of a complete application and the project's ability to proceed to commitment.

#### §371.24. Changes to Project.

Subsequent to adoption of an IUP, the Applicant for a proposed project listed within the Project Priority List may be allowed certain changes without requiring a re-ranking in the following circumstances:

- (1) the Applicant for a proposed project changes but the project does not change;
- (2) the number of participants in a consolidation project changes and the change does not result in a change to the combined rating factor; and
- (3) the fundable amount of a proposed project does not increase by more than 10 percent of the amount listed in the approved IUP. The executive administrator may waive the 10 percent limit to incorporate additional elements or increased project costs; however, any principal forgiveness awarded may not exceed the original IUP amounts allocation.

#### SUBCHAPTER D. APPLICATION FOR ASSISTANCE.

##### §371.30. Pre-Application Conferences.

The Applicant must schedule an appointment and participate in a pre-application conference to be held in person or by teleconference to discuss the eligibility of the project and of the Applicant for financial assistance; the general, engineering, environmental, fiscal, and legal requirements of an application; and to assist the Applicant in completing an application. The

following individuals should participate in the conference: a member of the governing body of the Applicant; the consulting engineer; and the financial advisor.

§371.31. Timeliness of Application and Required Application Information.

(a) Time to submit applications. Applications and required additional data or information must be submitted in a timely basis. The failure to timely submit the application, the information necessary to complete the application or additional requested information will result in the bypass of the project.

(1) Deadline to submit application. Applicants shall submit a complete application by the deadlines established by the Board as detailed in the applicable IUP or the project will be bypassed. The Applicant will be notified when an application is administratively complete.

(2) Incomplete applications. An Applicant shall cure any deficiency in an application upon request from the executive administrator and shall submit all requested information within fourteen days from the date of the notice of a deficiency.

(3) Additional information. The Applicant shall submit any additional or modified information or data required by the executive administrator within fourteen days of the request for same, regardless of the expiration of other applicable deadlines in this section.

(4) Extension of time. The executive administrator may grant an extension of time to complete the application or to receive additional information and data if the Applicant can show good cause for the delay or if the delay is caused by an event of force majeure. The executive administrator exercises sole discretion in determining whether and to what extent to grant a time extension.

(b) Required application information. For eligible public Applicants and eligible NPNC Applicants that are also eligible public Applicants, an application shall be in the form and number of copies prescribed by the executive administrator and, in addition to any other information that may be required by the executive administrator or the Board, the Applicant shall provide the following documentation:

(1) a resolution from its governing body that shall:

(A) request financial assistance, identifying the amount of requested assistance;

(B) designate the authorized representative to act on behalf of the governing body; and

(C) authorize the representative to execute the application, appear before the Board on behalf of the Applicant, and submit such other documentation as may be required by the executive administrator;

(2) a notarized affidavit from the authorized representative stating that:

(A) the decision to request financial assistance from the Board was made in a public meeting held in accordance with the Open Meetings Act (Government Code, Chapter 551) and after providing all such notice as is required by the Open Meetings Act or, for a corporation, that the decision to request financial assistance from the Board was made in a meeting open to all customers after providing all customers written notice at least 72 hours prior to such meeting;

(B) the information submitted in the application is true and correct according to best knowledge and belief of the representative;

(C) the Applicant has no outstanding judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issues of any kind or nature by EPA, the Commission, Texas Comptroller of Public Accounts, Utility Commission, Texas Office of the Secretary of State, or any other federal, state, or local government, that would materially affect the Applicant's ability to repay its debt, or identifying such judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issue as may be outstanding for the Applicant;

(D) the Applicant warrants compliance with the representations made in the application in the event that the Board provides the financial assistance; and

(E) the Applicant will comply with all applicable federal laws, rules, and regulations as well as the laws of this State and the rules and regulations of the Board;

(3) copies of the following project documents:

(A) any draft or executed contracts for consulting services to be used by the Applicant in applying for financial assistance or constructing the proposed project, including but not limited to, financial advisor, engineer, and bond counsel; and

(B) contracts for engineering services should include the scope of services, level of effort, costs, project schedules, and other information necessary for adequate review by the executive administrator. A project schedule shall be provided with the contract; the schedule must provide firm timelines for the completion of each phase of a project and note the milestones within the phase of the project;

(4) a citation to the specific legal authority in the Texas Constitution and statutes under which the Applicant is authorized to provide the service for which the Applicant is receiving financial assistance as well as the legal documentation identifying and establishing the legal existence of the Applicant;

(5) if the Applicant provides or will provide water supply or treatment service to another service provider, or receives such service from another service provider, the proposed agreement, contract, or other documentation which legally establishes such service relationship, with the final and binding agreements provided prior to closing;

(6) documentation of the ownership interest, with supporting legal documentation, for the property on which the proposed project shall be located, or if the property is to be acquired,

certification that the Applicant has the necessary legal power and authority to acquire the property;

(7) if financing of the project will require a contractual loan agreement or the sale of bonds to the Board payable either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts, for a duration specified by the executive administrator, under which the Applicant's gross income is expected to accrue. Before financial assistance is closed, an Applicant shall submit executed copies of such contracts to the executive administrator;

(8) if the bonds to be sold to the Board are revenue bonds secured by a subordinate lien, a copy of the authorizing instrument of the governing body for all prior and outstanding bonds shall be furnished;

(9) if a bond election is required by law to authorize the issuance of bonds to finance the project, the executive administrator may require the Applicant to provide the election date and election results necessary for the issuance of the bonds as part of the application or prior to closing;

(10) an audit of the Applicant for the preceding year prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant, unless an alternative method of establishing a reliable accounting of the financial records of the Applicant is approved by the executive administrator; and

(11) a listing of all the funds used for the project, including funds already expended from sources other than financial assistance offered from the Board, such as from participating local government entities or prior-issued debt.

(c) For eligible private Applicants and eligible NPNC Applicants that are not also eligible public Applicants, an application shall be in the form and number of copies prescribed by the executive administrator, and, in addition to any other information that may be required by the executive administrator or the Board, such Applicant shall provide:

(1) the legal documentation identifying and establishing the legal existence of the Applicant, including articles of incorporation with certificate of account status or partnership agreements;

(2) the documentation identifying and establishing full legal and equitable ownership interests of the real and personal property that constitute the water system held by the Applicant;

(3) the Applicant shall provide:

(A) identification of any affiliated interests or affiliates; and

(B) a notarized statement from the sole proprietor or each entity holding an ownership interest:

(i) identifying an individual whom may act as the representative on behalf of the sole proprietor

or each legal entity which has been identified as maintaining an ownership interest in the Applicant;

(ii) authorizing such representative to submit an application and such other documentation as may be required by the executive administrator;

(4) identification of the authority to provide the service for which the assistance is requested which shall include:

(A) a map of the area served acceptable to the executive administrator;

(B) if the Applicant provides or will provide water supply or treatment service to another service provider, or receives such service from another service provider, the proposed agreement, contract, or other documentation which legally establishes such service relationship, with the final and binding agreements provided prior to closing; and

(C) for utilities, as defined pursuant to Utility Commission rules, the Certificate of Convenience and Necessity number and a service area map;

(5) a notarized affidavit by the designated representative of the Applicant:

(A) requesting financial assistance and identifying the amount of requested assistance;

(B) stating that the information submitted in the application is true and correct according to belief and knowledge of the representative;

(C) stating that the Applicant or any of its affiliates or affiliated interests has no outstanding judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issue of any kind or nature by EPA, the Commission, Texas Comptroller of Public Accounts, Utility Commission, Texas Office of the Secretary of State, or any other federal, state, or local government, that would materially affect the Applicant's ability to repay its debt, or identifying such judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issue as may be outstanding against the Applicant or any of its affiliates or affiliated interests;

(D) stating that each entity with an ownership interest warrants compliance with representations made in the application in the event that the Board provides the financial assistance;

(E) for eligible private Applicants, stating that the decision to request financial assistance from the Board was made in accordance with any applicable bylaws or charter of the Applicant; and

(F) assuring compliance with all applicable federal laws, rules, and regulations as well as the laws of this State and the rules and regulations of the Board;

(6) copies of the following project documents:

(A) any draft or executed contracts for consulting services to be used by the Applicant in

applying for financial assistance or constructing the proposed project, to include, but not limited to, financial advisor, engineer, and bond counsel; and

