

AGENDA ITEM MEMO

BOARD MEETING DATE: February 8, 2024

TO: Board Members

THROUGH: Jeff Walker, Executive Administrator
Ashley Harden, General Counsel
Rebecca Trevino, Chief Financial Officer
Matt Nelson, Deputy Executive Administrator, Office of Planning

FROM: Sarah Lee, Manager, Regional Water Planning
Ron Ellis, Team Lead, Regional Water Planning

SUBJECT: Proposed rulemaking in 31 TAC Chapter 359 related to Texas Water Bank and Texas Water Trust

ACTION REQUESTED

Consider authorizing publication of proposed amendment to 31 Texas Administrative Code Chapter 359 relating to the Texas Water Bank and Texas Water Trust.

BACKGROUND

Senate Bill 1, 75th Texas Legislature, established the Texas Water Trust within the Texas Water Bank to hold water rights dedicated to environmental needs, including instream flows, water quality, fish and wildlife habitat, or bay and estuary inflows. Chapter 359 rules for the Water Bank address how the TWDB implements the Water Trust within the Water Bank. The Water Trust offers a significant opportunity to acquire, by donation, lease, or purchase, water rights for environmental purposes in accordance with the statute.

The rule proposal amends various sections of Chapter 359, related to Water Banking, resulting from a rule review authorized by the Board on October 5, 2023. Most changes consist of non-substantive wording changes for clarity. Additionally, the proposal includes detail in rule related to dedicating groundwater rights to the Texas Water Trust.

KEY ISSUES

The proposal provides detail on the required documentation and procedures for dedicating groundwater rights to the Texas Water Trust. Texas Water Code §15.7031 establishes the Texas Water Trust and governs dedications to the Trust. The statute gives specific

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requirements relevant to surface water right dedications, including review and approval by the Texas Commission on Environmental Quality (TCEQ); however, the statute and existing rule are silent on requirements for dedications of groundwater. The proposed rule will provide a parallel to TCEQ review and approval of dedication of groundwater rights, as the applicable groundwater conservation district, not the TCEQ, has authority over that permit or authorization.

RECOMMENDATION

The Executive Administrator recommends authorizing the publication of amendments to 31 Texas Administrative Code §359, as attached, for public comment.

Attachment:

Preamble and Proposed Amendment to 31 Texas Administrative Code Chapter 359.

The Texas Water Development Board (TWDB) proposes amendments to 31 Texas Administrative Code (TAC) §§359.1, 359.2, 359.5, 359.7, 359.9, 359.10, 359.11, 359.13, 359.14, and 359.15.

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

Pursuant to a rule review conducted by TWDB, the TWDB proposes to amend various sections of Chapter 359, related to Water Banking. Most changes consist of non-substantive wording changes for clarity. Additionally, the TWDB proposes to include detail in rule related to dedicating groundwater rights to the Texas Water Trust.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Section 359.1. The TWDB proposes to make non-substantive amendments for clarity purposes.

Section 392.2. The TWDB proposes to make non-substantive amendments for clarity purposes. The TWDB also proposes to update outdated citations.

Section 359.5. The TWDB proposes to make non-substantive amendments for clarity purposes.

Section 359.7. The TWDB proposes to make non-substantive amendments for clarity purposes.

Section 359.9. The TWDB proposes to make non-substantive amendments for clarity purposes.

Section 359.10. The TWDB proposes to make non-substantive amendments for clarity purposes.

Section 359.11. The TWDB proposes to make non-substantive amendments for clarity purposes. The TWDB also proposes to update outdated citations.

Section 359.13. The TWDB proposes to make non-substantive amendments for clarity purposes. The TWDB also proposes to correct a numbering error.

Section 359.14. The TWDB proposes to make non-substantive amendments for clarity purposes. The TWDB also proposes to remove the requirement that notice for fee schedules be published in the Texas Register. This publication is not required in statute. The notice will be provided in required notices for the Board Meeting to approve the fee schedule, which is more targeted at those interested in the Texas Water Bank.

