

TO: Board Members

THROUGH: Jeff Walker, Executive Administrator
Todd Chenoweth, General Counsel
Jessica Zuba, Deputy Executive Administrator, Water Supply & Infrastructure

FROM: Ashley Nwonuma, Assistant General Counsel

DATE: February 5, 2019

SUBJECT: Adoption of State Revolving Fund Rulemaking – 31 Texas Administrative Code Chapters 371 and 375

ACTION REQUESTED

Consider authorizing publication of adopted amendments to 31 Texas Administrative Code Chapters 371 and 375 related to financial assistance from the Drinking Water State Revolving Fund (DWSRF) and Clean Water State Revolving Fund (CWSRF).

BACKGROUND

The adopted amendments will provide clarity on the Texas Water Development Board’s (TWDB) procedures to entities seeking and receiving financial assistance through the TWDB’s CWSRF and DWSRF programs.

KEY ISSUES

Sections 371.14 and 375.15 are amended to streamline the procedure for setting fixed interest rates for loans with the procedure for setting interest rates for entities issuing bonds. Currently, the procedure for loans states that interest rates may not be set earlier than five business days before the execution of the loan agreement, which means that interest rates cannot be set until both the borrower and the TWDB execute the loan agreement. The procedure for setting interest rates for bonds provides that interest rates may not be set earlier than five business days before adoption of the borrower’s bond ordinance or resolution, and doesn’t require any TWDB action before interest rates can be set. The amendment changes the procedure for loans so that interest rates can be set no earlier than five business days before the borrower’s execution of the loan agreement, ensuring consistency in the procedures for all borrowers.

Sections 371.70 and 375.91 are amended to remove the requirement that the partial redemption of bonds or other authorized securities be made in inverse order of maturity. This will provide consistency with TWDB bond language.

Sections 371.71 and 375.92 are amended to clarify that before closing financial assistance secured by promissory notes and deeds of trust that applicants must establish a dedicated source of revenue for repayment of the financial assistance. This is already a closing requirement for loans and bonds, but the procedure was not in the TWDB's rules. Federal law requires that entities receiving loans establish a dedicated source for repayment.¹

Sections 371.85 and 375.106 are amended to streamline the final accounting provision with the TWDB's other financial assistance programs as provided in 31 Tex. Admin. Code §363.42. Currently, Section 363.42 provides that after final accounting any surplus loan funds may be used in a manner as approved by the executive administrator. Sections 371.85 and 375.106 are amended to match this procedure and ensure consistency across all financial programs.

Section 371.2 is amended to correct the heading of the subsection concerning what applicants are ineligible for assistance. Section 375.18 is amended to clarify that principal forgiveness may be provided in accordance with the federal appropriations acts.

The proposed rulemaking was published in the January 4, 2019 issue of the *Texas Register*. The public comment period was open until February 4, 2019. The TWDB did not receive any comments, and no changes to the rulemaking as proposed have been made.

The rules will be effective 20 days after filing with the *Texas Register*.

RECOMMENDATION

The Executive Administrator recommends authorizing the publication of adopted amendments to 31 Texas Administrative Code Chapters 371 and 375 in order to clarify procedures relating to financial assistance.

Attachments:

1. Adoption Rulemaking for Chapter 371
2. Adoption Rulemaking for Chapter 375

¹ See 33 U.S.C.A § 1383(d)(1)(C) and 42 U.S.C.A. § 300j-12(f)(1)(C).

The Texas Water Development Board (“TWDB” or “board”) adopts, with no changes from the proposal published in the January 4, 2019 issue of the *Texas Register* (44 TexReg 61), amendments to 31 Texas Administrative Code (TAC) §371.2 relating to projects and activities eligible for assistance, §371.14 relating to lending rates, §371.70 relating to financial assistance secured by bonds or other authorized securities, §371.71 relating to financial assistance secured by promissory notes and deeds of trust, and §371.85 relating to final accounting.

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

The TWDB adopts amendments to various provisions in 31 TAC Chapter 371 to provide clarity on the TWDB’s procedures to those seeking and receiving financial assistance from the board. The specific adopted amendments and the reasons for those adopted amendments are addressed in more detail below.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

31 TAC §371.2. Projects and Activities Eligible for Assistance.

Section 371.2 is amended to correct the heading of the subsection concerning what applicants are ineligible for assistance.

31 TAC §371.14. Lending Rates.

Section 371.14 is amended to streamline the procedure for setting fixed interest rates for loans with the TWDB’s procedure for setting interest rates for entities adopting bond ordinances or resolutions. Currently, the procedure for loans states that interest rates may not be set earlier than five business days before both the TWDB and the borrower execute the loan agreement. The amendment will change the procedure for loans to clarify that interest rates may be set no earlier than five business days before the borrower’s execution of the loan agreement.

