TO: Board Members

THROUGH: Jeff Walker, Executive Administrator
Joe Reynolds, Interim General Counsel
Jessica Zuba, Deputy Executive Administrator

FROM: Mark Wyatt, Director, Program Administration & Reporting

DATE: April 23, 2020

SUBJECT: Adoption of State Revolving Fund Rules

ACTION REQUESTED
Consider adopting and authorizing publication of additions, amendments and repeals to 31 Texas Administrative Code (TAC) 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 Texas Water Development Board (TWDB) authorized publication of proposed additions, amendments and repeals to 31 Texas Administrative Code Chapters 371 and 375, related to the DWSRF and CWSRF, on February 13, 2020. The proposed changes were published in the Texas Register on February 28, 2020, with a comment period that ended on March 30, 2020. In addition, the proposed rulemaking and comment period were posted on the TWDB’s website.

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

The purpose of adopting the additions, amendments and repeals is to implement changes in law from the federal America’s Water Infrastructure Act of 2018 (AWIA), state legislation in House Bill 3339, 86th (R) Legislative Session, recent changes in program delivery contained in the State Fiscal Year 2020 DWSRF and CWSRF Intended Use Plans, and program enhancements.

KEY ISSUES
Sections 371.4, 371.16, and 371.71 would be amended to implement the provisions of AWIA by allowing longer terms on loans as specified in the IUP and allowing principal payments on loans and bonds to commence 18 months instead of one year after completion of project.
construction. In addition, AWIA changed the references in law for the Davis Bacon Act wage rate requirements for the DWSRF program.

Sections 371.1, 371.34, 371.71, 371.89, 375.1, 375.43 and 375.109 would be revised to implement the provisions of House Bill 3339 by requiring a water conservation plan prepared in accordance with Texas Water Code Section 16.4021.

Sections 371.1, 371.14, 371.15, 371.36, 371.41, 371.60, 371.61, 371.62, 371.63, 371.70, 371.80, 375.16, 375.17, 375.45, 375.60, and 375.72 would be revised to implement the adopted SFY 2020 DWSRF and CWSRF IUPs. These revisions would incorporate both Equivalency and Non-Equivalency funding in the DWSRF program, increase flexibility for multi-year commitments, conform the interest rate setting procedure to the IUPs, reflect the reduction in loan origination fees, and otherwise conform the SRF rules to the most recently adopted IUPs.

Current sections 371.60 – 371.62, 371.70 – 371.74, and 371.80 – 371.89 would be repealed and replaced by renumbered rules due to the addition of rules outlining applicability of several subchapters.

Finally, the revisions include program enhancements and edits. Most are relatively minor; however, a significant enhancement would be the addition of new sections 371.91 and 375.111 covering the disallowance of project costs and remedies for noncompliance.

**RECOMMENDATION**

The Executive Administrator recommends adopting and authorizing the publication of revisions to 31 Texas Administrative Code Chapters 371 and 375 in order to conform to recent changes in law and implement program enhancements.

Attachments:
1. Adoption of Additions and Amendments to Chapter 371 for publication in the *Texas Register*
2. Adoption of Repeals in Chapter 371 for publication in the *Texas Register*
3. Adoption of Additions and Amendments to Chapter 375 for publication in the *Texas Register*

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

The TWDB adopts the additions and amendments to implement legislative changes from House Bill 3339, 86th (R) Legislative Session and from America’s Water Infrastructure Act of 2018 (AWIA), and to implement changes in program management, including addition of remedies for non-compliance. The specific provisions amended or added and the reasons for the amendments are addressed in more detail below.

SECTION BY SECTION DISCUSSION OF THE ADOPTED ADDITIONS AND AMENDMENTS.

31 TAC §371.1. Definitions

Section 371.1 is amended to define the term “water conservation plan” as a plan in compliance with Texas Water Code §16.4021, as required by H.B. 3339, 86th (R) Legislative Session, and to include definitions for equivalency projects and non-equivalency projects.

31 TAC §371.4 Federal Requirements

Section 371.4 is amended to comport with revised statutory references in AWIA.

31 TAC §371.14 Lending Rates

Section 371.14 is amended to make the procedure for setting fixed interest rates consistent with the Intended Use Plan (IUP).

31 TAC §371.15 Fees of Financial Assistance

Section 371.15 is amended to clarify the origination fee.

31 TAC §371.16 Terms of Financial Assistance

Section 371.16 is amended to remove mention of specific loan time periods and to provide the terms in the IUP. The AWIA amended the Federal Safe Drinking Water Act to allow loans of up to 30 years for planning, acquisition, design, and/or construction, and up to 40 years for a disadvantaged community.

31 TAC §371.17 Principal Forgiveness

Section 371.17 is amended to clarify that total principal forgiveness may not exceed the percentages established by federal law, appropriations acts, or the terms of the capitalization grant.
31 TAC §371.31 Timeliness of Application and Required Application Information

Section 371.31 is amended to add the requirement that a preliminary engineering feasibility report signed and sealed by a professional engineer be submitted as part of an application, and detailing the information to be included in the report.

31 TAC §371.34 Required Water Conservation Plan and Water Loss Audit

Section 371.34 is amended to require that the water conservation plan comply with Texas Water Code §16.4021, as enacted by H.B. 3339, 86th (R) Legislative Session, and to make other language in the rule consistent with the Clean Water State Revolving Fund statute and rules.

31 TAC §371.36 Multi-Year Commitments

Section 371.36 is amended to tie the terms to the IUP, increasing flexibility for financial assistance recipients and for the agency.

31 TAC §371.41 Environmental Review Process

Section 371.41 is amended to add language stating that for equivalency projects, the Board will inform the Environmental Protection Agency (EPA) when it is necessary for EPA to coordinate with other federal agencies regarding compliance with applicable federal authority.

