

TO: Board Members

THROUGH: Jeff Walker, Executive Administrator
John T. Dupnik, P.G., Deputy Executive Administrator, Water Science and Conservation
Ashely Harden, General Counsel
Rebecca Trevino, Chief Financial Officer

FROM: Erika Mancha, Manager, Innovative Water Technologies
Kevin Kluge, Director, Conservation and Innovative Water Technologies

DATE: July 20, 2020

SUBJECT: Proposed rulemaking on brackish groundwater production zones

ACTION REQUESTED

Consider authorizing the Executive Administrator to publish proposed amendments 31 Texas Administrative Code (TAC) 356 relating to brackish groundwater production zones.

BACKGROUND

In 2019, the 86th Texas Legislature passed House Bill 722 and created a framework for groundwater conservation districts (GCDs) to establish rules for a person interested in producing brackish groundwater from the Texas Water Development Board (TWDB) designated brackish groundwater production zones for a municipal drinking water project or an electric generation project. To date, the TWDB has identified and designated 31 local and regional brackish groundwater production zones in areas of the state with moderate to high availability and productivity of brackish groundwater that met certain criteria as directed in House Bill 30 by the 84th Texas Legislature in 2015.

House Bill 722 directed the TWDB to conduct technical reviews of operating permit applications and, when requested by a GCD, investigate the impacts of brackish groundwater production as described in the annual reports of the permitted production. House Bill 722 does not apply to a district that (1) overlies the Dockum Aquifer and (2) includes wholly or partly 10 or more counties, which is the High Plains Underground Water Conservation District No. 1.

For technical reviews of brackish groundwater production zone operating permit applications, the TWDB will submit to the GCD a report that includes (1) the findings regarding the compatibility of the proposed well field design with the designated brackish groundwater

ATTACHMENT

Preamble for rulemaking

The Texas Water Development Board (“TWDB” or “board”) proposes an amendment to 31 Texas Administrative Code (TAC) §356.10 and proposes a new Subchapter G, 31 TAC 356, relating to brackish groundwater production zones requirements by statutory amendments to Chapter 36 of the Texas Water Code.

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

Through House Bill 722 of the 86th Texas Legislature, 2019, the Legislature created a framework for groundwater conservation districts to establish rules for a person interested in obtaining a permit from a groundwater conservation district to authorize producing brackish groundwater from a designated brackish groundwater production zone for (1) a municipal drinking water project and (2) an electric generation project. The Legislature directed the TWDB to conduct technical reviews of operating permit applications and, when requested by a groundwater conservation district, conduct technical reviews of annual reports and summarize findings in a report.

The TWDB is proposing rules to implement the technical reviews by adding two new definitions in Section 356.10 and creating a new subchapter in Chapter 356, relating to brackish groundwater production zones.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

31 TAC §356.10 contains definitions related to groundwater management. The proposed amendment to §356.10 adds definitions for the following two terms that will be used in the proposed new Subchapter G: “Brackish groundwater production zone operating permit” and “Designated brackish groundwater production zone”.

Proposed Amendment to 31 TAC Chapter 356 by addition of a New Subchapter G (relating to brackish groundwater production zones)

31 TAC §356.70. Brackish Groundwater Production Zone Designation of Subchapter G. Section 356.70 is proposed to clarify how the agency identifies and designates local or regional brackish groundwater production zones in areas of the state that meet specific criteria and the information required to be provided for each zone. A designated brackish groundwater production zone may span multiple groundwater conservation districts and statute does not clarify how groundwater conservation districts should coordinate with each other related to production volumes and sharing information.

31 TAC §356.71. Brackish Groundwater Production Zone Operating Permit Review. Section 356.71 is proposed to outline how the agency will conduct an assessment and technical review of a brackish groundwater production zone operating permit applications. The section also discusses the information required to conduct the technical review and the report the agency will provide the groundwater conservation district that submitted the application.

31 TAC §356.72. Annual Report Review
Section 356.72 is proposed to outline how the agency will investigate and conduct a technical review of an annual report(s), upon request by a groundwater conservation district. The section

also discusses the information required to conduct the technical review and the technical report the agency will issue to the groundwater conservation district that sends the request.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration.