(B) contracts for engineering services should include the scope of services, level of effort, costs, project schedules, and other information necessary for adequate review by the executive administrator. A project schedule shall be provided with the contract; the schedule must provide firm timelines for the completion of each phase of a project and note the milestones within the phase of the project;

(7) a business plan that:

(A) identifies by month for the next 18 months, or for the time period of project construction, whichever is longer, anticipated revenues, including any anticipated rate increases, and anticipated expenditures; and

(B) provides five year historical data on system revenue and expenditures;

(8) copies of the federal income tax returns for the Applicant for the two previous tax years;

(9) documentation of any bankruptcy proceedings for the Applicant or any affiliated interests or affiliates for the preceding five years or a sworn statement that the Applicant or any affiliated interests or affiliates has not been a party to a bankruptcy proceeding for the preceding five years;

(10) if any part of the community water system has been pledged or otherwise used as security for any other indebtedness of the Applicant or an affiliate or affiliated interest, a copy of the outstanding indebtedness;

(11) if financing of the project will require a contractual loan agreement or the sale of bonds to the Board payable either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts, for a duration specified by the executive administrator, under which Applicant's gross income is expected to accrue. Before the financial assistance is closed, an Applicant shall submit executed copies of such contracts to the executive administrator;

(12) if the Applicant is required to utilize a surcharge or otherwise intends to rely on an increase in the rate that it is charging in order to repay the requested financial assistance, a copy of the acknowledgment from the Utility Commission that the proposed rate change filing has been received;

(13) an audit of the Applicant for the preceding year prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant, unless an alternative method of establishing a reliable accounting of the financial records of the Applicant is approved by the executive administrator; and

(14) if additional funds are necessary to complete the project, or if the Applicant has applied for and/or received a commitment from any other source for the project or any aspect of the

project, a listing of those sources, including total project costs, financing terms, and current status of the funding requests.

#### §371.32. Review of Applications for Financial Assistance.

(a) Review of applications. The executive administrator will review the application to ensure that sufficient information has been provided to support the eligibility of the Applicant and the project. The executive administrator may request that the information or data for any portion of the application be modified or supplemented.

(b) Submittal of requested information. If the Applicant fails to submit information or data requested within the established time period, then the executive administrator may notify the Applicant that the application is incomplete and will be bypassed.

(c) If an applicant does not proceed through the application process and obtain a commitment within the application timeframes established within the applicable IUP, the principal forgiveness may be re-allocated to another eligible project. An extension of time for obtaining a commitment may be granted at the discretion of the executive administrator.

#### §371.33. Refinancing.

(a) An application to refinance existing debt for eligible projects may be accepted by the executive administrator when sufficient funds are available to provide refinancing. If refinancing funds are available in an IUP, then the eligible Applicant shall describe the need for the eligible project and provide other specific information detailed in the project information form or otherwise requested by the executive administrator.

(b) An application for refinancing of existing debt shall be the same as an application for financial assistance under this chapter. The executive administrator may consider an application for refinancing when:

(1) the project meets all of the requirements under this chapter, including information evidencing that the environmental review, programmatic requirements, and engineering criteria meets the criteria required under law and this chapter for the same or similar projects; and

(2) the federal tax regulations allow such refinancing.

#### §371.34. Required Water Conservation Plan and Water Loss Audit.

(a) Water Conservation Plan. An Applicant shall submit a water conservation plan prepared in accordance with §363.15 of this title (relating to Required Water Conservation Plan).

(b) Water Loss Audit. An Applicant that is a retail public utility that provides potable water shall submit its most recent water loss audit in accordance with §358.6 of this title (relating to Water Loss Audits), unless it has previously been submitted.

(c) If a retail public utility's total water loss meets or exceeds the threshold for that utility in accordance with §358.6 of this title, the retail public utility must use a portion of any financial assistance received from the DWSRF, or any additional financial assistance provided by the Board, to mitigate the utility's water loss. However, at the request of a retail public utility, the Board may waive this requirement in accordance with §358.6 of this title.

#### §371.35. Board Approval of Funding.

(a) Presentation to Board. The Board must consider each application at a public meeting. The executive administrator will notify the Applicant when the Board's consideration of the application is scheduled for a public meeting.

(b) Action by Board. After considering the executive administrator's recommendation and comments from the Applicant and other interested persons, the Board may:

(1) resolve to approve an application only when it finds that the revenue or taxes or both revenue and taxes pledged by the Applicant will be sufficient to meet all obligations that will be assumed by the Applicant;

(2) resolve to disapprove or amend the proposed conditions for the financial assistance;

(3) request additional information related to the eligibility of the Applicant or the project or withdraw the application for consideration at another time; and

(4) approve an application for pre-design funding despite a negative recommendation from the executive administrator.

(c) Board's resolution. The Board's approval of an application and award of a commitment is recorded through the issuance of a resolution.

(d) Expiration of Board commitment. The Board's commitment for financial assistance expires on the date noted in the commitment as delineated in the IUP applicable to the project.

(e) Extension of expiration date. Upon good cause shown or upon a showing that an event of force majeure, as defined in this Chapter, caused the Applicant's failure to timely close the commitment, then an extension of the expiration date may be granted at the discretion of the Board.

(1) The Applicant must submit a written request, at least 45 days prior to the expiration date, except in the event of force majeure, as defined in this Chapter, that contains an explanation of the need for the extension and a request for a specific date for closing.

(2) The Board may, but is not required to, approve a request for an extension of time and may allow a longer extension as appropriate to the circumstances in the event of force majeure.

§371.36. Multi-year Commitments.

(a) Commitment periods may be set for a period of up to five years. The minimum interest rate reduction for the multi-year commitments will be established for the five year period based on the interest rate reduction prescribed in the IUP for the first year's commitment.

(b) This option is only available for projects that do not receive principal forgiveness based on the affordability criteria. However, the entity receiving a multi-year commitment may receive principal forgiveness for the other eligible options, such as principal forgiveness for green projects, for the amount of funds committed for the initial year.

(c) Any entity receiving a multi-year commitment must annually re-confirm its anticipated funding commitments established with the initial commitment.

SUBCHAPTER E. ENVIRONMENTAL REVIEWS AND DETERMINATIONS.

§371.40. Definitions.

Unless specifically defined differently within this subchapter, the following terms and acronyms, used in this subchapter, mean:

- (1) Affected community--A community potentially impacted by the proposed project.
- (2) Categorical Exclusion (CE)--An environmental finding issued by the Board for projects that would not individually or cumulatively have a significant adverse effect on the human environment and for which, therefore, the Applicant is not required to prepare an Environmental Information Document or an Environmental Impact Statement.
- (3) Emergency Relief Project--An infrastructure construction project that provides relief to an entity experiencing an emergency condition or incident that causes an imminent peril to public health, safety, environment, or welfare, including natural disasters, such as:
  - (A) the failure or destruction of public water supply pipelines, transmission, or distribution systems;
  - (B) the threat of or actual contamination of a public water supply;
  - (C) sustained or permanent service disruption of a source water or water treatment system;
  - (D) the reduction of public water supplies to critical levels by drought or other natural cause(s);  
or
  - (E) any other emergency condition as described in an IUP.
- (4) Environmental Assessment--A public document prepared by the executive administrator for projects that may result in adverse environmental impacts and the significance of those impacts

is not known. The Environmental Assessment, based primarily on the Environmental Information Document, must provide sufficient evidence and analysis to determine whether to prepare a Finding of No Significant Impact or an Environmental Impact Statement.

(5) Environmental Impact Statement (EIS)--A detailed written statement prepared by a third-party contractor, in close coordination with the executive administrator, that analyzes environmental impacts of project alternatives for projects with significant adverse impacts on the quality of the human environment. An EIS is required for projects that do not qualify for a Finding of No Significant Impact. An EIS provides the most comprehensive and detailed information about potential environmental impacts and mitigation required to comply with the NEPA. It is the basis for the Record of Decision issued by the Board.

(6) Environmental Information Document (EID)--A written analysis prepared by the Applicant that provides sufficient information, including appropriate regulatory agency correspondence and public participation documentation, for the executive administrator to undertake an environmental review and determine if the project qualifies for a Finding of No Significant Impact or if an Environmental Impact Statement will be required. An EID is not always necessary to determine if the project will require preparation of an EIS.