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

Section 371.70 is amended to remove the requirement that the partial redemption of bonds or other authorized securities be made in inverse order of maturity.

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

Section 371.71 is amended to clarify that before closing financial assistance secured by promissory notes and deeds of trust that applicants must establish a dedicated source of revenue for repayment of the financial assistance. This is already a closing requirement for loans and bonds, but the procedure was not in the TWDB rules. This is required by 42 U.S.C.A §300j-12(f)(1)(C).

31 TAC §371.85. Final Accounting.

Section 371.85 is amended to streamline the final accounting provision with the TWDB’s other financial assistance programs. Currently, 31 TAC §363.42 provides that after final accounting any surplus loan funds may be used in a manner as approved by the executive administrator. Section 371.85 is amended to match this procedure.

REGULATORY IMPACT ANALYSIS DETERMINATION

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 streamline the procedures for those seeking and receiving financial assistance from the board.

Even if the adopted rules were major environmental rules, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any 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 is adopted under the authority of Texas Water Code §§15.604, 15.605, and 16.093. Therefore, the adopted amendments do not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The board evaluated the adopted rules and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the rules is to provide clarity to those seeking and receiving financial assistance from the board. The adopted rules would substantially advance this stated purpose by updating internal references regarding TWDB financial assistance programs and streamlining the procedures across the financial assistance programs.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to the adopted rules because this is an action that is reasonably taken to fulfill an obligation mandated by state and federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that provides financial assistance for the construction of water, wastewater, flood control, and other related projects.

Nevertheless, the board further evaluated the adopted rules and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the 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, these rules require compliance with state and federal laws regarding financial assistance under the state revolving funds without burdening or restricting or limiting an owner's right to property and reducing its value by 25% or more. Therefore, the adopted rules do not constitute a taking under Texas Government Code, Chapter 2007.

PUBLIC COMMENTS

No comments were received.

STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Chapters 15 and 16 of the Texas Water Code are affected by this rulemaking.

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§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 applicants. 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:

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

(B) 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.

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STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Chapters 15 and 16 of the Texas Water Code are affected by this rulemaking.

§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 borrower's 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.

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STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Chapters 15 and 16 of the Texas Water Code are affected by this rulemaking.

§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/registrar 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/registrar 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 insurance coverage be obtained and maintained in an amount sufficient to protect the Board's interest in the project;

(J) 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;

(K) 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;

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

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

- (N) that the Applicant shall document the adoption and implementation of an approved water conservation program for the duration of the financial assistance;
- (O) 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;
- (P) that the Applicant shall establish a dedicated source of revenue for repayment of the financial assistance;
- (Q) that interest payments shall commence no later than one year after the date of closing;
- (R) that annual principal payments will commence no later than one year after completion of project construction; and
- (S) 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.

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STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

§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 shall establish a dedicated source of revenue for repayment of the financial assistance;

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

(12) copies of executed service and revenue contracts;

(13) 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;

(14) 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;

(15) 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

(16) 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.

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STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

§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 in a manner as approved by the executive administrator.

The Texas Water Development Board (“TWDB” or “board”) adopts, with no changes from the proposal published in the January 4, 2019 issue of the *Texas Register* (44 TexReg 65), amendments to 31 Texas Administrative Code (TAC) §375.15 relating to lending rates, §375.18 relating to principal forgiveness, §375.91 relating to financial assistance secured by bonds or other authorized securities, §375.92 relating to financial assistance secured by promissory notes and deeds of trust, and §375.106 relating to final accounting.

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

The TWDB adopts amendments to various provisions in 31 TAC Chapter 375 to provide clarity on the TWDB’s procedures to those seeking and receiving financial assistance from the board. The specific adopted amendments and the reasons for those adopted amendments are addressed in more detail below.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

31 TAC §375.15. Lending Rates.

Section 375.15 is amended to streamline the procedure for setting fixed interest rates for loans with the TWDB’s procedure for setting interest rates for entities adopting bond ordinances or resolutions. Currently, the procedure for loans states that interest rates may not be set earlier than five business days before both the TWDB and the borrower execute the loan agreement. The amendment will change the procedure for loans to clarify that interest rates may be set no earlier than five business days before the borrower’s execution of the loan agreement.

31 TAC §375.18. Principal Forgiveness.

Section 375.18 is amended to clarify that the board may provide principal forgiveness for financial assistance in accordance with the federal appropriations acts and for eligible activities as detailed in the TWDB’s Intended Use Plan.

31 TAC §375.91. Financial Assistance Secured by Bonds or Other Authorized Securities

Section 375.91 is amended to remove the requirement that the partial redemption of bonds or other authorized securities be made in inverse order of maturity.

