Texas Water Development Board

P.O. Box 13231, 1700 N. Congress Ave.
Austin, TX 78711-3231, www.twdb.texas.gov
Phone (512) 463-7847, Fax (512) 475-2053

TO: Board Members

THROUGH: Jeff Walker, Executive Administrator
John T. Dupnik, Deputy Executive Administrator, Water Science & Conservation
Todd Chenoweth, General Counsel

FROM: Larry French, P.G., Director, Groundwater

DATE: March 7, 2018

SUBJECT: Rulemaking – 31 Texas Administrative Code § 356.31 relating to Submission of Desired Future Conditions

ACTION REQUESTED

Consider adopting amendments to 31 Texas Administrative Code (TAC) § 356.31, relating to Submission of Desired Future Conditions.

BACKGROUND

The 85th Texas Legislature passed House Bill (HB) 2215 in 2017. It amended sections of Chapter 36 of the Texas Water Code to revise the deadlines for the proposal and adoption of a desired future condition by groundwater conservation districts. The revision of the deadline for the adoption of a desired future condition was a legislative recommendation identified by the agency in the 2017 State Water Plan. The revision in statute of the deadline for adopting desired future conditions requires a revision of Texas Water Development Board (TWDB) rules pertaining to the submission of a desired future condition statement adopted by groundwater conservation districts.

The amendment requires that desired future conditions must be approved by a resolution adopted by the groundwater conservation district representatives in a groundwater management area not later than January 5, 2022. Subsequent desired future conditions must be proposed and finally adopted by the district representatives before the end of each successive five-year period after that date.

Our Mission

To provide leadership, information, education, and support for planning, financial assistance, and outreach for the conservation and responsible development of water for Texas

Board Members

Peter Lake, Chairman | Kathleen Jackson, Board Member | Brooke T. Paup, Board Member

Jeff Walker, Executive Administrator

KEY ISSUES

On December 7, 2017, the Board authorized the Executive Administrator to publish the proposed amendment to 31 TAC Chapter 356 in the Texas Register. The proposed amendment was published in the December 22, 2017, issue of the *Texas Register* with a deadline of January 22, 2018, to receive public comments. No public comments were received.

RECOMMENDATION

The Executive Administrator recommends approval of this item in order to implement House Bill 2215 of the 85th Regular Legislative Session.

Attachment: Preamble and Amendment to 31 TAC § 356.31

Attachment
Preamble and Amendment to 31 Texas Administrative Code § 356.31

The Texas Water Development Board (TWDB) adopts an amendment to 31 Texas Administrative Code (TAC) § 356.31 relating to submission of desired future conditions. The proposal is adopted without changes as published in the December 22, 2017, issue of the *Texas Register* (42 TexReg 7288).

DISCUSSION OF THE ADOPTED AMENDMENTS

The TWDB adopts the amendment to implement legislative changes from House Bill (HB) 2215, 85th (R) Legislative Session. The specific provision being amended and the reason for the amendment are addressed in more detail below.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENT

Subchapter C. Submission of Desired Future Conditions.

Subsection 356.31. Submission Date.

Subsection 356.31 is revised to implement a change to Texas Water Code §36.108(d-3) made by HB 2215. The change requires that desired future conditions must be approved by a resolution adopted by a two-thirds vote of all the groundwater conservation district representatives in a groundwater management area not later than January 5, 2022. Subsequent desired future conditions must be proposed and finally adopted by the district representatives before the end of each successive five-year period after that date.

REGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to implement legislative changes and provide greater clarity regarding the TWDB's rules related to regional water planning.

Even if the rule were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4)

adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: 1) does not exceed 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 solely under the general powers of the agency, but rather Texas Water Code §6.101. Therefore, this rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The board evaluated this rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to implement legislative changes, address stakeholder concerns raised through preliminary input, and clarify rules to make them more understandable regarding the TWDB's rules related to regional water planning. The rule would substantially advance this stated purpose by adding language related to legislative changes and clarifying existing language related to regional water planning.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this adopted rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code §2007.003(b)(4). The board is the agency that administers the regional water planning process in order to develop a state water plan.

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

PUBLIC COMMENTS

The public comment period ended on January 22, 2018. No comments were received and no changes to the proposed rule were made.

STATUTORY AUTHORITY

The amendment is adopted under the authority of §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Chapter 36 of the Texas Water Code.

TITLE 31. NATURAL RESOURCES AND CONSERVATION.

PART 10. TEXAS WATER DEVELOPMENT BOARD.

CHAPTER 356. GROUNDWATER MANAGEMENT.

SUBCHAPTER C. SUBMISSION OF DESIRED FUTURE CONDITIONS.

§356.31. Submission Date.

(a) The desired future conditions must be approved by a resolution adopted by the districts in a groundwater management area not later than January 5, 2022, in accordance with Texas Water Code §36.108. Subsequent desired future conditions must be proposed and finally adopted by the district representatives before the end of each successive five-year period after that date.

(b) The districts in a groundwater management area may, as part of the process for adopting and submitting desired future conditions, propose classification of a portion or portions of a relevant aquifer as non-relevant if the districts determine that aquifer characteristics, groundwater demands, and current groundwater uses do not warrant adoption of a desired future condition. In such a case no desired future condition is required. The districts must submit the following documentation to the agency related to the portion of the relevant aquifer proposed to be classified as non-relevant:

(1) A description, location, and/or map of the aquifer or portion of the aquifer;

(2) A summary of aquifer characteristics, groundwater demands, and current groundwater uses, including the total estimated recoverable storage as provided by the executive administrator, that support the conclusion that desired future conditions in adjacent or hydraulically connected relevant aquifer(s) will not be affected; and

(3) An explanation of why the aquifer or portion of the aquifer is non-relevant for joint planning purposes.