(7) Federal Environmental Cross-cutters--Federal environmental statutes, laws and Executive Orders that apply to projects and activities with a federal nexus, including the receipt of federal financial assistance.

(8) Finding of No Significant Impact (FONSI)--An environmental finding issued by the Board when the environmental assessment prepared for the project supports the determination that the project will not have a significant adverse effect on the human environment and therefore, does not require the preparation of an environmental impact statement.

(9) Human environment--The natural and physical environment and the relationship of people with that environment.

(10) Indian tribes--Federally recognized Indian tribes.

(11) Mitigation--

(A) avoiding the impact altogether by not taking a certain action or parts of an action;

(B) minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(C) rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(D) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the project; and

(E) compensating for the impact by replacing or providing substitute resources or environments.

(12) NEPA--The Federal National Environmental Policy Act, 42 U.S.C. §§4321 et seq.

(13) Record of Decision (ROD)--An environmental finding issued by the Board that identifies the selected project alternative, presents the basis for the decision, identifies all the alternatives considered, specifies the environmentally preferable alternative, and provides information on the adopted means to mitigate for environmental impacts. The ROD is based on the conclusions of the EIS.

(14) Statement of Finding (SOF)--An environmental finding issued by the Board to correct, clarify, modify, or adopt a previous environmental finding, issued by the Board or other agency.

#### §371.41. Environmental Review Process.

(a) Policy and purpose. This subchapter governs the environmental review of projects funded in whole or in part by the DWSRF. Environmental review of all proposed infrastructure projects is a condition of the use of DWSRF financial assistance and is subject to annual audits by the EPA. This subchapter follows the procedures established by the EPA for implementing the National Environmental Policy Act set forth at 40 CFR Part 6. The environmental review process described in this subchapter applies to the maximum extent legally and practicably feasible. However, the environmental review process may be modified due to an emergency condition as described in §371.40(3) of this title (relating to Definitions). The environmental review is subject to public comment. The Applicant, at all times throughout the design, construction, and operation of the project, shall comply with the findings resulting from the environmental review.

(b) Timing. The environmental review process is a component of the planning phase and must be completed prior to the executive administrator's approval of the Applicant's engineering feasibility report.

(c) Types of environmental findings. At the culmination of the environmental review process described in this subchapter, the Board will issue one of the following findings:

(1) a Categorical Exclusion:

(A) based on review of information submitted by the Applicant; and

(B) the eligibility criteria described in §371.42 of this subchapter.

(2) a Finding of No Significant Impact:

(A) based on review of the Applicant's Environmental Information Document; and

(B) the executive administrator's Environmental Assessment;

(3) a Record of Decision based on review of the Environmental Impact Statement prepared by the Applicant's third party contractor; or

(4) a Statement of Findings:

(A) based on review of a previous environmental finding for the proposed project;

(B) based on review of proposed project modifications for consistency with a previous environmental finding; and/or

(C) to correct, clarify, or modify an environmental finding.

(d) General review by the executive administrator.

(1) The executive administrator shall ensure that an inter-disciplinary, inter-agency, and public review is conducted consistent with the NEPA. The purpose of this review is to ensure that the proposed project will comply with the applicable local, state, and federal laws and regulations relating to the identification of potential environmental impacts of a proposed project and the necessary steps required to mitigate such impacts. The scope of the environmental review will depend upon the type of proposed action, the reasonable alternatives, and the type of environmental impacts.

(2) For all environmental findings that are five years old or older, and for which the proposed infrastructure project has not yet been implemented, the executive administrator must re-evaluate the proposed financial assistance application as well as the environmental conditions and public comment to determine whether to conduct a supplemental environmental review in compliance with the NEPA, or to reaffirm the original finding. If there has been substantial change in the proposed infrastructure project that is relevant to environmental concerns, or if there are significant new circumstances, changes in federal environmental cross-cutter requirements that affect the environmental finding, or information relevant to environmental concerns, the executive administrator must conduct a supplemental environmental review and complete an appropriate finding in compliance with the NEPA. The executive administrator may consider environmental findings issued by other entities.

§371.42. Board's Environmental Finding: Categorical Exclusions.

(a) A proposed project can be categorically excluded from a full environmental review if the proposed project:

(1) fits within the category of action that is eligible for exclusion, as listed in subsection (b) of this section;

(2) will not result in significant impacts on the quality of the human environment; and

(3) does not involve extraordinary circumstances, as listed in subsection (d)(1) - (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;

(2) minor expansion of system capacity;

(3) the rehabilitation, including functional replacement of the existing system and system components; and

(4) the construction of new minor ancillary facilities located adjacent to or on the same property as existing facilities.

(c) Projects not eligible for a CE include:

(1) projects that would otherwise be eligible for a CE but due to extraordinary circumstances, as listed in subsection (d)(1) - (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 percent 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.

(d) 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;

(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 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;

(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) conflict with federal, state, or local government, or federally-recognized Indian tribe environmental, resource protection, or land-use laws or regulations.

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

(f) The executive administrator shall review the information submitted by the Applicant and may request additional information as needed to complete the finding regarding the eligibility of a proposed project for a categorical exclusion.

(g) The Board's finding 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.

#### §371.43. Applicant Requirements: Categorical Exclusions.

(a) Projects that qualify to be categorically excluded from a full environmental review fit into a category of actions, identified by the EPA, that do not individually or cumulatively have a significant effect on the human environment and do not involve extraordinary circumstances. This determination is based upon the criteria established in §371.42 of this subchapter (relating to Board's Environmental Finding: Categorical Exclusions).

(b) An Applicant shall submit sufficient information to demonstrate why the project is eligible for a CE including, but not limited to, the following documentation:

- (1) a brief but complete description of the project;
- (2) 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;
- (3) information regarding the eligibility of the project for a CE under the criteria listed in §371.42 of this subchapter;
- (4) any information that may be helpful to determine whether any extraordinary circumstances, as listed in §371.42 of this subchapter, apply to the project; and
- (5) any information that may be helpful to determine if mitigation measures are required to ensure the project will not individually or cumulatively have a significant adverse impact on the human environment. This includes, but is not limited to, coordination with applicable regulatory agencies regarding resources within their jurisdiction that may be adversely impacted by the project.

§371.44. Board's Environmental Finding: Finding of No Significant Impact.

(a) Purpose and applicability. A Finding of No Significant Impact (FONSI) may be issued if the proposed action will not have a significant effect on the human environment. A FONSI shall be based upon the information submitted by the Applicant and upon the environmental assessment (EA) prepared by the executive administrator.

(b) Environmental Assessment. An Environmental Assessment is required when the proposed project is expected to result in environmental impacts and the significance of those impacts is not known. When the executive administrator preliminarily determines that the impacts will not be significant and may be addressed by ordinary mitigation measures, then an Environmental Assessment will be prepared. An Environmental Assessment is not required if the proposed action is categorically excluded or if an Environmental Impact Statement is required.

(c) Contents of an Environmental Assessment.

(1) An Environmental Assessment shall include a brief discussion of the following:

(A) the purpose and need for the proposed project and an estimate of cost of the project;

(B) the alternatives considered, including the no action alternative, and the reasons for the rejection or acceptance of the alternatives;

(C) the affected environment, including baseline conditions that may be impacted by the proposed actions and the alternatives;

(D) the environmental impacts of the proposed project and the alternatives, including any unresolved conflicts concerning alternative use of available resources; and

(E) applicable environmental laws and executive orders.

(2) The form of the Environmental Assessment generally shall include:

(A) a listing or summary of coordination and consultation undertaken with any federal, state, local, or Indian tribe government regarding compliance with applicable environmental laws and executive orders;

(B) identification and description of the mitigation measures considered, including mitigation measures that must be adopted to ensure the proposed project will not have significant impacts; and

(C) incorporation of documents by reference, including the Environmental Information Document submitted by the Applicant.

(d) Contents of a FONSI. When the Environmental Assessment supports a finding that the proposed project will not have a significant effect on the human environment, then the Board may issue a FONSI. The FONSI must include the following components:

(1) an Environmental Assessment;

(2) a brief description of the reasons why there are no significant impacts;

(3) any commitments to mitigation measures that are essential to render the impacts of the proposed project insignificant;

(4) the date of issuance and signature of the executive administrator; and

(5) the executive administrator's statement that the Applicant has committed to the mitigation measures and that the Applicant has the ability and the authority to fulfill the commitment to mitigation;

(e) Public comments and the issuance of a FONSI.