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for implementing these amendments and adding a new subchapter. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code Section 2001.0045 to repeal a rule does not apply. Furthermore, the requirement in Section 2001.0045 does not apply because these rules are amended to reduce the burden or responsibilities imposed on regulated persons by the rule; are necessary to protect water resources of this state as authorized by the Water Code; and are necessary to implement legislation.

The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as the rules will clarify the agency's role in technical reviews of brackish groundwater production zone operating permit applications and associated annual reports and groundwater conservation districts will be able to receive these technical reviews and reports.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of enforcing this rulemaking. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a “major environmental rule” as defined in the Administrative Procedure Act. A “major environmental rule” is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to clarify the agency’s role in technical reviews of brackish groundwater production zone operating permit applications and associated annual reports.

Even if the proposed rule were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any standard set by 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 proposed solely under the general powers of the agency, but rather is proposed under the authority of Texas Water Code §§16.060 and 36.1015. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The board invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT

The board evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to implement legislation and clarify the agency’s role in technical reviews of brackish groundwater production zone operating permit applications and associated annual reports. The proposed rule would substantially advance this stated purpose by proposing new rules for brackish groundwater production zone designation and guiding groundwater conservation districts in the technical review process of permit applications and annual reports.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that identifies and designates brackish groundwater production zones.

Nevertheless, the board further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT

The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rule would be in effect, the proposed rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy.

SUBMISSION OF COMMENTS

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov, or by fax to (512) 475-2053. Comments will be accepted until 5:00 p.m. of the 31st day following publication the Texas Register. Include Chapter 356 in the subject line of any comments submitted.

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board; and Texas Water Code §§16.060 and 36.1015, which requires the board to designate brackish groundwater production zones and to conduct technical reviews of brackish groundwater production zone operating permit applications and annual reports.

Chapters 16 and 36 of the Texas Water Code are affected by this rulemaking.

<rule>

CHAPTER 356. GROUNDWATER MANAGMENT

SUBCHAPTER A. DEFINITONS

§356.10. Definitions.

(1) – (4) no change

(5) Brackish groundwater production zone operating permit--a permit issued by a district under Texas Water Code §36.1015.

(6)[(5)] Conjunctive use--The combined use of groundwater and surface water sources that optimizes the beneficial characteristics of each source, such as water banking, aquifer storage and recovery, enhanced recharge, and joint management.

(7)~~(6)~~ Conjunctive surface management issues--Issues related to conjunctive use such as groundwater or surface water quality degradation and impacts of shifting between surface water and groundwater during shortages.

(8) Designated brackish groundwater production zone – an aquifer, subdivision of an aquifer, or geologic stratum designated under Texas Water Code §16.060(b)(5).

(9)~~(7)~~ Desired future condition--The desired, quantified condition of groundwater resources (such as water levels, spring flows, or volumes) within a management area at one or more specified future times as defined by participating groundwater conservation districts within a groundwater management area as part of the joint planning process.

(10)~~(8)~~ District--Any district or authority subject to Chapter 36, Texas Water Code.

(11)~~(9)~~ Executive administrator--The executive administrator of the Texas Water Development Board or a designated representative.

(12)~~(10)~~ Groundwater Availability Model--A regional groundwater flow model approved by the executive administrator.

(13)~~(11)~~ Major aquifer--An aquifer designated as a major aquifer in the State Water Plan.

(14)~~(12)~~ Minor aquifer--An aquifer designated as a minor aquifer in the State Water Plan.

(15)~~(13)~~ Modeled Available Groundwater--The amount of water that the executive administrator determines may be produced on an average annual basis to achieve a desired future condition.

(16)~~(14)~~ Most efficient use of groundwater--Practices, techniques, and technologies that a district determines will provide the least consumption of groundwater for each type of use balanced with the benefits of using groundwater.

(17)~~(15)~~ Natural resources issues--Issues related to environmental and other concerns that may be affected by a district's groundwater management plan and rules, such as impacts on endangered species, soils, oil and gas production, mining, air and water quality degradation, agriculture, and plant and animal life.