31 TAC §375.92. Financial Assistance Secured by Promissory Notes and Deeds of Trust.

Section 375.92 is amended to clarify that before closing financial assistance secured by promissory notes and deeds of trust, applicants must establish a dedicated source of revenue for repayment of the financial assistance. This is already a closing requirement for loans and bonds, but the procedure was not in the TWDB rules. This is required by 33 U.S.C.A §1383(d)(1)(C).

31 TAC §375.106. Final Accounting.

Section 375.106 is amended to streamline the final accounting provision with the TWDB’s other financial assistance programs. Currently, 31 TAC §363.42 provides that after final accounting, any surplus loan funds may be used in a manner as approved by the executive administrator. Section 375.106 is amended to match this procedure.

REGULATORY IMPACT ANALYSIS DETERMINATION

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 streamline the procedures for those seeking and receiving financial assistance from the board.

Even if the adopted rules were major environmental rules, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any 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 is adopted under the authority of Texas Water Code §§15.604, 15.605, and 16.093. Therefore, the adopted amendments do not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The board evaluated the adopted rules and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the rules is to provide clarity to those seeking and receiving financial assistance from the board. The adopted rules would substantially advance this stated purpose by updating internal references regarding TWDB financial assistance programs and streamlining the procedures across the financial assistance programs.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to the adopted rules because this is an action that is reasonably taken to fulfill an obligation mandated by state and federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that provides financial assistance for the construction of water, wastewater, flood control, and other related projects.

Nevertheless, the board further evaluated the adopted rules and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking of

private real property. Specifically, the 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, these rules require compliance with state and federal laws regarding financial assistance under the state revolving funds without burdening or restricting or limiting an owner's right to property and reducing its value by 25% or more. Therefore, the adopted rules do not constitute a taking under Texas Government Code, Chapter 2007.

PUBLIC COMMENTS

No comments were received.

STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Chapters 15 and 16 of the Texas Water Code are affected by this rulemaking.

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§375.15. 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 borrower's 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, 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 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 (4) 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 or 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 the 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 (4) 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.

(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 CWSRF 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 CWSRF. 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 subsection (c) of this section.

(e) 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.

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STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Chapters 15 and 16 of the Texas Water Code are affected by this rulemaking.

§375.18. Principal Forgiveness.

(a) The Board may provide principal forgiveness for financial assistance in accordance with 33 U.S.C. §1383(i) or federal appropriations acts:

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

(2) to implement a process, material, technique, or technology:

(A) to address water-efficiency goals;

(B) to address energy-efficiency goals;

(C) to mitigate stormwater runoff; and/or

(D) to encourage sustainable project planning, design, and construction; or

(3) for any other eligible activity as detailed in the Intended Use Plan.

(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.

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STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Chapters 15 and 16 of the Texas Water Code are affected by this rulemaking.

§375.91. 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 §375.1 of this title (relating to Definitions);

(ii) funds shall not be released from the escrow without prior written approval from the executive administrator who shall issue written authorization for the release of the 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, Texas 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 in a manner that complies with the Public Funds Collateral Act; Texas 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 insurance coverage be obtained and maintained in an amount sufficient to protect the Board's interest in the project;
- (J) 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;
- (K) 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;
- (L) that the Applicant shall annually submit an audit, prepared by a certified public accountant in accordance with generally accepted auditing standards;
- (M) that the Applicant shall submit a final accounting within 60 days of the completion of the project;
- (N) that the Applicant shall document the adoption and implementation of an approved water conservation program for the duration of the financial assistance;
- (O) 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;
- (P) that the Applicant shall establish a dedicated source of revenue for repayment of the financial assistance;
- (Q) that interest payments shall commence no later than one year after the date of closing;

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

(S) 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) a Private Placement Memorandum containing a detailed description of the issuance of 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;

(7) 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;

(8) if applicable, a home rule municipality pursuant to Chapter 104, Local Government Code, shall execute a Certification of Trust as defined in §375.1 of this title; and

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

(b) Certified bond transcript. Within sixty (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.

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STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Chapters 15 and 16 of the Texas Water Code are affected by this rulemaking.

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

(a) **Applicability.** This section contains closing requirements for a water supply corporation 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;

(4) an owner's title insurance policy for the benefit of the Board covering all the real property identified in the deed of trust;

(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 shall establish a dedicated source of revenue for repayment of the financial assistance;

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

(12) copies of executed service and revenue contracts;

(13) 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

(14) 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 §375.1 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 that 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.

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STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Chapters 15 and 16 of the Texas Water Code are affected by this rulemaking.

§375.106. 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 in a manner as approved by the executive administrator.