(1) The executive administrator shall make the Environmental Assessment and preliminary FONSI available on the Board's website for review and public comment for a period of at least thirty (30) days.

(2) If no substantive comments are received, the executive administrator may proceed with the proposed project subject to the mitigation measures identified in the FONSI. If substantive comments are received, then the executive administrator shall respond to the comments and revise the FONSI accordingly, if necessary.

(3) The executive administrator shall ensure that the mitigation measures necessary to the FONSI determination are enforceable and shall conduct appropriate monitoring of these measures. All contracts, plans, specifications, and other applicable documents used during the design and construction of the project shall contain reference to or descriptions of the mitigation measures included in the FONSI, as required by this subchapter.

(f) Dissemination of information about mitigation measures. The executive administrator may provide written notification describing the outcome of the mitigation measure proposed in an environmental finding to interested agencies and public groups.

§371.45. Applicant Requirements: Environmental Information Document.

(a) An Applicant shall prepare an Environmental Information Document (EID) in consultation with the executive administrator for projects that have potential adverse environmental impacts and the significance of those impacts is not known. The executive administrator will provide guidance on the format and contents of the EID prior to the initiation of planning for the proposed project or as soon as practicable upon receipt of an application. An EID is not required when:

- (1) the project is eligible for a CE or requires the preparation of an EIS;
- (2) the Applicant submits a previous environmental finding that meets DWSRF program requirements, including compliance with the NEPA; or
- (3) the Applicant prepares and submits a draft EIS and supporting documents that meet DWSRF program requirements, including compliance with the NEPA.

(b) Coordination. The Applicant shall prepare the EID in coordination with the appropriate federal agencies, state, and local governments, Indian tribes, and other potentially affected parties. The Applicant must also notify the executive administrator regarding any private entities or organizations affected by the proposed project.

(c) Contents of EID. The EID shall include, but is not limited to:

- (1) a description of the project;
- (2) the need for the proposed project;
- (3) the alternatives to the project, including the no action alternative;
- (4) the affected environment, including baseline conditions that may be impacted by the proposed project and the alternatives;
- (5) the environmental impacts of the proposed action and alternatives, including unresolved conflicts concerning alternative uses of available resources;
- (6) potential impacts on resources protected by the federal environmental cross-cutters;
- (7) documentation showing that requisite regulatory agencies have been consulted;
- (8) proposed mitigation measures supporting the issuance of a FONSI;
- (9) documentation showing that the requisite public participation requirements have been satisfied; and
- (10) any other information required by the executive administrator.

§371.46. Environmental Impact Statements.

(a) Purpose and applicability. An EIS examines impacts from the proposed project that are

significantly affecting the human environment, requires close coordination with the Board and other agencies, and is the primary basis for the Board's issuance of a Record of Decision.

(b) Required EIS. An EIS shall be prepared for:

(1) new regional water supply systems for a community with a population greater than 100,000;

(2) actions likely to have a significant adverse effect on:

(A) local ambient air quality;

(B) local ambient noise levels;

(C) surface water reservoirs or navigation projects;

(D) the environment due to the releases of radioactive, hazardous, or toxic substances or biota;

(E) federal or state natural landmarks or any property eligible for the national or state register of historic places; or

(F) environmentally important natural resources such as wetland, floodplains, significant agricultural lands, aquifer recharge zones, coastal zones, barrier islands, wild and scenic rivers, and significant fish or wildlife habitat;

(3) actions inconsistent with federal, state, local, or Indian tribe environmental, resources protection, or land use laws or approved land use plans or regulations;

(4) actions likely to significantly affect the pattern and type of land use or growth and distribution of population, including altering the character of residential areas;

(5) actions that in conjunction with federal, state, local, or Indian tribe projects are likely to produce significant cumulative impacts; and

(6) actions with uncertain environmental effects or highly unique environmental risks that are likely to be significant.

§371.47. Decision to Prepare an Environmental Impact Statement: Notice of Intent.

(a) Notice of Intent (NOI) to prepare an EIS. When the executive administrator recommends the issuance of an EIS, a NOI will be published in the *Texas Register* in order to provide the public with the opportunity to participate in a scoping meeting.

(b) Contents of NOI. The NOI shall contain information about a scoping meeting which shall be held no sooner than fifteen days after the publication of the notice of intent. The public comment period for the proposed scope of the EIS shall be at least forty-five days.

§371.48. Board's Environmental Finding: Record of Decision.

(a) General. A Record of Decision (ROD) results from an extensive environmental review of a proposed project's potential environmental impacts as detailed in an EIS.

(b) Contents of ROD. A ROD must include the following components:

(1) a brief description of the proposed project and the alternatives considered in the EIS as well as the environmental factors considered and the project's impacts;

(2) commitments to implement mitigation measures;

(3) an explanation if the environmentally preferred alternative was not selected;

(4) responses to substantive comments on the final EIS;

(5) the executive administrator's statement that the Applicant has committed to the mitigation measures and that the Applicant has the ability and the authority to fulfill the commitment to the measures; and

(6) the date of issuance and the signature of the executive administrator.

(c) Issuance of the ROD. The issuance of a ROD allows the Applicant to proceed with the proposed action subject to mitigation measures described in the ROD. The ROD shall be made available to the public.

(d) Monitoring of mitigation measures. The executive administrator shall ensure that adequate monitoring of the mitigation measures occurs throughout the construction of the project. Additionally all contracts, plans, specifications, and other applicable documents used during the planning, design, and construction of the project shall contain reference to or descriptions of the mitigation measures.

(e) Dissemination of information about mitigation measures. The executive administrator may provide written notification describing the outcome of the mitigation measures proposed in an environmental finding to interested agencies and public groups.

§371.49. Applicant Requirements: Environmental Impact Statement.

(a) Third party contractor. The Applicant shall contract with a third-party contractor at its own expense to prepare an EIS and any associated documents required for consideration by the executive administrator.

(b) Executive administrator approval. The executive administrator must approve of and participate in the Applicant's selection of the third-party contractor. The third party contractor shall be selected on the basis of its qualifications to prepare the EIS, including experience with data collection and analyses as well as with the clear presentation of information and data. The

third-party contractor shall be responsible for providing technical advice to the Applicant and for receiving and incorporating technical advice from the executive administrator.

(c) The third-party contractor shall not have any financial or other interest in the proposed project and must submit a disclosure statement to the executive administrator documenting the fact that it has no financial or other interest in the project.

(d) Contract with third party. The Applicant and the executive administrator must agree to the creation and terms of a contract with the third party jointly selected by them to prepare the EIS. The contract terms must ensure that the third party does not have recourse to the Board or the EPA for financial or other claims arising under the contract.

(e) The third-party contractor shall cooperate with the executive administrator and shall provide draft documents, analyses, and conclusions that adequately assess the relevant environmental issues for review, comment, and direction from the executive administrator. The executive administrator shall have sole responsibility to ensure that the EIS and any associated documents adequately address the relevant environmental issues.

#### §371.50. Proposed Project Alterations.

(a) Proposed project changes during review. The Applicant must notify the executive administrator if during the environmental review process, the Applicant:

(1) changes its plans for the project as originally submitted; or

(2) changes its schedule for the project from the originally submitted schedule.

(b) Alterations of proposed project. Any alteration to a project after the issuance of an environmental finding requires the Applicant to notify the executive administrator in writing in a timely manner. The Applicant shall briefly describe the reasons for the alterations in the proposed project.

(c) The executive administrator shall examine the contract documents, application, and other related documents to evaluate the proposed alterations to ensure consistency with the environmental finding. The executive administrator's review of proposed project alterations may result in:

(1) a notation to the file that the proposed alterations are minor in nature as described in subsection (d) of this section;

(2) the issuance of a SOF to confirm that project alterations are within the scope of the original environmental finding and do not require preparation of a new EID;

(3) the issuance of a FONSI when a CE has been revoked, or the issuance of a public notice that the preparation of an EIS will be required;

(4) the issuance of an amendment to a FONSI, or the revocation of a FONSI and the issuance of a public notice that the preparation of an EIS will be required; or

(5) the issuance of a supplement to a ROD, or the revocation of the ROD and issuance a public notice that financial assistance for the proposed project will not be provided.

(d) Minor changes to the proposed or reviewed project that do not create previously unconsidered adverse environmental impacts usually will not affect the ability of the proposed project alterations to proceed without additional formal environmental review.