(18)~~(16)~~ Office--State Office of Administrative Hearings.

(19)~~(17)~~ Petition--A document submitted to the groundwater conservation district by an affected person appealing the reasonableness of a desired future condition.

(20)~~(18)~~ Projected water demand--The quantity of water needed on an annual basis according to the state water plan for the state water plan planning period.

~~(21)~~~~(19)~~ Recharge enhancement--Increased recharge accomplished by the modification of the land surface, streams, or lakes to increase seepage or infiltration rates or by the direct injection of water into the subsurface through wells.

~~(22)~~~~(20)~~ Relevant aquifer--An aquifer designated as a major or minor aquifer.

~~(23)~~~~(21)~~ State water plan--The most recent state water plan adopted by the board under Texas Water Code §16.051 (relating to State Water Plan).

~~(24)~~~~(22)~~ Surface water management entities--Political subdivisions as defined by Texas Water Code Chapter 15 and identified from Texas Commission on Environmental Quality records that are granted authority under Texas Water Code Chapter 11 to store, take, divert, or supply surface water either directly or by contract for use within the boundaries of a district.

~~(25)~~~~(23)~~ Total Estimated Recoverable Storage--The estimated amount of groundwater within an aquifer that accounts for recovery scenarios that range between 25% and 75% of the porosity-adjusted aquifer volume.

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STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board; and Texas Water Code §§16.060 and 36.1015, which requires the board to designate brackish groundwater production zones and to conduct technical reviews of brackish groundwater production zone operating permit applications and annual reports.

Chapters 16 and 36 of the Texas Water Code are affected by this rulemaking.

<rule>

SUBCHAPTER G. BRACKISH GROUNDWATER PRODUCTION ZONES.

§356.70. Brackish Groundwater Production Zone Designation.

(a) The agency will identify and designate local or regional brackish groundwater production zones in areas of the state with moderate to high availability and productivity of brackish groundwater that can be used to reduce the use of fresh groundwater and that:

(1) are separated by hydrogeologic barriers sufficient to prevent significant impacts to water availability or water quality in any area of the same or other aquifers, subdivisions of aquifers, or geologic strata that have an average total dissolved solids level of 1,000 milligrams per liter or less at the time of designation of the zones; and

(2) are not located in:

(A) an area of the Edwards Aquifer subject to the jurisdiction of the Edwards Aquifer Authority;

(B) the boundaries of the:

(i) Barton Springs-Edwards Aquifer Conservation District;

(ii) Harris-Galveston Subsidence District; or

(iii) Fort Bend Subsidence District;

(C) an aquifer, subdivision of an aquifer, or geologic stratum that:

(i) has an average total dissolved solids level of more than 1,000 milligrams per liter; and

(ii) is serving as a significant source of water supply for municipal, domestic, or agricultural purposes at the time of designation of the zones; or

(D) an area of a geologic stratum that is designated or used for wastewater injection through the use of injection wells or disposal wells permitted under Texas Water Code Chapter 27.

(b) In designating a brackish groundwater production zone under this section, the agency shall:

(1) determine the amount of brackish groundwater that the zone is capable of producing over a 30-year period and a 50-year period without causing a significant impact to water availability or water quality as described by Paragraph (a)(1); and

(2) include in the designation description:

(A) the amounts of brackish groundwater that the zone is capable of producing during the periods described by Paragraph (1); and

(B) recommendations regarding reasonable monitoring to observe the effects of brackish groundwater production within the zone.

(c) Areas of the state that are not designated as brackish groundwater production zones are not precluded from development of brackish groundwater or from future designation of zones.

§356.71. Brackish Groundwater Production Zone Operating Permit Review.

(a) This section does not apply to a district that overlies the Dockum Aquifer and includes wholly or partly 10 or more counties.

(b) When a district submits an application for a brackish groundwater production zone operating permit to the agency, the agency will conduct a technical review of the application, subject to subsections (c) and (d).

