

AGENDA ITEM MEMO

BOARD MEETING DATE: November 9, 2023

TO: Board Members

THROUGH: Jeff Walker, Executive Administrator
John T. Dupnik, P.G., Deputy Executive Administrator, Water Science and Conservation
Ashley Harden, General Counsel

FROM: Erika Mancha, Director, Conservation and Innovative Water Technologies
John Sutton, Manager, Conservation

SUBJECT: Adoption of amendments to 31 Texas Administrative Code Chapter 358 relating to water loss audits

ACTION REQUESTED

Consider adopting previously proposed amendments to 31 Texas Administrative Code (TAC) § 358.6 relating to water loss audits to implement Senate Bill 28 (88th Regular Session).

BACKGROUND

In 2023, the 88th Texas Legislature passed Senate Bill 28 (SB 28) to address financial assistance and other water programs administered by the Texas Water Development Board (TWDB). Among the provisions of the bill, Section 8 directs the TWDB to adopt rules establishing a program to provide technical assistance to qualifying retail public utilities to (1) conduct water loss audits required by Chapter 16 of the Texas Water Code and (2) apply for financial assistance from the TWDB to mitigate the utility system's water loss. The TWDB is also required to prioritize technical assistance offered to qualifying retail public utilities based on submitted water loss audits, the population served by the utility, and the integrity of the utility's system.

SB 28 also requires the publication of (1) water loss data according to category of retail public utility and to regional water planning area, (2) measures taken by retail public utilities to reduce water loss, and (3) a list of those retail public utilities who received technical and financial assistance to mitigate a retail public utility's water loss on the agency's official website. The TWDB can contract or partner with other entities to help

implement any aspect of the program as established by these proposed rules. Rules are required to be adopted no later than January 1, 2024.

The publication of proposed amendments to 31 TAC §358.6 was approved at the September 14, 2023, Board meeting. The proposed rules were posted to the *Texas Register* on September 29, 2023, (48 *Texas Register* 5635). Public comment was accepted for 30 days until October 30, 2023. No public comments were received.

KEY ISSUES

The provisions of SB 28 to be implemented with the adoption of these amendments are complementary of the TWDB's existing water loss program and provide clear legislative direction and authority to continue developing and enhancing the information and assistance provided to improve water loss in Texas. Once implemented, the effect of these amendments and assistance established will provide multiple benefits including:

- more accurate water loss data;
- more effective guidance to water utilities on how to best address and fund water loss mitigation;
- more effective investment of state financial resources; and ultimately; and
- more effective conservation of the state's water resources.

RECOMMENDATION

The Executive Administrator recommends adoption of previously proposed amendments to 31 TAC § 358.6 and authorization of the publication of these amendments in the *Texas Register*.

Attachment:

1. Adoption of amendments to 31 TAC § 358.6 in the *Texas Register*

The Texas Water Development Board (TWDB) adopts 31 Texas Administrative Code §358.6 to provide technical assistance in water loss control for qualifying retail public utilities that submit water loss audits and related data to the TWDB. The proposal is adopted without changes as published in the September 29, 2023, issue of the *Texas Register* (48 *Texas Register* 5635) and will not be republished.

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

This rulemaking is to implement Senate Bill 28 (SB 28), Section 8, passed by the 88th Texas Legislature, effective September 1, 2023. SB 28 directs the TWDB to establish a program providing technical assistance to retail public utilities conducting water loss audits required by Chapter 16 of the Texas Water Code. The TWDB is required to prioritize technical assistance to retail public utilities required to submit water loss audits to the TWDB based on submitted water loss audits, the population served by the utility, and the integrity of the utility's system. SB 28 also requires the TWDB to publish certain water loss data submitted to the TWDB on its official website in addition to information related to entities receiving technical assistance established by these proposed rules.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

In 31 TAC §358.6, new §358.6(g) is adopted to provide technical assistance in water loss control and outlining the circumstances of the technical assistance offered by the TWDB.

In 31 TAC §358.6, new §358.6(h) is adopted to describe how the agency will prioritize the technical assistance offered by the TWDB to retail public utilities based on water loss audits submitted, the population served by the retail public utility, and the system integrity of the retail public utility.

In 31 TAC §358.6, new §358.6(i) is adopted to establish how the TWDB will publish on its official website certain information related to the retail public utilities receiving technical assistance in addition to other information and data related to water loss audits that the TWDB currently collects.

REGULATORY IMPACT ANALYSIS DETERMINATION (Texas Government Code §2001.0225)

The TWDB reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the rulemaking is not subject to Texas Government Code §2001.0225, because it does not meet the definition of a “major environmental rule” as defined in the Administrative Procedure Act. A “major environmental rule” is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to establish a program to provide technical assistance to retail public water utilities in conducting required water loss audits and in applying for financial assistance from the TWDB to mitigate the utility system's water loss.

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

does not exceed 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.

This rule is adopted under the authority of Texas Water Code §16.0121, as amended by SB 28, 88th Texas Legislative Session. Therefore, this rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

TAKINGS IMPACT ASSESSMENT (Texas Government Code §2007.043)

The TWDB evaluated this rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to establish a program to provide technical assistance to retail public water utilities in conducting required water loss audits and in applying for financial assistance from the board to mitigate the utility system's water loss as well as to prioritize the technical assistance based on three factors. The rule also directs the TWDB to publish certain information related to its collection of water loss data and the use of this program on its official website. The rule would substantially advance this stated purpose by codifying and expanding TWDB's water loss program to better assist retail public utilities in mitigating their water loss.

The TWDB's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this rule because this is an action, including an action of a political subdivision, that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code §2007.003(b)(4). The TWDB is the agency that requires retail public utilities to conduct and submit water loss audits.

Nevertheless, the TWDB further evaluated this rule and performed an assessment of whether it constitutes a taking under Texas Government Code Chapter 2007. Promulgation and enforcement of this rule would be neither a statutory, nor a constitutional, taking of private real property. Specifically, the subject regulation does not affect a landowner's rights in private real property because this rulemaking does not burden, 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, the specific purpose of this rule is to implement portions of SB 28 and expand the TWDB's water loss program to better assist retail public utilities in mitigating their water loss. The creation of this program as proposed and collection of better water loss data by the TWDB is not a statutory or constitutional taking of private real property. Therefore, the rule does not constitute a taking under Texas Government Code, Chapter 2007.

PUBLIC COMMENTS (Texas Government Code §2001.033(a)(1))

The comment period ended October 30, 2023. No public comments were received; therefore, no revisions to the rule as proposed will be made and the rule as published in 48 *Texas Register* 5635, will not be republished.

STATUTORY AUTHORITY (Texas Government Code §2001.033(a)(2))

The amendment is adopted under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and under the authority of Texas Water Code Section 16.0121(k) and Section 16.0121(l), as enacted by SB 28, passed during the 88th Texas Legislative Session, effective September 1, 2023. This rulemaking affects Water Code, Chapter 16, Subchapter B. §358.6 Water Loss Audits.