(e) Major changes to the proposed or reviewed project that are previously unexamined and that have the potential to create adverse environmental impacts may result in a decision to revoke a CE or a FONSI and to proceed with a more detailed level of environmental review consistent with this subchapter.

#### §371.51. Use of Previously Prepared Environmental Findings.

(a) Adoption of a previous environmental finding. Previous environmental findings issued by the EPA and other agencies may be adopted in accordance with this section, provided that the finding was produced through procedures in compliance with the NEPA. The executive administrator must re-evaluate the proposed financial assistance application as well as environmental conditions and public comment to determine whether to conduct a supplemental environmental review of the action and complete an appropriate document in compliance with the NEPA, or to reaffirm the original finding.

(b) Previously required mitigation measures. Any and all mitigation measures specified in the previous finding for the applicable project components shall be applied as conditions of the commitment and closing for financial assistance documents and shall be consistent with the requirements of this subchapter.

(c) Method of adoption of a previous environmental finding. The previous finding will be adopted through the issuance of a Statement of Findings when the proposed project and its previous finding will be adopted without substantial modifications. The previous finding may also be adopted in a FONSI.

(d) Validity of previous environmental findings and re-evaluation. An environmental finding shall be re-evaluated if it was issued five years or more prior to the executive administrator's environmental review and if:

(1) the proposed project has not yet been implemented;

(2) there has been substantial change in the proposed infrastructure project that is relevant to environmental concerns; and

(3) there are significant new circumstances or information relevant to environmental impacts of the proposed action.

(e) Dissemination of information about mitigation measures. The executive administrator may provide written notification describing the outcome of the mitigation measures proposed in an environmental finding to interested agencies and public groups.

§371.52. Emergency Relief Project Procedures.

(a) If an Applicant requests funding for an emergency relief project, the executive administrator shall review all information relevant to the emergency, proposed project, status of environmental review of the proposed project, known issues with the natural or cultural environment of the project area, and availability of funding.

(b) If an emergency condition described in §371.40(3) of this title (relating to Definitions) is present, the Board may authorize funding for the emergency relief project, subject to availability of funds, without full preparation or public review of NEPA review documentation (including a CE finding, EA, or EIS) if the executive administrator determines that:

(1) delaying commencement of project construction during the period it would take to prepare, review, and circulate NEPA documentation, would increase the imminent peril to public health, safety, environment, or welfare; and

(2) consultations required by the Endangered Species Act and National Historic Preservation Act have been completed.

(c) Special conditions appropriate to minimize any potential for adverse impact due to abbreviated or expedited review may be required.

SUBCHAPTER F. ENGINEERING REVIEW AND APPROVAL.

§371.60. Engineering Feasibility Report.

(a) Applicant shall submit an engineering feasibility report signed and sealed by a professional engineer registered in the State. The report, based on guidelines provided by the executive administrator, shall provide:

(1) a description and purpose of the project;

(2) the names of the entities to be served, along with the current and future population;

(3) the cost of the project;

(4) a description of the alternatives considered and reasons for selection of the project proposed;

(5) sufficient information to evaluate the engineering feasibility;

(6) maps and drawings as necessary to locate and describe the project area;

(7) sufficient detail to document how the project will remedy the drinking water issues and problems that were evaluated for rating on the IUP;

(8) information showing that the project is cost effective; and for projects that implement new systems or significantly alter current systems, a detailed cost-effective analysis, including detailed operation and maintenance costs, may be requested to document program eligibility;

(9) a detailed project schedule with timelines for each phase of the project and the milestones within each phase of the project; and

(10) any other information or data necessary to evaluate the proposed project. The Applicant must submit any additional information requested by the executive administrator to document the project's eligibility for funding by the program.

(b) Approval of engineering feasibility report. The executive administrator will approve the engineering feasibility report when:

(1) the items listed in subsection (a) of this section have been completed, including requests for additional information or data;

(2) the appropriate environmental findings have been completed in accordance with this chapter and the Applicant has agreed to incorporate into project documents, including contracts, all mitigation measures as a result of the environmental review; and

(3) the project and alternatives to the project have been analyzed and the proposed project is cost effective.

(c) Request for project amendment. A request for an amendment, after the approval of the engineering feasibility report, to a project shall be granted only if implementation of the amendment does not affect the original purpose of the project. The implementation of a project amendment must remedy the problems and issues identified in the Applicant's original project information form. Significant amendments to a project require previous approval by the executive administrator. The Applicant shall:

(1) provide a description of and the need for an amendment;

(2) submit additional engineering or environmental information as requested by the executive administrator;

(3) provide an estimate of any increase or decrease in total project costs resulting from the proposed amendment; and

(4) certify that the proposed amendment will not significantly alter the purpose of the project.

(d) Alternative methods of project delivery. Design build, construction manager at-risk, and other alternative methods of project delivery are eligible for available financial assistance, including combinations of planning, design and construction funding, in accordance with programmatic requirements. The executive administrator will provide written guidance regarding modifications of the type of financial assistance, and the review, approval, and release of funds processes for alternative delivery projects. The Board may specify special conditions in the commitment as appropriate to accommodate an alternative method of project delivery.

§371.61. Contract Documents: Review and Approval.

(a) Contract documents include the documents that form the construction contracts and the documents that form the contracts for alternative methods of project delivery, which may include the construction phase or other phases of the project.

(b) An Applicant shall submit three copies of proposed contract documents, including the engineering plans and specifications, which shall be as detailed as would be required for submission to contractors bidding on the work. The Applicant shall provide the executive administrator with all contract documents proposed for bid advertising. The executive administrator shall review contract documents:

(1) to ensure consistency with the approved engineering feasibility report and with approved environmental planning documents;

(2) to ensure the proposed construction drawings and specifications provide adequate information so that a contractor can bid and construct the project without additional details or directions;

(3) to ensure compliance with Commission rules at Title 30, Texas Administrative Code, Chapter 290, relating to Public Drinking Water and other applicable state and federal laws and rules;

(4) to ensure the contract documents notify the contractor about the Board's authority to audit project files and inspect during construction; and

(5) to ensure compliance with other requirements as provided in guidance forms and documents, including any additional documentation required by EPA.

(c) Other approvals. The Applicant shall obtain the approval of the plans and specifications from any other local, state, and federal agencies having jurisdiction over the project. The executive administrator's approval is not an assumption of the Applicants' liability or responsibility to conform to all requirements of applicable laws relating to design, construction, operation, or performance of the project.

§371.62. Advertising and Awarding Construction Contracts.

(a) Applicable laws and rules. The Applicant shall comply with State procurement laws and rules and with applicable federal procurement rules.

(b) Executive administrator approval required. The Applicant shall not proceed to advertising for bids on the project without express written approval of the solicitation documents by the executive administrator. If the applicant proceeds to advertising without approval, it may affect eligibility for funding.

(c) Changes prior to award. If the Applicant needs to alter the plans, specifications, or contract

documents after the executive administrator's approval, then the Applicant shall:

- (1) provide the information and reasons relating to the changes therefore, if changes are required prior to bidding. The executive administrator must affirmatively approve any changes prior to advertising.
- (2) changes that occur after advertising must be incorporated into an addendum and provided to the executive administrator for approval as part of the bidding process.
- (d) Contract award. The text of a construction contract or a contract containing construction phase work submitted for approval prior to advertising shall contain the same language and provisions as the contingently executed contract.
- (e) Pre-construction conference. The Applicant shall conduct a preconstruction conference on significant construction contracts to address the contents of the executed contract documents with the project owner, the project engineer, the prime contractor, and other appropriate parties in attendance. The Applicant shall provide the executive administrator with at least 10 days advance notice of the date, time, and location of the conference.
- (f) Notice to proceed. The executive administrator shall review the executed contract documents, including any additional documentation required by EPA and upon acceptance of same shall advise the Applicant that a notice to proceed may be issued to the contractor.
- (g) No liability. The executive administrator and the Board shall have no liability for any event arising out of or in any way related to the contracts for or construction of the project.