31 TAC §371.60 Applicability

Section 371.60 is added to outline applicability of the subchapter on engineering review and approval. The existing §371.60 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.61 Engineering Feasibility Report

Section 371.61 is added to replace the rule previously numbered as 371.60. The existing §371.61 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.62 Contract Documents: Review and Approval

Section 371.62 is added to replace the rule previously numbered as 371.61, and amended to include a requirement that Applicants submit an electronic copy of applications and reduce the number of paper copies required unless the Applicant is directed otherwise. The existing §371.62 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.63 Advertising and Awarding Construction Contracts

Section 371.63 is added to replace the rule previously numbered as 371.62. The existing §371.63 is repealed elsewhere in this issue of the Texas Register.
31 TAC §371.70 Applicability

Section 371.70 is added to outline applicability of the subchapter on loan closings and availability of funds. The existing §371.70 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.71 Financial Assistance Secured by Bonds or Other Authorized Securities

Section 371.71 is added to replace the rule previously numbered as 371.70. The existing §371.71 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.72 Financial Assistance Secured by Promissory Notes and Deeds of Trust

Section 371.72 is added to replace the rule previously numbered as 371.71. The existing §371.72 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.73 Disbursement of Funds

Section 371.73 is added to replace the rule previously numbered as 371.72. The existing §371.73 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.74 Remaining Unused Funds

Section 371.74 is added to replace the rule previously numbered as 371.73 and to clarify the disposition of remaining project funds. The existing §371.74 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.75 Surcharge

Section 371.75 is added to replace the rule previously numbered as 371.74. The existing §371.75 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.80 Applicability

Section 371.80 is added to outline applicability of the subchapter on construction and post-construction requirements. The existing §371.80 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.81 Inspection During Construction

Section 371.81 is added to replace the rule previously numbered as 371.80, to change the term “inspection” to “site visits”, and to review compliance with EPA’s American Iron and Steel requirements. The existing §371.81 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.82 Alterations During Construction

Section 371.82 is added to replace the rule previously numbered as 371.81. The existing §371.82 is repealed elsewhere in this issue of the Texas Register.
31 TAC §371.83 Force Account

Section 371.83 is added to replace the rule previously numbered as 371.82. The existing §371.83 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.84 As Built Plans

Section 371.84 is added to replace the rule previously numbered as 371.83. The existing §371.84 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.85 Certificate of Approval and Project Completion

Section 371.85 is added to replace the rule previously numbered as 371.84. The existing §371.85 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.86 Final Accounting

Section 371.86 is added to replace the rule previously numbered as 371.85. The existing §371.86 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.87 Records Retention

Section 371.87 is added to replace the rule previously numbered as 371.86. The existing §371.87 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.88 Release of Retainage

Section 371.88 is added to replace the rule previously numbered as 371.87. The existing §371.88 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.89 Responsibilities of Applicant

Section 371.89 is added to replace the rule previously numbered as 371.88 and changes the term “water conservation program” to “water conservation plan,” the term used in Texas Water Code §16.4021. The existing §371.89 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.90 Authority of the Executive Administrator

Section 371.90 is added to replace the rule previously numbered as 371.89. The existing §371.90 is repealed elsewhere in this issue of the Texas Register.

31 TAC §371.91 Disallowance of Project Costs and Remedies for Noncompliance

Section 371.91 is added to provide remedies for noncompliance with project rules and financial assistance documents.
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, or 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 new requirements in state and federal law and changes in program management within the current framework of the drinking water state revolving fund.

Even if the adopted amendments and 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 amendments and performed an analysis of whether they constitute a taking under Texas Government Code Chapter 2007. The specific purpose of the rules is to implement new requirements in state and federal law and changes in program management within the current framework of the drinking water state revolving fund.

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 they constitute 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 rulemaking 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 rulemaking does not constitute a taking under Texas Government Code Chapter 2007.

PUBLIC COMMENT

No comments were received.

STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

<rule>

SUBCHAPTER A: GENERAL PROGRAM REQUIREMENTS

§371.1 Definitions

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

(1) (No change).


(3) - (19) (No change.)


(21) - (28) (No change.)

(29) Equivalency projects--Those funded projects that must follow all federal cross-cutter requirements.

(30) [(29)]Escrow account--A separate account maintained by an escrow agent until such funds are eligible for release to the construction account.
(31) [30] Escrow agent--Any of the following:

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

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

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

(32) [31] Executive administrator--The executive administrator of the Board or a designated representative.

(33) [32] Expiration date--The date on which the Board's offer of financial assistance is no longer open or valid and by which a Closing must occur.

(34) [33] Financial assistance--Funding made available to eligible Applicants as authorized in 40 CFR §35.3525, including principal forgiveness.

(35) [34] Force majeure--Acts of god, strikes, lockouts, or other industrial disturbances, acts of the public enemy, war, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, droughts, tornadoes, hurricanes, arrests and restraints of government and people, explosions, breakage or damage to machinery, pipelines or canals, and any other inabilities of either party, whether similar to those enumerated or otherwise, and not within the control of the party claiming such inability, which by the exercise of due diligence and care such party could not have avoided.

(36) [35] Green project--A project or components of a project that, when implemented, will result in energy efficiency, water efficiency, green infrastructure, or environmental innovation that is characterized as a green project either categorically or by utilizing a business case as approved by the executive administrator.

(37) [36] Green project reserve--A federal directive requiring a specified portion of the capitalization grant to be used for green projects.

(38) [37] Initial Invited Projects List--That portion of the Project Priority List listing the eligible projects ranked according to their rating that will initially be invited to submit applications in accordance with procedures and deadlines as detailed in the applicable IUP.

(39) [38] Intended Use Plan (IUP)--A document prepared annually by the Board, after public review and comment, which identifies the intended uses of all DWSRF program funds and describes how those uses support the overall goals of the DWSRF program.

(40) [39] Lending rate--The rate of interest applicable to financial assistance that must be repaid.

(41) [40] Market interest rates--Interest rates comparable to those attained for securities in an open market offering.
(42) [41]Municipality--A city, town, or other public body created by or pursuant to state law.

(43) Non-equivalency projects--All projects other than Equivalency projects.

(44) [42]Nonprofit organization--Any legal entity that is recognized as a tax-exempt organization by the Texas Comptroller of Public Accounts pursuant to 34 Texas Administrative Code, Part 1, Chapter 3, Subchapter O (relating to State and Local Sales and Use Taxes).

(45) [43]Nonprofit noncommunity (NPNC) water system--A public water system that is not operated for profit, is owned by a political subdivision or nonprofit entity, and is not a community water system.

(46) [44]Outlay report--The Board's form used to report costs incurred on the project.

(47) [45]Permit--Any permit, license, registration, or other legal document required from any local, regional, state, or federal government for construction of the project.

(48) [46]Person--An individual, corporation, partnership, association, State, municipality, commission, or political subdivision of the State, or any interstate body, as defined by 33 U.S.C. §1362, including a political subdivision as defined by Chapter 15, Subchapter J, of the Texas Water Code, if the person is eligible for financial assistance under the Act.

(49) [47]Planning--The project phase during which the Applicant identifies and evaluates potential alternatives to meet the needs of the proposed project. It includes the environmental review described in Subchapter E of this Chapter and preparation of the engineering feasibility report as described in Subchapter F of this Chapter.

(50) [48]Political subdivision--A municipality, intermunicipal, interstate, or state agency, any other public entity eligible for assistance, or a nonprofit water supply corporation created and operating under Texas Water Code Chapter 67.