(c) Upon receipt of such an application, the agency will assess the application to determine whether a proposed production well is located within a designated brackish groundwater production zone. If a proposed production well is not located within a designated brackish groundwater production zone, the agency will not conduct the technical review of the application. If a proposed production well is located within a designated brackish groundwater production zone, the agency will conduct the technical review of the applicable permit application or applicable portions of a permit application in accordance with subsections (d) – (f).

(d) Upon receipt of an application for a brackish groundwater production zone operating permit for a proposed production well located within a designated brackish groundwater production zone and that includes all of the information required by Texas Water Code §36.1015(g), the agency will conduct a technical review of the application. If the agency does not receive all of the information required by Texas Water Code §36.1015(g), the agency will notify the district of the missing information. The agency will not conduct a technical review of an incomplete application until all required information is received.

(e) After conducting the application assessment and required technical review of a complete application, the board shall provide a report of the technical review of the application to the district that submitted the application that includes:

(1) findings regarding the compatibility of the proposed well field design with the designated brackish groundwater production zone, including:

(A) whether the proposed production exceeds the amount of brackish groundwater that the zone is capable of producing over a 30-year period and a 50-year period, as determined pursuant to Texas Water Code §16.060(e); and

(B) whether the parameters and assumptions used in the model described in Texas Water Code §36.1015(g)(4)(A) are compatible with the designated brackish groundwater production zone;

(2) recommendations for the monitoring system required by Texas Water Code §36.1015(e)(4) and (6), including whether the number of monitoring wells are adequate and in appropriate locations and aquifers, in accordance with recommendations established under Texas Water Code §16.060(e)(2)(B);

(f) The findings and recommendations included in subsection (e) will only be site-specific if the agency has received site-specific data and information from the district.

§356.72. Annual Report Review

(a) If a district makes a request under Texas Water Code §36.1015(j), the agency will investigate and issue a technical report to the district that sent the request, subject to subsection (b).

(b) Upon receipt of a request, the agency will determine whether it has received the applicable annual report and all of the information required under Texas Water Code §36.1015(e)(6), and for a project located in a designated brackish groundwater production zone in the Gulf Coast

Aquifer, the information required to be collected under Texas Water Code §36.1015(e)(5) related to subsidence. If the agency has not received all of the information required under Texas Water Code §36.1015(e)(6) or §36.1016(e)(5), as applicable, the agency will notify the district of the missing information and will not conduct a technical review of the reports until all required information is received.

(c) Not later than the 120th day after the date the agency receives all of the required information, the agency will investigate and issue a technical report on whether:

(1) brackish groundwater production under the project that is the subject of the report from the designated brackish groundwater production zone is projected to cause:

(A) significant aquifer level declines in the same or an adjacent aquifer, subdivision of an aquifer, or geologic stratum that were not anticipated by the agency in the designation of the zone;

(B) negative effects on quality of water in an aquifer, subdivision of an aquifer, or geologic stratum; or

(C) for a project located in a designated brackish groundwater production zone in the Gulf Coast Aquifer, subsidence during the permit term;

(2) not enough information is available to determine whether brackish groundwater production under the project that is the subject of the report from the designated brackish groundwater production zone is projected to cause the conditions listed in subsection (a)(1).

ATTACHMENT

Fiscal Note for rulemaking

TO: Rebecca Trevino, Chief Financial Officer

THROUGH: Chris Hayden, Budget Director

FROM: Erika Mancha, Manager, Innovative Water Technologies
Kevin Kluge, Director, Conservation and Innovative Water Technologies

DATE: July 20, 2020

SUBJECT: Fiscal Analysis for Proposed Amendments to 31 Texas Administrative Code 356 regarding brackish groundwater production zones

BACKGROUND

Your approval of the fiscal note portion of the proposed rulemaking relating to amendments to 31 Texas Administrative Code (TAC) 356 is required.

Through House Bill 722 of the 86th Texas Legislature, 2019, the Legislature created a framework for groundwater conservation districts to establish rules for a person interested in producing brackish groundwater from a designated brackish groundwater production zone for (1) a municipal drinking water project and (2) an electric generation project. The Legislature directed the TWDB to conduct technical reviews of operating permit applications and, when requested by a groundwater conservation district, conduct technical reviews of annual reports and summarize findings in a report.