#### SUBCHAPTER G. LOAN CLOSINGS AND AVAILABILITY OF FUNDS.

##### §371.70. Financial Assistance Secured by Bonds or Other Authorized Securities.

- (a) Applicability and required documents. This section applies to closings for financial assistance with entities issuing bonds or other authorized securities. The following documents are required for closing financial assistance secured by bonds or other authorized securities:
  - (1) evidence that applicable requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;
  - (2) a certified copy of the ordinance or resolution adopted by the governing body authorizing the issuance of debt to be sold to the Board that is acceptable to the executive administrator. The ordinance or resolution shall have sections providing as follows:
    - (A) if financial assistance proceeds are to be deposited into an escrow account at the time of closing then an escrow account shall be created that shall be separate from all other accounts and funds, as follows:

- (i) the account shall be maintained by an escrow agent as defined in §371.1 of this title (relating to Definitions);
- (ii) funds shall not be released from the escrow account without prior written approval from the executive administrator who shall issue written authorization for the release of funds;
- (iii) upon request of the executive administrator, escrow account statements shall be provided to the executive administrator;
- (iv) the investment of any financial assistance proceeds deposited into an approved escrow account shall be handled in a manner that complies with the Public Funds Investment Act, Government Code, Chapter 2256; and
- (v) the escrow account shall be adequately collateralized in a manner sufficient to protect the Board's interest in the project and that complies with the Public Funds Collateral Act, Government Code, Chapter 2257;
- (B) that the Applicant shall fix and maintain rates, in accordance with state law, and collect charges to provide adequate operation and maintenance of the project;
- (C) that a construction account shall be created which shall be kept separate from all other accounts and funds of the Applicant;
- (D) that bonds shall be closed in book-entry-only form;
- (E) the use of a paying agent/registrars that is a Depository Trust Company (DTC) participant;
- (F) that the payment of all DTC closing fees assessed by the Board's custodian bank be directed to the Board's custodian bank by the Applicant;
- (G) evidence that one fully registered bond has been sent to the DTC or to the Applicant's paying agent/registrars prior to closing;
- (H) that all payments, including the origination fee, are made to the Board via wire transfer at no cost to the Board;
- (I) that the partial redemption of bonds or other authorized securities be made in inverse order of maturity;
- (J) that insurance coverage be obtained and maintained in an amount sufficient to protect the Board's interest in the project;
- (K) that the Applicant, or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the Applicant's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis as required by Securities and

Exchange Commission (SEC) rule 15c2-12 and determined as if the Board were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the Board and the beneficial owner of the political subdivision's obligations, if the Board sells or otherwise transfers such obligations, and the beneficial owners of the Board's bonds if the political subdivision is an obligated person with respect to such bonds under rule 15c2-12. The ordinance or resolution shall also contain any other requirements of the SEC or the IRS relating to arbitrage, private activity bonds, or other relevant requirements regarding the securities held by the Board;

(L) the maintenance of current, accurate, and complete records and accounts in accordance with generally accepted accounting principles to demonstrate compliance with requirements in the financial assistance documents;

(M) that the Applicant shall annually submit an audit, prepared by a certified public accountant in accordance with generally accepted auditing standards;

(N) that the Applicant shall submit a final accounting within 60 days of the completion of the project;

(O) that the Applicant shall document the adoption and implementation of an approved water conservation program for the duration of the financial assistance;

(P) the Applicant's agreement to comply with special environmental conditions specified in the Board's environmental finding as well as with any applicable Board laws or rules relating to use of the financial assistance;

(Q) that the Applicant shall establish a dedicated source of revenue for repayment of the financial assistance;

(R) that interest payments shall commence no later than one year after the date of closing;

(S) that annual principal payments will commence no later than one year after completion of project construction; and

(T) any other recitals mandated by the executive administrator;

(3) unqualified approving opinions of the attorney general of Texas and, if bonds or other authorized securities are issued, a certification from the comptroller of public accounts that such debt has been registered in that office;

(4) an unqualified approving opinion by a recognized bond attorney;

(5) assurances that the Applicant will comply with any special conditions specified by the Board's environmental finding;

(6) if the project will result in the development of surface water or groundwater resources, the

Applicant shall provide information showing that it has the legal right to use the water that the project will provide. Upon receipt of the information, the executive administrator shall prepare a finding that the Applicant has a reasonable expectation of obtaining the water rights to the water that the project will provide prior to any release of funds for planning, land acquisition, and design activities. Prior to the release of funds for construction, a written water rights certification shall be prepared by the executive administrator. The certification shall be based upon the Applicant's information showing the necessary water rights have been acquired;

(7) evidence that the Applicant has the technical, managerial, and financial capacity to maintain the system unless the use of the funds will be to ensure that the system has the technical, managerial, and financial capacity to comply with the national primary or applicable state drinking water regulations over the long term;

(8) a Private Placement Memorandum containing a detailed description of the issuance of the debt to be sold to the Board. The Applicant shall submit a draft Private Placement Memorandum at least 30 days prior to the closing of the financial assistance; a final electronic version of the Memorandum shall be submitted no later than seven days before closing;

(9) when any portion of the financial assistance is to be held in an escrow account, the Applicant shall execute an escrow agreement, approved as to form and substance by the executive administrator;

(10) if applicable, a home rule municipality pursuant to Chapter 104, Local Government Code, shall execute a Certification of Trust as defined in §371.1 of this title (relating to Definitions); and

(11) any additional information specified in writing by the executive administrator.

(b) Certified bond transcript. Within 60 days of closing the financial assistance, the Applicant shall submit a transcript of proceedings relating to the debt purchased by the Board which shall contain those instruments normally furnished by a purchaser of debt.

(c) Phased closing. The executive administrator may determine that closing the financial assistance in phases is appropriate when:

(1) the project has distinct phases for planning, design, acquisition, and construction or if any one of the phases can be logically and practically divided into discrete sections;

(2) the project utilizes the design-build or construction manager-at-risk process or any process wherein there is simultaneous design and construction;

(3) there are limitations on the availability of funds;

(4) additional oversight is required due to the financial condition of the Applicant or the complexity of the project; or

(5) due to any unique facts arising from the particular transaction.

(d) Financial assistance consisting of 100 percent principal forgiveness. Notwithstanding subsection (a) of this section, the following documents are required for closing financial assistance consisting of 100 percent principal forgiveness:

(1) evidence that applicable requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) an executed principal forgiveness agreement adopted by the governing body that is acceptable to the executive administrator. The agreement shall have the following sections:

(A) if financial assistance proceeds are to be deposited into an escrow account at the time of closing then an escrow account shall be created that shall be separate from all other accounts and funds, as follows:

(i) the account shall be maintained by an escrow agent as defined in §371.1 of this title (relating to Definitions);

(ii) funds shall not be released from the escrow account without prior written approval from the executive administrator, who shall issue written authorization for the release of funds;

(iii) upon request of the executive administrator, escrow account statements shall be provided to the executive administrator;

(iv) the investment of any financial assistance proceeds deposited into an approved escrow account shall be handled in a manner that complies with the Public Funds Investment Act, Government Code, Chapter 2256; and

(v) the escrow account shall be adequately collateralized in a manner sufficient to protect the Board's interest in the project and that complies with the Public Funds Collateral Act, Government Code, Chapter 2257;

(B) that the Applicant shall fix and maintain rates, in accordance with state law, and collect charges to provide adequate operation and maintenance of the project;

(C) that a construction account shall be created which shall be kept separate from all other accounts and funds of the Applicant;

(D) that insurance coverage be obtained and maintained in an amount sufficient to protect the Board's interest in the project;

(E) that the Applicant, or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the Applicant's obligations or obligated persons, in a written agreement or contract to comply with

requirements for continuing disclosure on an ongoing basis as required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the Board were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the Board and the beneficial owner of the political subdivision's obligations, if the Board sells or otherwise transfers such obligations, and the beneficial owners of the Board's bonds if the political subdivision is an obligated person with respect to such bonds under rule 15c2-12. The ordinance or resolution shall also contain any other requirements of the SEC or the IRS relating to arbitrage, private activity bonds, or other relevant requirements regarding the securities held by the Board;

(F) the maintenance of current, accurate, and complete records and accounts in accordance with generally accepted accounting principles to demonstrate compliance with requirements in the financial assistance documents;

(G) that the Applicant shall annually submit an audit, prepared by a certified public accountant in accordance with generally accepted auditing standards;

(H) that the Applicant shall submit a final accounting within 60 days of the completion of the project;

(I) that the Applicant shall document the adoption and implementation of an approved water conservation program for the duration of the financial assistance;