(51) [49]Population--The number of people who reside within the territorial boundaries of or receive wholesale or retail water service from the Applicant based upon data that is acceptable to the executive administrator and which includes the following:

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

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

(52) [50]Primary drinking water regulation--Regulations promulgated by EPA which:

(A) apply to public and private water systems;

(B) specify contaminants which, in the judgment of the EPA, may have any adverse effect on the health of persons;
(C) specify for each such contaminant either:

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

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

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

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

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

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

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

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

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

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

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

(59) [(57)]Public water system--

(A) In General. A system that provides water to the public for human consumption through pipes or other constructed conveyances, if such system has at least 15 service connections or regularly serves at least 25 individuals. Such term includes:
(i) any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system; and

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

(B) Connections. A connection to a system that delivers water by a constructed conveyance other than a pipe shall not be considered a connection, if:

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

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

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

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

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

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

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

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

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

(63) [(61)]Small water system--A system that serves ten thousand persons or fewer

(64) [(62)]State--The State of Texas

(65) [(63)]Subsidy--A reduction in the interest rate from the market interest rate

(66) [(64)]Utility Commission--The Public Utility Commission of Texas

(67) [(65)]Water conservation plan--A plan that complies with the requirements of Texas Water Code §16.4021.[report outlining the methods and means by which water conservation may be achieved within a particular facilities planning area.]

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

§371.4 Federal Requirements

(a) Davis-Bacon Act Prevailing Wage Provision. The Applicant must comply with the requirements of section 1452(a)(5) [1450(c)] of the Act (42 U.S.C. §300j-12(a)(5)) [(42 U.S.C. §300j-9(e))] in all procurement contracts and sub-grants, and require that loan recipients, procurement contractors, and sub-grantees include such a term and condition in subcontracts and other lower tiered transactions. The Davis-Bacon prevailing wage requirements, as provided in 40 U.S.C. §§3141 – 3148 [et seq.] and the Department of Labor's implementing regulations, apply to any construction project funded by the DWSRF.

(b) (No change.)

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

(d) - (e) (No change).

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STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16
SUBCHAPTER B: FINANCIAL ASSISTANCE

§371.14 Lending Rates

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

(1) – (8) (No change.)

(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, but may be based on interest rate levels determined as of an earlier date; and

(B) (No change).

(2) (No change).

(c) – (f) (No change).

§371.15 Fees of Financial Assistance

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

(b) Origination fee. An administrative fee not to exceed $2 [2.25] percent of the project costs will be assessed [,] as a one-time non-refundable charge. Project costs on [upon] which the fee will be assessed do not include the origination fee or those project costs that are funded through principal forgiveness. The fee is due and payable at the time of closing and may be financed as a part of the financial assistance.

§371.16 Term of Financial Assistance

(a) The Board may offer financial assistance in accordance with the Act and the IUP under which the project received funding.

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

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

(a) (No change).

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

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STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

SUBCHAPTER D: APPLICATION FOR ASSISTANCE

§371.31 Timeliness of Application and Required Application Information

(a) Time to submit applications. Applications and required additional data or information, must be submitted by the deadlines established by the executive administrator. Failure to timely submit the application, the information necessary to complete the application or additional requested information will result in the bypass of the project.

(1) – (4) (No change).

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

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

(A) – (C) (No change).

(2) (No change).

(3) copies of the following project documents:
(A) - (No change)

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

(4) – (11) No change put and at end of 11

(12) a Preliminary Engineering Feasibility Report signed and sealed by a professional engineer registered in the State of Texas. The report, based on guidelines provided by the executive administrator, must provide:

(A) a description and purpose of the project;

(B) the entities to be served and current and future population;

(C) the cost of the project;

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

(E) sufficient information to evaluate the engineering feasibility of the project;

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

(G) any other information the executive administrator determines is necessary to evaluate the project.

(c) (No change).

§371.34 Required Water Conservation Plan and Water Loss Audit

(a) Water Conservation Plan. An Applicant shall submit a water conservation plan prepared in accordance with Texas Water Code § 16.4021[§ 363.15 of this title (relating to Required Water Conservation Plan)].

(b) (No change).

(c) If an applicant that is a retail public utility[utility’s] providing potable water has a[total] water loss that meets or exceeds the threshold for that utility in accordance with §358.6 of this title, the retail public utility must use a portion of any financial assistance received from the DWSRF, or any additional financial assistance provided by the Board, to mitigate the utility's water loss. However, at the request of a retail public utility, the Board may waive this requirement in accordance with §358.6 of this title.
§371.36 Multi-Year Commitments

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

(b) This option is only available for projects as described in the IUP. However, the entity receiving a multi-year commitment may receive principal forgiveness for the other eligible options, such as principal forgiveness for green projects, for the amount of funds committed for the initial year.

(c) (No change).

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STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

SUBCHAPTER E: ENVIRONMENTAL REVIEW AND DETERMINATIONS

§371.41 Environmental Review Process

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

(b) – (d) (No change)

(e) Equivalency projects. The Board will inform EPA when consultation or coordination by EPA with other federal agencies is necessary to resolve issues regarding compliance with applicable federal laws.
STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

SUBCHAPTER F: ENGINEERING REVIEW AND APPROVAL

§371.60 Applicability

This subchapter applies to financial assistance for non-equivalency and equivalency projects.

§371.61 Engineering Feasibility Report

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

(1) a description and purpose of the project;

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

(3) the cost of the project;

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

(5) sufficient information to evaluate the engineering feasibility;

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

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

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

(9) a detailed project schedule with timelines for each phase of the project and the milestones within each phase of the project; and
(10) any other information or data necessary to evaluate the proposed project. The Applicant must submit any additional information requested by the executive administrator to document the project's eligibility for funding by the program.

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

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

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

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

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

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

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

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

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

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

§371.62 Contract Documents: Review and Approval

(a) Contract documents include the documents that form the construction contracts and the documents that form the contracts for alternative methods of project delivery, which may include the construction phase or other phases of the project.
(b) Unless otherwise specified by the executive administrator, an Applicant must submit at least one paper and one electronic copy of proposed contract documents, including engineering plans and specifications, which must be as detailed as would be required for submission to contractors bidding on the work. The Applicant must provide the executive administrator with all contract documents proposed for bid advertising. The executive administrator will review contract documents:

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

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

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

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

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

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

§371.63 Advertising and Awarding Construction Contracts

(a) Applicable laws and rules. The Applicant shall comply with State procurement laws and rules and with applicable federal procurement rules, depending on the equivalency requirements for the financial assistance.

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

(c) Changes prior to award. If the Applicant needs to alter the plans, specifications, or contract documents after the executive administrator's approval, then the Applicant shall:

1. provide the information and reasons relating to the changes therefore, if changes are required prior to bidding. The executive administrator must affirmatively approve any changes prior to advertising.