The TWDB is proposing rules to implement the technical reviews by adding two new definitions in Section 356.10 and creating a new subchapter in Chapter 356, relating to brackish groundwater production zones.

FISCAL ANALYSIS

The estimated fiscal implications of these proposed rule changes for the first five-year period they are in effect is as follows:

A. Costs to State and Local Government.

These rules are not expected to result in reductions in costs to either state or local governments. These rules apply only to those entities interested in obtaining a brackish groundwater production zone operating permit from a groundwater conservation district. The intent of these

rules is to clarify the agency’s role in the technical reviews of brackish groundwater production zone operating permit applications and associated annual reports.

These rules are not expected to have any impact on state or local revenues. These rules are applicable to designated brackish groundwater production zones in the State. An interested person may decide to apply for brackish groundwater production zone operating permit to withdraw brackish groundwater and construct desalination plant to treat the groundwater, that voluntary decision would create additional jobs for the duration of the construction and operation of the desalination plant and possible revenues. However, the adoption of these rules alone has no impact on state or local revenues.

| Effect on Government | | | | | |
|--|-------------|-------------|-------------|-------------|-------------|
| Effect on State Government (including TWDB) | | | | | |
| | 2015 | 2016 | 2017 | 2018 | 2019 |
| Estimated additional cost | 0 | 0 | 0 | 0 | 0 |
| Estimated reduction in cost | 0 | 0 | 0 | 0 | 0 |
| Estimated loss or increase | 0 | 0 | 0 | 0 | 0 |
| Effect on Local Government | | | | | |
| Estimated additional cost | 0 | 0 | 0 | 0 | 0 |
| Estimated reduction in cost | 0 | 0 | 0 | 0 | 0 |
| Estimated loss or increase | 0 | 0 | 0 | 0 | 0 |
| | | | | | |

B. Public Benefits and Costs: It is estimated that for the first five-year period the rules are in effect the public will benefit from the rulemaking. The public will benefit from the rulemaking as the rules will clarify the agency’s role in technical reviews of brackish groundwater production zone operating permit applications and associated annual reports and groundwater conservation districts will be able to receive these technical reviews and reports.

C. Small business, micro-business, and rural community assessment: The cost of compliance with the proposed amendments for small businesses, micro-businesses, and rural communities will be \$0 because the rules are not regulatory and are not directed at private small or micro-businesses.

D. Small business and rural community regulatory flexibility statement: These rules do not affect small businesses or rural communities because they apply only to those entities interested in obtaining a brackish groundwater production zone operating permit from a groundwater conservation district. There is nothing in the rules that is directed to private small businesses.

E. Local Employment Economic Impact Statement: Pursuant to Texas Government Code § 2001.022, these proposed rules have been examined and there will not be any direct effect on local employment. These rules are applicable to designated brackish groundwater production zones in the State. An interested person may decide to apply for brackish groundwater production zone operating permit to withdraw brackish groundwater and construct desalination

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plant to treat the groundwater, that voluntary decision would create additional jobs for the duration of the construction and operation of the desalination plant. However, the adoption of these rules alone has no impact on local employment in any geographic region of the State.

Rebecca Trevino, Chief Financial Officer

Date

Return final, executed copy to the Office of General Counsel to be retained with the rulemaking file. This memo is not a part of the Board member notebook materials and is not posted to the website.

ATTACHMENT

Proposed Rulemaking Memorandum

Proposed Rulemaking Memorandum

To: Fisher Reynolds, Policy advisor

From: Ashley Harden, General Counsel

Date: July 20, 2020

Subject: Proposed rulemaking for designated brackish groundwater production zones

The Texas Water Development Board proposes a rulemaking for an amendment to 31 Texas Administrative Code (TAC) §356.10 and a new Subchapter G, 31 TAC 356, relating to brackish groundwater production zones requirements.

- 1. Provide the draft Notice of Proposed Rule that you intend to submit to the Texas Register, including preambles, comments, notices, and any other text that will be submitted to the Texas Register**

See attachments.