(J) the Applicant's agreement to comply with special environmental conditions specified in the Board's environmental finding as well as with any applicable Board laws or rules relating to use of the financial assistance;

(3) assurances that the Applicant will comply with any special conditions specified by the Board's environmental finding;

(4) if the project will result in the development of surface water or groundwater resources, the Applicant shall provide information showing that it has the legal right to use the water that the project will provide. Upon receipt of the information, the executive administrator shall prepare a finding that the Applicant has a reasonable expectation of obtaining the water rights to the water that the project will provide prior to any release of funds for planning, land acquisition, and design activities. Prior to the release of funds for construction, a written water rights certification shall be prepared by the executive administrator. The certification shall be based upon the Applicant's information showing the necessary water rights have been acquired;

(5) evidence that the Applicant has the technical, managerial, and financial capacity to maintain the system unless the use of the funds will be to ensure that the system has the technical, managerial, and financial capacity to comply with the national primary or applicable state drinking water regulations over the long term;

(6) when any portion of the financial assistance is to be held in an escrow account, the Applicant shall execute an escrow agreement, approved as to form and substance by the

executive administrator;

(7) if applicable, a home rule municipality pursuant to Chapter 104, Local Government Code, shall execute a Certification of Trust as defined in §371.1 of this title (relating to Definitions); and

(8) any additional information specified in writing by the executive administrator.

#### §371.71. Financial Assistance Secured by Promissory Notes and Deeds of Trust.

(a) Applicability. This section contains closing requirements for a water supply corporation, an eligible NPNC, or an eligible private Applicant or other Applicant that is not authorized to issue bonds or other securities. This section applies to financial assistance for either pre-design or construction funding.

(b) Use of consultants. The executive administrator may recommend, but not require, that the entity engage the services of a financial advisor or other consultant to ensure the appropriateness of the proposed debt and to provide advice to the entity.

(c) Documents required for closing. The executive administrator shall ensure that the following documents have been submitted prior to closing financial assistance secured by promissory notes and deeds of trust:

(1) evidence that applicable requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) an executed promissory note and loan agreement in a form approved by the executive administrator;

(3) a Deed of Trust and Security Agreement that shall contain a first mortgage lien evidenced by a deed of trust on all the real and personal property of the water system; provided, however, these are not needed if the financial assistance consists of 100 percent principal forgiveness;

(4) an owner's title insurance policy for the benefit of the Board covering all the real property identified in the deed of trust; provided, however, these are not needed if the financial assistance consists of 100 percent principal forgiveness;

(5) evidence that the rates on which the Applicant intends to rely for repayment of the financial assistance have received final and binding approval from the Utility Commission and, for Applicants required to utilize a surcharge account, evidence that the approval of the Utility Commission was conditioned on the creation of a surcharge account;

(6) a certified copy of the resolution adopted by the governing body authorizing the indebtedness and a certificate from the secretary of the governing body attesting to adoption of the resolution in accordance with the by-laws or rules of the governing body and in compliance

with the Open Meetings Act, if applicable;

(7) a legal opinion from Applicant's counsel that provides:

(A) that the entity has the legal authority to enter into the loan agreement and to execute a promissory note;

(B) that the entity is not in breach or default of any state or federal order, judgment, decree, or other instrument which would have a material effect on the loan transaction;

(C) that there is no pending suit, action, proceeding, or investigation by a public entity that would materially adversely affect the enforceability or validity of the required financial assistance documents;

(D) evidence that the entity is in good standing with the Texas Office of the Secretary of State; and

(E) a statement relating to any other issues deemed relevant by the executive administrator.

(8) evidence that an approved water conservation plan has been adopted and will be implemented through the life of the project;

(9) evidence of the Applicant's agreement to comply with special environmental conditions contained in the Board's environmental finding;

(10) evidence that the Applicant has adopted final water rates and charges that are not subject to appeal to the Utility Commission;

(11) copies of executed service and revenue contracts;

(12) evidence that the Applicant has the technical, managerial, and financial capacity to maintain the system unless the use of the funds will be to ensure that the system has the technical, managerial, and financial capacity to comply with the national primary or applicable state drinking water regulations over the long term;

(13) if the project will result in the development of surface or groundwater resources, the Applicant shall demonstrate that it has the right to use the quantity of water necessary for project effectiveness and efficiency. Upon receipt of the information, the executive administrator shall prepare a finding that the Applicant has a reasonable expectation of obtaining the water rights necessary for project implementation prior to any release of funds for planning, land acquisition, and design activities. A written water rights certification must be prepared by the executive administrator before funds can be released for construction activities based upon a showing by the Applicant that the necessary water rights have been acquired;

(14) when any portion of the financial assistance is to be held in an escrow account, the Applicant shall execute an escrow agreement, approved as to form and substance by the

executive administrator; and

(15) any other documents relevant to the particular transaction.

(d) if in the event that financial assistance proceeds are to be deposited into an escrow account at the time of closing the financial assistance, then an escrow account shall be created that shall be separate from all other accounts and funds, as follows:

(1) the account shall be maintained by an escrow agent as defined in §371.1 of this title (relating to Definitions);

(2) funds shall not be released from the escrow account without prior written approval of the executive administrator who shall issue written authorization for the release of funds;

(3) upon request of the executive administrator, escrow account statements shall be provided on a monthly basis to the executive administrator;

(4) the investment of any financial assistance proceeds deposited into an approved escrow account, shall be handled in a manner that complies with the Public Funds Investment Act, Government Code, Chapter 2256; and

(5) the escrow account shall be adequately collateralized in a manner sufficient to protect the Board's interest in the project and that complies with the Public Funds Collateral Act, Government Code, Chapter 2257.

(e) Construction account. A construction account shall be created which shall be kept separate from all other accounts and funds of the Applicant.

(f) Phased closing. The executive administrator may determine that closing the financial assistance in phases is appropriate when:

(1) the project has distinct phases for planning, design, acquisition, and for construction or if any one of the phases can be logically and practically divided into discrete sections;

(2) the project utilizes the design-build or construction manager-at-risk process or any process wherein there is simultaneous design and construction;

(3) there are limitations on the availability of funds;

(4) additional oversight is required due to the financial condition of the Applicant or the complexity of the project; or

(5) due to any unique facts arising from the particular transaction.

§371.72. Disbursement of Funds.

(a) Escrow of funds. The executive administrator may deposit funds into an escrow account at the time of closing of the financial assistance. Releases from an escrow account shall occur sequentially as described in subsection (c) of this section or in accordance with phasing required for the applicable project. The Applicant shall submit outlays for all expenses incurred.

(b) Reimbursement method of accessing funds. DWSRF financial assistance is available for disbursement under a reimbursement method unless the executive administrator approves the deposit of funds into an escrow account at the closing of the financial assistance, as appropriate. The executive administrator shall reimburse the Applicants' expenditures upon the receipt of an outlay report supported by detailed invoices of expenditures or the executive administrator may issue a written authorization for the release of funds from an escrow account based on the receipt of outlay reports supported by detailed invoices of expenditures. The outlays and the releases from an escrow account shall be consistent with the approved project schedule.

(c) Sequence of availability of funds. Financial assistance shall be available for disbursement in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase, and after approval of a water conservation plan;

(2) for design costs, after receipt of executed contracts for design, after approval of an engineering feasibility report, and after completion of the environmental review; and

(3) for construction costs, after issuance of any applicable permits, after acquisition documents and contract documents (including plans and specifications) are approved and executed, and after the executive administrator has approved the issuance of a Notice to Proceed.

(d) Outlay reports. Applicants shall submit outlay reports supported by detailed invoices for incurred costs as the project progresses in accordance with the project schedule. Applicants shall submit outlay reports, in a form determined by the executive administrator, as follows:

(1) for financial assistance for planning, acquisition, and design, quarterly; and

(2) for financial assistance for construction, monthly.

(e) Consistency for project schedules and outlays. The executive administrator shall require that projects proceed in accordance with approved project schedules as closely as possible, and that outlays are submitted as required in subsection (d) of this section.

§371.73. Remaining Unused Funds.

(a) Remaining unused funds are those funds unspent after the original approved project is completed. Remaining unused funds may be spent for enhancements to the original project that are explicitly approved by the executive administrator, including green components.

(b) If there are no enhancements authorized, the Applicant shall be required to submit a final accounting and disposition of any unused funds.