2. incorporate changes that occur after advertising into an addendum and provided to the executive administrator for approval as part of the bidding process.
(d) Contract award. The text of a construction contract or a contract containing construction phase work submitted for approval prior to advertising must contain the same language and provisions as the contingently executed contract.

(e) Pre-construction conference. The Applicant shall conduct a preconstruction conference on significant construction contracts to address the contents of the executed contract documents with the project owner, the project engineer, the prime contractor, and other appropriate parties in attendance. The Applicant shall provide the executive administrator with at least 10 days advance notice of the date, time, and location of the conference.

(f) Notice to proceed. The executive administrator shall review the executed contract documents, including any additional documentation required by EPA for equivalency projects, and upon acceptance of same shall advise the Applicant that a notice to proceed may be issued to the contractor.

(g) No liability. The executive administrator and the Board have no liability for any event arising out of or in any way related to project contracts or construction.

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STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

SUBCHAPTER G: LOAN CLOSINGS AND AVAILABILITY OF FUNDS

§371.70 Applicability

This subchapter applies to financial assistance for non-equivalency and equivalency projects.

§371.71 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 and conditions 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 must 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 separate from all other accounts and funds must be created, as follows:

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

(ii) funds cannot 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) escrow account statements must be provided to the executive administrator upon request;

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

(v) the escrow account must be adequately collateralized in a manner sufficient to protect the Board's interest in the project and in compliance with the Public Funds Collateral Act, Texas Government Code Chapter 2257.

(B) 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) a construction account must be created and must be kept separate from all other accounts and funds of the Applicant;

(D) bonds must be closed in book-entry-only form;

(E) the use of a paying agent/registrar that is a Depository Trust Company (DTC) participant is required;

(F) the payment of all DTC closing fees assessed by the Board's custodian bank must be directed to the Board's custodian bank by the Applicant;

(G) the Applicant must provide evidence that one fully registered bond has been sent to the DTC or to the Applicant's paying agent/registrar prior to closing;

(H) all payments, including the origination fee, must be made to the Board via wire transfer at no cost to the Board;

(I) insurance coverage must be obtained and maintained in an amount sufficient to protect the Board's interest in the project;
(J) the Applicant, or an obligated person for whom financial or operating data is presented, either individually or in combination with other issuers of the Applicant's obligations or obligated persons, must undertake in a written agreement or contract to comply with requirements for continuing disclosure 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 is 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 required in this paragraph of this subsection, above, must 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) current, accurate, and complete records and accounts must be maintained in accordance with generally accepted accounting principles to demonstrate compliance with requirements in the financial assistance documents;

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

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

(N) the Applicant must document the adoption and implementation of an approved water conservation plan for the duration of the financial assistance;

(O) the Applicant must 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) the Applicant must establish a dedicated source of revenue for repayment of the financial assistance;

(Q) interest payments must commence no later than one year after the date of closing;

(R) annual principal payments must commence no later than 18 months 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 must 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 will 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 will be prepared by the executive administrator. The certification will be based on 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 must submit a draft Private Placement Memorandum at least 30 days before closing of the financial assistance; a final electronic version of the Memorandum must 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 must execute an escrow agreement approved as to form and substance by the executive administrator;

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

(11) 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 must 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 must 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 separate from all other accounts and funds must be created, as follows:

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

(ii) funds cannot 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) escrow account statements must be provided to the executive administrator upon request;

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

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

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

(C) a construction account separate from all other accounts and funds of the Applicant must be created;

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

(E) the Applicant, or an obligated person for whom financial or operating data is presented, either individually or in combination with other issuers of the Applicant's obligations or obligated persons, must undertake in a written agreement or contract to comply with requirements for continuing disclosure 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 is 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 required in subsection
(a)(2) of this section, must 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) current, accurate, and complete records and accounts must be maintained in accordance with generally accepted accounting principles to demonstrate compliance with requirements in the financial assistance documents;

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

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

(I) the Applicant must document the adoption and implementation of an approved water conservation plan for the duration of the financial assistance;

(J) the Applicant must 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 must 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 will 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 will be prepared by the executive administrator. The certification will 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 must execute an escrow agreement approved as to form and substance by the executive administrator;

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

(8) any additional information specified in writing by the executive administrator.
§371.72 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 following documents and conditions are required for 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 must contain a first mortgage lien evidenced by a deed of trust on all the real and personal property of the water system; provided, however, this is 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, this is 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 bylaws 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 addressing any other issues deemed relevant by the executive administrator.

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

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

(10) evidence that the Applicant has established 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 water or groundwater resources, the Applicant must 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 will 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 must be prepared by the executive administrator. The certification will be based on the Applicant’s information showing 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 additional information specified in writing by the executive administrator.

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

(1) the account must be maintained by an escrow agent as defined in §371.1 of this title (relating to Definitions):
(2) funds cannot 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) escrow account statements must be provided to the executive administrator upon request;

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

(5) the escrow account must 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, Texas Government Code Chapter 2257.

(e) Construction account. A construction account must be created and must 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 construction, or if any one of the phases can be logically and practically divided into discrete sections;

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

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

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

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

§371.73 Disbursement of Funds

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

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

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

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

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

(d) Outlay reports. Applicant’s outlay reports must be supported by detailed invoices for incurred costs as the project progresses in accordance with the project schedule. Outlay reports must be submitted in a form determined by the executive administrator, and on the following schedule:

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

(2) for financial assistance for construction, monthly.

(e) Consistency for project schedules and outlays. Projects must proceed in accordance with approved project schedules as closely as possible.

§371.74 Remaining Unused Funds

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

(b) If there are no enhancements authorized, the Applicant must submit a final accounting and disposition of any unused funds as specified in §371.86 of this title (relating to Final Accounting).

§371.75 Surcharge

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

This rulemaking is adopted under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

SUBCHAPTER H: CONSTRUCTION AND POST-CONSTRUCTION REQUIREMENTS

§371.80 Applicability

This subchapter applies to financial assistance for non-equivalency and equivalency projects.

§371.81 Inspection During Construction

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

(b) Board's site visits. The executive administrator may conduct site visits regarding the construction and materials of a project at any time. The purpose of site visits is to determine whether the contractor is substantially complying with the approved engineering plans for the project and is constructing the project in accordance with the approved project schedule. The site visits do not subject the state to any civil liability.

