TO: Board Members

THROUGH: Jeff Walker, Executive Administrator
Amanda Lavin, Assistant Executive Administrator
Ashley Harden, General Counsel
Rebecca Trevino, Chief Financial Officer

FROM: Glenna Bowman, Deputy Chief Financial Officer

DATE: September 14, 2020

SUBJECT: Rulemaking relating to the use of Automated Clearing House (ACH) payments for RWAF Loans

ACTION REQUESTED
Consider adopting an amendment to 31 Texas Administrative Code (TAC) §365.41 relating to Loan Closing for the Rural Water Assistance Fund (RWAF) program.

BACKGROUND
The Texas Water Development Board authorized publication of a proposed amendment to 31 Texas Administrative Code (TAC) §365.41 on August 5, 2020. The proposed amendment was published in the Texas Register on August 21, 2020, with a deadline to receive public comments by September 21, 2020.

No comments were received.

KEY ISSUES
The proposed amendment would authorize the Executive Administrator to accept payments from borrowers in the RWAF program “by wire transfer or in a manner acceptable to the Executive Administrator.”

RECOMMENDATION
The Executive Administrator recommends approval of this item.

Attachment(s): Adoption of rule amendment for publication in the Texas Register – Chapter 365.
The Texas Water Development Board (TWDB) adopts an amendment to 31 Texas Administrative Code (TAC) §365.41 regarding Loan Closing for the Rural Water Assistance Fund (RWAF) program. The proposal is adopted without changes as published in the August 21, 2020, issue of the Texas Register (45 TexReg 5845).

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

TWDB presently has outstanding loans in the RWAF program for which we receive payments directly from borrowers, rather than through paying agents. In accordance with current TAC §365.41, these borrowers may remit their payments only by wire transfer. Many RWAF loans require monthly payments, and wire transfers can cost the borrower $30 or more per transaction for the life of the loan. The adopted rule expands allowable payments forms, including allowing Automated Clearing House (ACH) payments. The adopted rules will save time and reduce costs to TWDB borrowers and improve TWDB’s administrative processes.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

Section 365.41(a)(2)(J) is amended to add the words “or in a manner acceptable to the Executive Administrator.”

All other wording in the rule remains unchanged.

REGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a “major environmental rule” as defined in the Administrative Procedure Act. A “major environmental rule” is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to reduce the administrative burden for local governments that are the recipients of TWDB financial assistance.

Even if the adopted rule were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed 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 §15.995. Therefore, this adopted rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The board evaluated this adopted rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to reduce the administrative burden and processing costs for the remittance of loan repayments to the TWDB. The adopted rule would substantially advance this stated purpose by providing more repayment options to TWDB borrowers.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this adopted rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that administers the Rural Water Assistance Fund.

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

PUBLIC COMMENTS

The comment period ended on September 20, 2020, no comments were received, and no changes were made.

STATUTORY AUTHORITY

The amendment is adopted under the authority of §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Water Code §15.995.

This rulemaking affects Water Code, Chapter 15, Subchapter R.
<rule>

TITLE 31. NATURAL RESOURCES AND CONSERVATION.
PART 10. TEXAS WATER DEVELOPMENT BOARD.

CHAPTER 365. RURAL WATER ASSISTANCE FUND.

SUBCHAPTER C. CLOSING AND RELEASE OF FUNDS.

§365.41. Loan Closing.

(a) Instruments needed for closing. The documents which shall be required at the time of closing shall include the following:

(1) if not closing under the pre-design funding option, evidence that 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 bond ordinance, order or resolution adopted by the governing body authorizing the issuance of debt to be sold to the board, or an executed promissory note and loan agreement, that is acceptable to the executive administrator and which shall have sections providing as follows:

(A) if loan proceeds are to be deposited into an escrow account, at the closing on all or a portion of the loan or grant, then an escrow account shall be created that shall be separate from all other accounts and funds, as follows:

(i) the account shall be maintained by an escrow agent as defined in §363.2 of this title (relating to Definitions of Terms);

(ii) funds shall not be released from the escrow account without written approval by the executive administrator;

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

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

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

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

(C) that a final accounting be made to the board of the total sources and authorized use of project funds within 60 days of the completion of the project and that any surplus loan funds be used in a
manner as approved by the executive administrator;

(D) that an annual audit of the rural political subdivision, prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant be provided annually to the executive administrator;

(E) that the rural political subdivision shall fix and maintain rates and collect charges to provide adequate operation, maintenance and insurance coverage on the project in an amount sufficient to protect the board's interest;

(F) that the rural political subdivision shall document the adoption and implementation of an approved water conservation program for the duration of the loan;

(G) that the rural political subdivision shall maintain current, accurate and complete records and accounts in accordance with generally accepted accounting principles necessary to demonstrate compliance with financial assistance related legal and contractual provisions;

(H) that the rural political subdivision covenants to abide by the board's rules and relevant statutes, including the Texas Water Code, Chapters 15 and 17;

(I) that the rural political subdivision or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the rural political subdivision's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis substantially in the manner required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the board were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the board and the beneficial owner of the rural political subdivision's obligations, if the board sells or otherwise transfers such obligations, and the beneficial owners of the board's obligations if the rural political subdivision is an obligated person with respect to such obligations under rule 15c2-12;

(J) that all payments shall be made to the board via wire transfer or in a manner acceptable to the Executive Administrator at no cost to the board;

(K) that the partial redemption of bonds or other authorized securities be made in inverse order of maturity;

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

(M) that the rural political subdivision shall establish a dedicated source of revenue for repayment; and

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

(3) evidence that the rural political subdivision has adopted a water conservation program in
accordance with §363.15 of this title (relating to Required Water Conservation Plan);

(4) an unqualified approving opinions of the attorney general of Texas and a certification from the comptroller of public accounts that such debt has been registered in that office;

(5) if obligations are issued, an unqualified approving opinion by a recognized bond attorney acceptable to the executive administrator, or if a promissory note and loan agreement is used, an opinion from the corporation's attorney which is acceptable to the executive administrator;

(6) executed escrow agreement entered into by the entity and an escrow agent satisfactory to the executive administrator, in the event that funds are escrowed, or a certificate of trust as defined in §363.2 of this title, if applicable;

(7) other or additional data and information, if deemed necessary by the executive administrator.

(b) Certified transcript. At such time as available following the final release of funds the rural political subdivision shall submit a transcript of proceedings relating to the debt purchased by the board which shall contain those instruments normally furnished a purchaser of debt.

(c) Additional closing requirements for bonds. A rural political subdivision shall be required to comply with the following closing requirements if the applicant issues obligations that are purchased by the board:

(1) all bonds shall be closed in book-entry-only form;

(2) the rural political subdivision shall use a paying agent/registrar that is a depository trust company (DTC) participant;

(3) the rural political subdivision shall be responsible for paying all DTC closing fees assessed to the rural political subdivision by the board's custodian bank directly to the board's custodian bank;

(4) the rural political subdivision shall provide evidence to the board that one fully registered bond has been sent to the DTC or to the rural political subdivision's paying agent/registrar prior to closing; and

(5) the rural political subdivision shall provide a private placement memorandum containing a detailed description of the issuance of debt to be sold to the board that is acceptable to the executive administrator.