#### §371.74. Surcharge.

For eligible private Applicants and eligible NPNC Applicants that are not also eligible public Applicants, the establishment of a surcharge and creation of a surcharge account is required. If the executive administrator determines that the use of a surcharge and surcharge account is not available to an Applicant through the Utility Commission, the executive administrator may recommend that the Board consider other sources of revenue available to an Applicant for repayment of financial assistance from the Board.

### SUBCHAPTER H. CONSTRUCTION AND POST-CONSTRUCTION REQUIREMENTS

#### §371.80. Inspection During Construction.

(a) Applicant's inspection. The Applicant shall provide for the adequate qualified inspection of the project under the supervision of a registered engineer and shall require the engineer's assurance that the work is being performed in a satisfactory manner in accordance with the approved plans, specifications, and other engineering design or permit documents, approved alterations or changes, and in accordance with the requirements in the environmental finding applicable to the project, and to the sound engineering principles and construction practices.

(b) Board's inspection. The executive administrator may, at his discretion, inspect the construction and materials of any project at any time. The purpose of the inspection is to determine whether the contractor is substantially complying with the approved engineering plans of the project and is constructing the project in accordance with the approved project schedule. The inspection by the Board does not subject the state to any civil liability.

(c) Scope of inspections. Inspections may include, but are not limited to:

(1) on-site observations, review of the conditions at the construction sites, including compliance with environmental mitigation measures;

(2) review of documents related to the construction projects, including but not limited to:

(A) payroll, daily attendance, and any other records relating to person employed during the construction, and records relating to the Davis Bacon Act and related federal laws and regulations relating to prevailing wage rates;

(B) invoice, receipts for materials, accounting ledgers, and any other documents related to expenditure of funds to facilitate tracking project's progress;

(C) evidence of testing of installed materials and equipment;

(D) deviations from approved plans and specifications;

(E) change orders and supporting documents; and

(F) review of any other documents to ensure compliance with the terms of the approved contract documents and the Board's rules.

(d) The executive administrator may document issues to ensure compliance with applicable laws, rules, and contract documents, and may recommend to the owner that certain corrective actions occur to ensure compliance with laws, rules, and approved plans and specifications.

(e) The Applicant shall provide the executive administrator with a response to the issues relating to compliance.

#### §371.81. Alterations During Construction.

(a) Changes after approval of engineering feasibility report. Applicant shall notify the executive administrator of any changes to the project that occur after the approval of the report but prior to the start of construction. The executive administrator shall review the proposed changes and notify the Applicant if additional engineering or other information is required. For facilities required to have Commission approval, the Commission must give its approval before any substantial or material changes are made in the plans. No changes may be implemented without the express written approval of the executive administrator.

(b) Changes during construction. Any proposed change to the construction contract must be submitted to the executive administrator in the form of a formal change order; the change will be reviewed for compliance with program requirements and applicable Commission rules. Depending upon the scope and complexity of the proposed change, approval by the executive administrator also may require amendments to other engineering and environmental documents and coordination with the Commission for issues involving variances to Commission rules.

#### §371.82. Force Account.

The executive administrator expects that all significant elements of a project shall be constructed with skilled laborers and mechanics obtained through the competitive bidding process. Notwithstanding that expectation, the Applicant, with the prior approval of the executive administrator, may utilize its own employees and equipment for inspection or minor construction upon showing that it possesses the necessary competence required to accomplish such work and that the work can be accomplished more economically by the use of the force account method.

#### §371.85. Final Accounting.

(a) Within 60 days of Applicant's receipt of the certificate of approval for the final prime construction contract and the final inspection report, the Applicant shall submit a final accounting and a final funds requisition form.

(b) After the final accounting, the executive administrator shall notify the Applicant if

remaining surplus funds exist and advise the Applicant that the remaining surplus funds may be used, as specified in any applicable bond ordinance, for:

- (1) payment of bonds in inverse order of maturity;
- (2) deposit into the interest and sinking fund; or
- (3) deposit to a reserve fund.

#### §371.86. Records Retention.

The Applicant shall retain all documents, records, and invoices whether in electronic form or otherwise relating to the expenditure of all financial assistance from the DWSRF for a period of three full state fiscal years after the completion of the project and the final certificate of approval.

#### §371.87. Release of Retainage.

(a) Retainage. The Applicant will withhold a minimum of five percent of each progress payment throughout the course of the construction contract.

(b) Full release of retainage. The executive administrator will approve the full release of retainage on a contract when:

- (1) the Applicant's engineer approves the contractor's request for release of retainage; and
- (2) the Applicant's governing body approves the release of retainage; and
- (3) the executive administrator issues the Certificate of Approval.

(c) Partial release of retainage. If a project is substantially complete, the executive administrator may approve a partial release of retainage.

#### §371.88. Responsibilities of Applicant.

After the satisfactory completion of the project, the Applicant remains responsible for compliance with applicable laws and rules relating to the project and to the financial assistance documents including, but not limited to, submission of an annual audit, implementation and enforcement of the approved water conservation program and other assurances made to the Board. The Board has a continuing interest in the State's investment and therefore, the Applicant shall be subject to the continuing authority of the Board and the executive administrator through final payment of the financial assistance.

## Attachment 2

The Texas Water Development Board (“TWDB” or “Board”) adopts the repeal of 31 Texas Administrative Code (TAC) §§371.3, 371.4, and 371.43 - 371.51, as published in the April 1, 2016 issue of the *Texas Register* (41 TexReg 2428).

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

The TWDB adopts the repeal of provisions of 31 TAC Chapter 371 in order to reorganize certain information to provide greater clarity and to streamline TWDB processes for implementation of the Drinking Water State Revolving Fund (DWSRF). The specific provisions being repealed and the reasons for the repeals are discussed in more detail below.

### SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

Sections 371.3 and 371.4 are repealed in order to combine relevant language and delete language that is no longer necessary. These changes are made to provide greater clarity and to ensure consistency with state and federal DWSRF requirements.

Sections 371.43 through 371.51 are repealed in order to provide greater clarity regarding the environmental requirements for the DWSRF. These changes will provide greater clarity on which documents are prepared by the Applicant, which documents are prepared by the TWDB, and which documents are prepared by a third party. These changes will also provide greater clarity on the timing of required environmental documentation. The repeal of these sections is adopted in order to reorganize and renumber this subchapter for greater clarity.

### REGULATORY IMPACT ANALYSIS

The Board reviewed the adopted repeal in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the repeal 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 this repeal is to provide greater clarity regarding the DWSRF and ensure consistency with state and federal requirements for that fund.

Even if the adopted repeal were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this repeal 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 repeal does not meet any of these four applicability criteria because it: 1) does not exceed the Federal Safe Drinking Water 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 adopted solely under the general powers of the agency, but rather it is also adopted under authority of Texas Water Code §15.605. Therefore, this adopted repeal does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

#### TAKINGS IMPACT ASSESSMENT.

The Board evaluated this adopted repeal and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this repeal is to more closely align the TWDB's rules related to the DWSRF to state statutes and federal requirements and to provide greater clarity. The adopted repeal would substantially advance this stated purpose by reflecting the current state and federal requirements for the DWSRF.

The Board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this adopted repeal because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The Board is the agency that administers the DWSRF for the State of Texas.

Nevertheless, the Board further evaluated this adopted repeal and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this adopted repeal 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 repeal 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 repeal requires compliance with state and federal laws and rules regarding the DWSRF. These requirements will not burden, restrict, or limit an owner's right to property. Therefore, the adopted repeal does not constitute a taking under Texas Government Code, Chapter 2007.

#### PUBLIC COMMENTS

No comments were received.

#### STATUTORY AUTHORITY.

This repeal is adopted under the authority of Texas Water Code §15.605.

The adopted repeal affects Chapter 15 of the Texas Water Code.

§371.3. Land Costs.

§371.4. Other Authorized Securities: Source Water Protection and Technical Assistance.

§371.43. Types of Environmental Determinations: Finding of No Significant Impact.

§371.44. Environmental Information Document: Applicant Requirements.

§371.45. Decision to Prepare an Environmental Impact Statement: Notice of Intent.

§371.46. Types of Environmental Determinations: Record of Decision.

§371.47. Environmental Impact Statements.

§371.48. Environmental Impact Statement: Applicant Requirements.

§371.49. Proposed Project Alterations.

§371.50. Use of Environmental Determinations Prepared by Other Entities.

§371.51. Emergency Relief Project Procedures.