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

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

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

(A) payroll, daily attendance, and any other records relating to person employed during the construction, and records relating to the Davis-Bacon Act and related federal laws and regulations regarding prevailing wage rates;
(B) invoices, receipts for materials, accounting ledgers, and any other documents related to expenditure of funds to facilitate tracking the project's progress;

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

(D) deviations from approved plans and specifications;
(E) change orders and supporting documents;

(F) compliance with EPA’s American Iron and Steel requirements; and

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

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

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

§371.82 Alterations During Construction

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

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

§371.83 Force Account

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

§371.84 As Built Plans

After a project is completed, the Applicant shall notify the executive administrator of the receipt of a complete set of as-built drawings of the project from the project construction engineer.
§371.85 Certificate of Approval and Project Completion

(a) Purpose. The executive administrator will issue a Certificate of Approval (certificate) upon completion of all work under each prime construction contract.

(b) Final prime construction contract. A certificate will be issued at the completion of all work under the final prime construction contract. This certificate will be transmitted to the Applicant with a statement that the project and the Board’s inspection process are complete.

§371.86 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 will notify the Applicant if remaining surplus funds exist and advise the Applicant that any remaining surplus funds may be used in a manner approved by the executive administrator.

§371.87 Records Retention

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

§371.88 Release of Retainage

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

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

(1) the Applicant's engineer approves the contractor's request for release of retainage; and

(2) the Applicant's governing body approves the release of retainage; and

(3) the executive administrator issues the Certificate of Approval.

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

§371.89 Responsibilities of Applicant

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

§371.90 Authority of the Executive Administrator

(a) The financial assistance provided by the Board is based on the project's economic feasibility, and the Board shares the Applicant's desire to maintain this feasibility in the project's operation and maintenance at all times. The executive administrator will periodically inspect, analyze, and monitor the project's revenues, operation, and any other information the Board requires in order to perform its duties and to protect the public interest.

(b) After construction is complete and the Applicant has completed construction, the executive administrator is authorized to:

(1) inspect the project at any time. If the executive administrator determines that the project is being improperly or inadequately operated and maintained to the extent that the project purposes are not being properly fulfilled or that integrity of the State's investment is being endangered, the executive administrator may require the Applicant to take corrective action;

(2) inspect certified copies of all minutes, operating budgets, monthly operating statements, contracts, leases, deeds, audit reports, and other documents concerning the operation and maintenance of the project;

(3) inspect and review the project and to obtain information through documents or interviews with appropriate personnel to ensure that the Applicant is complying with the requirements of the covenants of the bond indenture and/or the master agreement;

(4) inspect accounting and financial records to ensure that the Applicant maintains debt service fund accounts and all other fund accounts related to the DWSRF debt in accordance with standards set forth by the Governmental Accounting Standards Board; and

(5) request the Applicant to determine the status of compliance with mitigation measures as required in the final environmental determination.

§371.91 Disallowance of Project Costs and Remedies for Noncompliance

(a) If the Applicant does not comply with applicable laws and rules relating to the project and to the financial assistance documents, the executive administrator may take any of the following actions:

(1) impose additional conditions to remedy the noncompliance;

(2) withhold releases from escrows or disbursements until the Applicant comes into compliance;

(3) refrain from closing on existing commitments;

(4) disallow all or part of the cost of a project expenditure that is not in compliance;
(5) allow a substitution of eligible cost activities for disallowed costs or require repayment of disallowed costs, at the discretion of the executive administrator; and

(6) take other remedial actions that may be legally available.

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

The TWDB adopts the repeal of these sections of the rules because new rules 31 TAC §§371.60 – 371.63, 371.70 – 371.75, and 371.80 – 371.89 are being adopted elsewhere in this issue of the Texas Register.

SECTION BY SECTION DISCUSSION OF THE ADOPTED REPEALS

31 TAC §371.60 Engineering Feasibility Report

Section 371.60 is repealed due to addition of a new §371.60 outlining applicability of the subchapter on engineering review and approval. The new §371.60 is adopted elsewhere in this issue of the Texas Register.

31 TAC §371.61 Contract Documents: Review and Approval

Section 371.61 is repealed to replace it with the Engineering Feasibility Report rule previously numbered as 371.60. The new §371.61 is adopted elsewhere in this issue of the Texas Register.

31 TAC §371.62 Advertising and Awarding Construction Contracts

Section 371.62 is repealed to replace it with the Contract Documents: Review and Approval rule previously numbered as 371.61. The new §371.62 is adopted elsewhere in this issue of the Texas Register.

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

Section 371.70 is repealed due to addition of a new §371.70 outlining applicability of the subchapter on loan closing and availability of funds. The new §371.70 is adopted elsewhere in this issue of the Texas Register.

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

Section 371.71 is repealed to replace it with the Financial Assistance Secured by Bonds and Other Authorized Securities rule previously numbered as 371.70. The new §371.71 is adopted elsewhere in this issue of the Texas Register.
31 TAC §371.72 Disbursement of Funds

Section 371.72 is repealed to replace it with the Financial Assistance Secured by Promissory Notes and Deeds of Trust rule previously numbered as 371.71. The new §371.72 is adopted elsewhere in this issue of the Texas Register.

31 TAC §371.73 Remaining Unused Funds

Section 371.73 is repealed to replace it with the Disbursement of Funds rule previously numbered as 371.72. The new §371.73 is adopted elsewhere in this issue of the Texas Register.

31 TAC §371.74 Surcharge

Section 371.74 is repealed to replace it with the Remaining Unused Funds rule previously numbered as 371.73. The new §371.74 is adopted elsewhere in this issue of the Texas Register.

31 TAC §371.80 Inspection During Construction

Section 371.80 is repealed due to addition of a new §371.78 outlining applicability of the subchapter on construction and post-construction requirements. The new §371.70 is adopted elsewhere in this issue of the Texas Register.

31 TAC §371.81 Alteration During Construction

Section 371.81 is repealed to replace it with the Inspection During Construction rule previously numbered as 371.80. The new §371.81 is adopted elsewhere in this issue of the Texas Register.

31 TAC §371.82 Force Account

Section 371.82 is repealed to replace it with the Alterations During Construction rule previously numbered as 371.81. The new §371.82 is adopted elsewhere in this issue of the Texas Register.

31 TAC §371.83 As Built Plans

Section 371.83 is repealed to replace it with the Force Account rule previously numbered as 371.82. The new §371.83 is adopted elsewhere in this issue of the Texas Register.

31 TAC §371.84 Certificate of Approval and Project Completion

Section 371.84 is repealed to replace it with the As Built Plans rule previously numbered as 371.83. The new §371.84 is adopted elsewhere in this issue of the Texas Register.
31 TAC §371.85 Final Accounting

Section 371.85 is repealed to replace it with the Certificate of Approval and Project Completion rule previously numbered as 371.84. The new §371.85 is adopted elsewhere in this issue of the Texas Register.