- 2. Attach to this memorandum a complete copy of the following analyses:**

- a. The analysis supporting the draft government growth impact statement required by Texas Government Code § 2001.0221.**

The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rule would be in effect, the proposed rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy.

- b. The analysis supporting the economic impact statement required by Texas Government Code § 2006.002.**

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration.

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for implementing these amendments and adding a new subchapter. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code Section 2001.0045 to repeal a rule does not apply. Furthermore, the requirement in Section 2001.0045 does not apply because these rules are amended to reduce the burden or

responsibilities imposed on regulated persons by the rule; are necessary to protect water resources of this state as authorized by the Water Code; and are necessary to implement legislation.

The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

c. The analysis supporting the regulatory flexibility analysis required by Texas Government Code § 2006.002.

The board reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a “major environmental rule” as defined in the Administrative Procedure Act. A “major environmental rule” is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to clarify the agency’s role in technical reviews of brackish groundwater production zone operating permit applications and associated annual reports.

Even if the proposed rule were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any standard set by 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 proposed solely under the general powers of the agency, but rather is proposed under the authority of Texas Water Code §§16.060 and 36.1015. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The board invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

d. The analysis supporting the takings impact assessment required by Tex. Gov’t Code § 2007.043.

The board evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to implement legislation and clarify the agency’s role in technical reviews of brackish groundwater production zone operating permit applications and associated annual reports. The proposed rule would substantially advance this stated purpose by proposing new rules for brackish groundwater

productions zone designation and guiding groundwater conservation districts in the technical review process of permit applications and annual reports.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that identifies and designates brackish groundwater production zones.

Nevertheless, the board further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

e. The analysis supporting the local employment impact statement required by Texas Government Code § 2001.024(a)(6).

The board has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of enforcing this rulemaking. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

f. The analysis supporting the cost-benefit analysis required by Texas Government Code § 2001.024(a)(5).

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as the rules will clarify the agency's role in technical reviews of brackish groundwater production zone operating permit applications and associated annual reports and groundwater conservation districts will be able to receive these technical reviews and reports.

g. The analysis supporting the fiscal note required by Texas Government Code § 2001.024(a)(4).

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration.

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for implementing these amendments and adding a new subchapter. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code Section 2001.0045 to repeal a rule does not apply. Furthermore, the requirement in Section 2001.0045 does not apply because these rules are amended to reduce the burden or responsibilities imposed on regulated persons by the rule; are necessary to protect water resources of this state as authorized by the Water Code; and are necessary to implement legislation. The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

3. If Texas Government Code § 2001.0045(b) applies to the proposed rule, identify the proposed repeal or amendment that offsets the costs imposed by the proposed rule and explain the reasoning behind your estimates of the costs. If Texas Government Code § 2001.0045(b) does not apply to the proposed rule, explain why.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code Section 2001.0045 to repeal a rule does not apply. Furthermore, the requirement in Section 2001.0045 does not apply because these rules are amended to reduce the burden or responsibilities imposed on regulated persons by the rule; are necessary to protect water resources of this state as authorized by the Water Code; and are necessary to implement legislation.

4. Is there anything else you would like the Office of the Governor to know about this proposed rule?

This rulemaking is proposed under the authority of Texas Water Code §6.101, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board; and Texas Water Code §§16.060 and 36.1015, which requires the board to designate brackish groundwater production zones and to conduct technical reviews of brackish groundwater production zone operating permit applications and annual reports.

Through House Bill 722 of the 86th Texas Legislature, 2019, the Legislature created a framework for groundwater conservation districts to establish rules for a person interested in obtaining a permit from a groundwater conservation district to authorize producing brackish groundwater from a designated brackish groundwater production zone for (1) a municipal drinking water project and (2) an electric generation project. The Legislature directed the TWDB to conduct technical reviews of operating permit applications and, when requested by a groundwater conservation district, conduct technical reviews of annual reports and summarize findings in a report.

The TWDB is proposing rules to implement the technical reviews by adding two new definitions in Section 356.10 and creating a new subchapter in Chapter 356, relating to brackish groundwater production zones.