31 TAC §371.86 Records Retention

Section 371.86 is repealed to replace it with the Final Accounting rule previously numbered as 371.85. The new §371.86 is adopted elsewhere in this issue of the Texas Register.

31 TAC §371.87 Release of Retainage

Section 371.87 is repealed to replace it with the Records Retention rule previously numbered as 371.86. The new §371.87 is adopted elsewhere in this issue of the Texas Register.

31 TAC §371.88 Responsibilities of Applicant

Section 371.88 is repealed to replace it with the Release of Retainage rule previously numbered as 371.87. The new §371.88 is adopted elsewhere in this issue of the Texas Register.

31 TAC §371.89 Authority of the Executive Administrator

Section 371.89 is repealed to replace it with the Responsibilities of Applicant rule previously numbered as 371.88. The new §371.89 is adopted elsewhere in this issue of the Texas Register.

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, or 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 these repeals is to reorganize the rules based on the addition of sections that implement new requirements in state and federal law within the current framework of the drinking water state revolving fund.

Even if the adopted repeals 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 repeals do not fall under any of the applicability criteria in Texas Government Code §2001.0225.

TAKINGS IMPACT ASSESSMENT

The board evaluated the adopted repeals and performed an analysis of whether they constitute a taking under Texas Government Code Chapter 2007. The specific purpose of the repeals is to reorganize the rules based on the addition of sections that implement new requirements in state and federal law within the current framework of the drinking water state revolving fund.

The board's analysis indicates that Texas Government Code Chapter 2007 does not apply to the adopted repeals 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 repeals and performed an assessment of whether they constitute a taking under Texas Government Code Chapter 2007. Promulgation and enforcement of the adopted repeals would be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted rulemaking 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 repeal. Therefore, the adopted rulemaking does not constitute a taking under Texas Government Code Chapter 2007.

PUBLIC COMMENT

No comments were received.

STATUTORY AUTHORITY

These repeals are adopted under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16.
SUBCHAPTER F ENGINEERING REVIEW AND APPROVAL

31 TAC §371.60 Engineering Feasibility Report

31 TAC §371.61 Contract Documents: Review and Approval

31 TAC §371.62 Advertising and Awarding Construction Contracts

* * 

STATUTORY AUTHORITY

These repeals are adopted under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16.

SUBCHAPTER G LOAN CLOSINGS AND AVAILABILITY OF FUNDS

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

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

31 TAC §371.72 Disbursement of Funds

31 TAC §371.73 Remaining Unused Funds

31 TAC §371.74 Surcharge

* * 

STATUTORY AUTHORITY

These repeals are adopted under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and under the authority of Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16.

SUBCHAPTER H CONSTRUCTION AND POST-CONSTRUCTION REQUIREMENTS

31 TAC §371.80 Inspection During Construction

31 TAC §371.81 Alteration During Construction
31 TAC §371.82 Force Account

31 TAC §371.83 As Built Plans

31 TAC §371.84 Certificate of Approval and Project Completion

31 TAC §371.85 Final Accounting

31 TAC §371.86 Records Retention

31 TAC §371.87 Release of Retainage

31 TAC §371.88 Responsibilities of Applicant

31 TAC §371.89 Authority of the Executive Administrator
The Texas Water Development Board (“TWDB”) adopts new 31 Texas Administrative Code (TAC) §§375.72 and 375.111 and amendments to existing 31 TAC §§375.1, 375.16, 375.17, 375.31, 375.41, 375.43, 375.45, 375.60, 375.82, 375.91, 375.92, 375.94, 375.101 and 375.109, relating to the Clean Water State Revolving Fund. The proposal is adopted without changes as published in the February 28, 2020, issue of the Texas Register (45 TexReg 1348).

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

The TWDB adopts the additions and amendments is to implement legislative changes from House Bill 3339, 86th (R) Legislative Session and from America’s Water Infrastructure Act of 2018 (AWIA), and to implement changes in program management, including addition of remedies for non-compliance. The specific provisions being amended or added and the reasons for the amendments are addressed in more detail below.

SECTION BY SECTION DISCUSSION OF THE ADOPTED ADDITIONS AND AMENDMENTS

31 TAC §375.1 Definitions

Section 375.1 is amended to define the term “water conservation plan” as a plan in compliance with Texas Water Code §16.4021, as required by H.B. 3339, 86th (R) Legislative Session.

31 TAC §375.16 Fees for Financial Assistance

Section 375.16 is amended to clarify the origination fee.

31 TAC §375.17 Term of Financial Assistance

Section 375.17 is amended to remove mention of specific loan time periods and to provide the terms in the IUP.

31 TAC §375.31 Rating Process

Section 375.31 is amended to make emergency relief applicable to all disasters, not just natural disasters.

31 TAC §375.41 Timeliness of Application and Required Application Information

Section 375.41 is amended to add the requirement that a preliminary engineering feasibility report signed and sealed by a professional engineer be submitted as part of an application, and detailing the information to be included in the report.
31 TAC §375.43 Required Water Conservation Plan and Water Loss Audit

Section 375.43 is amended to require that the water conservation plan comply with Texas Water Code §16.4021, as enacted by H.B. 3339, 86th (R) Legislative Session, and to clarify that a requirement that a portion of assistance be used for water loss mitigation applies only to Applicants providing potable water.

31 TAC §375.45 Multi-Year Commitment

Section 375.45 is amended to tie the terms to the IUP, increasing flexibility for financial assistance recipients.

31 TAC §375.60 Definitions

Section 375.60 is amended to define the term “emergency relief project”.

31 TAC §375.72 Emergency Relief Project Procedures

Section 375.72 is added to outline emergency relief project procedures identical to those already contained in rules for the Drinking Water State Revolving Fund.

31 TAC §375.82 Contract Documents: Review and Approval

Section 375.82 is amended to include a requirement that Applicants submit an electronic copy of applications and reduces the number of paper copies required unless the Applicant is directed otherwise.

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

Section 375.91 is amended to add requirements for closing financial assistance projects consisting of 100 percent principal forgiveness.

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

Section 375.92 is amended to clarify language and conform with rules for the Drinking Water State Revolving Fund.

31 TAC §375.94 Remaining Unused Funds

Section 375.94 is amended to clarify the disposition of remaining project funds.

31 TAC §375.101 Inspection During Construction

Section 375.101 is amended to change the term “inspection” to “site visits” and to add the requirement to review compliance with EPA’s American Iron and Steel requirements.
31 TAC §375.109 Responsibilities of Applicant

Section 375.109 is amended to change the term “water conservation program” to “water conservation plan,” the term used in Texas Water Code §16.4021.

31 TAC §375.111 Disallowance of Project Costs and Remedies for Noncompliance

Section 375.111 is added to provide remedies for noncompliance with project rules and financial assistance documents.

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, or 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 new requirements in state and federal law and changes in program management within the current framework of the clean water state revolving fund.

Even if the adopted amendments and 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 amendments and performed an analysis of whether they constitute a taking under Texas Government Code Chapter 2007. The specific purpose of the rules is to implement new requirements in state and federal law and changes in program management within the current framework of the clean water state revolving fund.
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 they constitute 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 rulemaking 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 rulemaking does not constitute a taking under Texas Government Code Chapter 2007.

PUBLIC COMMENT

No comments were received.

STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

<rule>

SUBCHAPTER A GENERAL PROGRAM REQUIREMENTS

§375.1 Definitions

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

(1) – (68) (No change.)

(69) Water conservation plan--A plan that complies with the requirements of Texas Water Code Section 16.4021. [report outlining the methods and means by which water conservation may be achieved within a particular facilities planning area.]

[(70) Water conservation program—A comprehensive description and schedule of the methods and means to implement and enforce a water conservation plan.]

[(70) [(71)] Water quality management plan--A plan prepared and updated annually by the State and approved by the Environmental Protection Agency that determines the nature, extent, and
causes of water quality problems in various areas of the State and identifies cost-effective and locally acceptable facility and nonpoint measures to meet and maintain water quality standards.

*STATUTORY AUTHORITY*

This rulemaking is adopted under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

**SUBCHAPTER B FINANCIAL ASSISTANCE**

§375.16 Fees for Financial Assistance

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

(b) Origination fee. An administrative fee not to exceed 1.75 percent of the project costs will be assessed as a one-time non-refundable charge. Project costs do not include the origination fee or those project costs that are funded through principal forgiveness. The fee is due and payable at the time of loan closing and may be financed as a part of the financial assistance.

§375.17 Term of Financial Assistance

The Board may offer financial assistance in accordance with the Act and the IUP under which the project received funding.

[(a) The Board may offer financial assistance up to 30 years for the planning, acquisition, design and/or construction of a project, in accordance with the Act and the IUP under which the project received funding.]

[(b) Notwithstanding the terms in subsection (a) of this section, the term of financial assistance may not exceed the useful life of an eligible project, in accordance with the Act.]
STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

SUBCHAPTER C INTENDED USE PLAN

§375.31 Rating Process

(a) – (e) (No change.)

(f) Emergency relief. Projects that are affected by [natural] disasters and according to the following requirements:

(1) – (2) (No change.)

STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

SUBCHAPTER D APPLICATION FOR ASSISTANCE

§375.41 Timeliness of Application and Required Application Information

(a) (No change.)

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

(1) – (11) (No change.)

(12) Preliminary Engineering Feasibility Report signed and sealed by a professional engineer registered in the State of Texas. The report, based on guidelines provided by the executive administrator, must provide:
(A) a description and purpose of the project;
(B) the entities to be served and current and future population;
(C) the cost of the project;
(D) a description of alternatives considered and reasons for the selection of the project proposed;
(E) sufficient information to evaluate the engineering feasibility of the project;
(F) maps and drawings as necessary to locate and describe the project area; and
(G) any other information the executive administrator determines is necessary to evaluate the project.
(c) (No change.)

§375.43 Required Water Conservation Plan and Water Loss Audit

(a) Water Conservation Plan. An Applicant shall submit a water conservation plan prepared in accordance with Texas Water Code Section 16.4021. [§363.15 of this title (relating to Required Water Conservation Plan).]
(b) (No change.)
(c) If an Applicant that is a retail public utility providing potable water has a water loss that [If a retail public utility’s total water loss] meets or exceeds the threshold for that utility in accordance with §358.6 of this title, the retail public utility must use a portion of any new financial assistance, or any other financial assistance provided by the Board, for project[s] costs that are eligible under the Act and the applicable IUP to mitigate the utility's water loss. However, at the request of a retail public utility, the Board may waive this requirement in accordance with §358.6 of this title.

§375.45 Multi-year Commitments

(a) Commitment periods may be set for a period of up to five years. The minimum interest rate reduction for[ the] multi-year commitments will be established for the five-year[five year] period based on the interest rate reduction prescribed in the IUP for the first year's commitment.
(b) This option is only available for projects as described in the IUP [that do not receive principal forgiveness based on the affordability criteria. However, the entity receiving a multi-year commitment may receive principal forgiveness for the other eligible options, such as principal forgiveness for green projects, for the amount of funds committed for the initial year.]
(c) (No change.)
STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which gives the
TWDB the authority to adopt rules, and Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

SUBCHAPTER E ENVIRONMENTAL REVIEWS AND DETERMINATIONS

§375.60 Definitions

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

(1) – (2) (No change.)

(3) Emergency Relief Project--An infrastructure construction project that provides relief to an
entity experiencing an emergency condition or incident that causes an imminent peril to public
health, safety, environment, or welfare, including natural disasters and any other emergency
condition as described in an IUP.

(4) [3]Environmental Assessment--A public document prepared by the executive administrator for
projects that may result in adverse environmental impacts where [and] the significance of those
impacts is not known. The Environmental Assessment, based primarily on the Environmental
Information Document, must provide sufficient evidence and analysis to determine whether to
prepare a Finding of No Significant Impact or an Environmental Impact Statement.

(5) [4]Environmental Impact Statement (EIS)--A detailed written statement prepared by a third-
party contractor, in close coordination with the executive administrator, that analyzes
environmental impacts of project alternatives for projects with significant adverse impacts on the
quality of the human environment. An EIS is required for projects that do not qualify for a Finding
of No Significant Impact. An EIS provides the most comprehensive and detailed information
about potential environmental impacts and mitigation required to comply with the NEPA. It is the
basis for the Record of Decision issued by the Board.

(6) [5]Environmental Information Document (EID)--A written analysis prepared by the Applicant
that provides sufficient information, including appropriate regulatory agency correspondence and
public participation documentation, for the executive administrator to undertake an environmental
review and determine if the project qualifies for a Finding of No Significant Impact or if an
Environmental Impact Statement will be required. An EID is not always necessary to determine if
the project will require preparation of an EIS.

(7) [6]Federal Environmental Cross-cutters--Federal environmental statutes, laws and Executive
Orders that apply to projects and activities with a federal nexus, including the receipt of federal
financial assistance.
Finding of No Significant Impact (FONSI)--An environmental finding issued by the Board when the environmental assessment prepared for the project supports the determination that the project will not have a significant adverse effect on the human environment and therefore, does not require the preparation of an environmental impact statement.

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

Indian tribes--Federally recognized Indian tribes.

Mitigation--
(A) avoiding the impact altogether by not taking a certain action or parts of an action;
(B) minimizing the impact[s] by limiting the degree or magnitude of the action and its implementation;
(C) – (E) (No change.)


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

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

§375.72 Emergency Relief Project Procedures

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

(b) If an emergency condition described in §375.60(3) of this title (relating to Definitions) is present, the Board may authorize funding for the emergency relief project, subject to availability of funds, without full preparation or public review of NEPA review documentation (including a CE finding, EA, or EIS) if the executive administrator determines that:

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

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

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

This rulemaking is adopted under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

SUBCHAPTER F ENGINEERING REVIEW AND APPROVAL

§375.82 Contract Documents: Review and Approval

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

(b) Unless otherwise specified by the executive administrator, an Applicant must submit at least one paper and one electronic copy of proposed contract documents, including the engineering plans and specifications, which must be as detailed as would be required for submission to contractors bidding on the work. The Applicant must provide the executive administrator with all contract documents proposed for bid advertising. The executive administrator will review contract documents:

(1) – (5) (No change.)

(c) (No change.)

*STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and Texas Water Code §§15.604, 15.605, and 16.093.

Cross-reference to statute: Texas Water Code Chapters 15 and 16

SUBCHAPTER G LOAN CLOSINGS AND AVAILABILITY OF FUNDS

§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 and conditions are required for closing financial assistance secured by bonds or other authorized securities:

(1) (No change.)

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

(i) the account must [shall] be maintained by an escrow agent as defined in §375.1 of this title (relating to Definitions);

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

(iii) escrow account statements must be provided to the executive administrator 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 must [shall] be handled in a manner that complies with the Public Funds Investment Act, Texas Government Code[,] Chapter 2256; and

(v) the escrow account must [shall] be adequately collateralized in a manner sufficient to protect the Board’s interest in the project and in compliance 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 must [shall] be created and must [which shall] be kept separate from all other accounts and funds of the Applicant;

(D) [that] bonds must [shall] be closed in book-entry-only form;

(E) the use of a paying agent/registrar that is a Depository Trust Company (DTC) participant is required;

(F) [that] the payment of all DTC closing fees assessed by the Board’s custodian bank must be directed to the Board’s custodian bank by the Applicant;

(G) the Applicant must provide 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, must be [are] made to the Board via wire transfer at no cost to the Board;

(I) [that] insurance coverage must 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, must undertake 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 [such] continuing disclosure undertaking is [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 required in subsection (a)(2) of this section must.
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 must be maintained in accordance with generally accepted accounting principles to demonstrate compliance with requirements in the financial assistance documents;

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

(M) the Applicant must submit a final accounting within 60 days of project completion of the project.

(N) the Applicant must document the adoption and implementation of an approved water conservation plan for the duration of the financial assistance;

(O) the Applicant must 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) the Applicant must establish a dedicated source of revenue for repayment of the financial assistance;

(Q) interest payments must commence no later than one year after the date of closing;

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

(S) (No change.)

(3) – (5) (No change.)

(6) a Private Placement Memorandum containing a detailed description of the issuance of debt to be sold to the Board. The Applicant must submit a draft Private Placement Memorandum at least 30 days before closing; a final electronic version of the Memorandum must 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 must execute an escrow agreement approved as to form and substance by the executive administrator;

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

(9) (No change.)

(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 contain those instruments normally furnished by a purchaser of debt.

(c) (No change.)

(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 must 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 separate from all other accounts and funds must be created, as follows:

(i) the account must be maintained by an escrow agent as defined in §375.1 of this title;

(ii) funds cannot 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) escrow account statements must be provided to the executive administrator upon request;

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

(v) the escrow account must 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, Texas Government Code Chapter 2257;

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

(C) a construction account separate from all other accounts and funds of the Applicant must be created;

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

(E) the Applicant, or an obligated person for whom financial or operating data is presented, either individually or in combination with other issuers of the Applicant's obligations or obligated persons, must undertake in a written agreement or contract to comply with requirements for continuing disclosure 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 is 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 required in subsection (a)(2) of this section, above, must 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) current, accurate, and complete records and accounts must be maintained in accordance with generally accepted accounting principles to demonstrate compliance with requirements in the financial assistance documents;

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

(H) the Applicant must submit a final accounting within 60 days of the completion of the project;
(I) the Applicant must document the adoption and implementation of an approved water conservation plan for the duration of the financial assistance;

(J) the Applicant must 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 must 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 will 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 will be prepared by the executive administrator. The certification will 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 must execute an escrow agreement, approved as to form and substance by the executive administrator;

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

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

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

(a) – (b) (No change.)

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

(1) – (2) (No change.)

(3) a Deed of Trust and Security Agreement that must [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, this is 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, this is not needed if the financial assistance consists of 100 percent principal forgiveness;

(5) – (6) (No change.)

(7) a legal opinion from Applicant's counsel that provides:
(A) – (D) (No change.)

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

(8) – (9) (No change.)

(10) evidence that the Applicant has established [shall establish] a dedicated source of revenue for repayment of the financial assistance;

(11) – (14) (No change.)

(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 separate from all other accounts and funds must be created, [shall be created that shall be separate from all other accounts and funds,] as follows:

(1) the account must [shall] be maintained by an escrow agent as defined in §375.1 of this title (relating to Definitions);

(2) funds cannot [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 must [shall] be provided on a monthly basis to the executive administrator upon request;

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

(5) the escrow account must [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, Texas Government Code[,] Chapter 2257.

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

(f) (No change.)

§375.94 Remaining Unused Funds

(a) No change

(b) If there are no enhancements authorized, the Applicant must [shall be required to] submit a final accounting and disposition of any unused funds as specified in §375.106. (relating to Final Accounting).

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STATUTORY AUTHORITY

This rulemaking is adopted under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and Texas Water Code §§15.604, 15.605, and 16.093.
§375.101 Inspection During Construction

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

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

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

(1) (No change.)

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

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

(B) – (E) (No change.)

(F) compliance with EPA’s American Iron and Steel requirements; and

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

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

(e) The Applicant must [shall] provide the executive administrator with a response to any documented [the] issues relating to compliance.

§375.109 Responsibilities of Applicant

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

§375.111 Disallowance of Project Costs and Remedies for Noncompliance

If the Applicant does not comply with applicable laws and rules relating to the project and to the financial assistance documents, the executive administrator may take any of the following actions:
(1) impose additional conditions to remedy the noncompliance;
(2) withhold releases from escrows or disbursements until the Applicant comes into compliance;
(3) refrain from closing on existing commitments;
(4) disallow all or part of the cost of a project expenditure that is not in compliance;
(5) allow a substitution of eligible cost activities for disallowed costs or require repayment of disallowed costs, at the discretion of the executive administrator; and
(6) take other remedial actions that may be legally available.