Section 359.15. The TWDB proposes to make non-substantive amendments for clarity purposes. Additionally, the TWDB proposes to provide detail on the required documentation and procedures for dedicating groundwater rights to the Texas Water Trust. Texas Water Code §15.7031 establishes the Texas Water Trust and governs dedications to the Trust. The statute gives specific requirements relevant to dedications of water rights (which, by definition, includes both surface and groundwater) including

review and approval by the Texas Commission on Environmental Quality (TCEQ); however, the statute and existing rule are more relevant to surface water than groundwater. The proposed rule will provide a parallel to TCEQ review and approval of dedication of groundwater rights, as the applicable groundwater conservation district, not the TCEQ, has authority over that permit or authorization. Because the statute includes TCEQ review and approval for all water rights, this will still be required for groundwater dedications. The proposed rule does not add any additional requirements for TCEQ.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS (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 the Texas Water Bank or Texas Water Trust, as these rules simply seek to clarify existing procedures or provide updated procedures. Additionally, participation in the Texas Water Bank and Texas Water Trust is purely voluntary. 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, §2001.0045 to repeal a rule does not apply. Furthermore, the requirement in §2001.0045 does not apply because these rules are necessary to protect water resources of this state as authorized by the Texas Water Code.

The TWDB 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 (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 it clarifies requirements for the Texas Water Bank and Texas Water Trust and facilitates participation in the Texas Water Bank and Texas Water Trust. Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the rules will not impose an economic cost on persons required to comply with the rule as participation in the Texas Water Bank and Texas Water Trust is voluntary.

ECONOMIC AND LOCAL EMPLOYMENT IMPACT STATEMENT (Texas Government Code §§2001.022, 2006.002); REGULATORY FLEXIBILITY ANALYSIS (Texas Government Code §2006.002)

The TWDB 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 TWDB 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 TWDB 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 (Texas Government Code §2001.0225)

The TWDB 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 requirements for the Texas Water Bank and Texas Water Trust and facilitate participation in the Texas Water Bank and Texas Water Trust.

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 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 Texas Water Code §§15.703 and 15.7031. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

The TWDB 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 (Texas Government Code §2007.043)

The TWDB 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 clarify requirements for the Texas Water Bank and Texas Water Trust and facilitate participation in the Texas Water Bank and Texas Water Trust. The proposed rule would substantially advance this stated purpose by aligning terminology with agency and industry practice and by providing greater detail on documentation and procedural requirements.

The TWDB'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 TWDB is the agency that operates the Texas Water Bank and Texas Water Trust.

Nevertheless, the TWDB 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, 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 simply establishes procedural requirements for two purely voluntary programs. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT (Texas Government Code §2001.0221)

The TWDB 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 (Texas Government Code §2001.024(a)(7))

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 in the Texas Register. Include Chapter 359 in the subject line of any comments submitted.

STATUTORY AUTHORITY (Texas Government Code §2001.024(a)(3))

The amendment is proposed under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code §§15.703 and 15.7031.

This rulemaking affects Water Code Chapter 15, Subchapter K.

<rule>

§359.1. Purpose.

These sections are proposed to establish and administer the Texas Water Bank in accordance with the Texas Water Code, Chapter 15, Subchapter K. The board administers [~~shall administer~~] the water bank to facilitate water transactions to provide sources of adequate water supplies for use within the State of Texas. The adoption of these rules is not intended to prevent any person from selling or leasing water or water rights by transactions outside the purview of the water bank or duly-established regional water banks, where such transactions are otherwise allowed by law.

§359.2. Definitions.

The following words and terms when used in this chapter [~~shall~~] have the following meanings, unless the context clearly indicates otherwise:

- (1) Administrator--The executive administrator of the Texas Water Development Board or designated representative(s).
- (2) Bank--The Texas Water Bank, including regional banks established pursuant to this subchapter.
- (3) Board--The Texas Water Development Board.
- (4) Commission--The Texas Commission on Environmental Quality.
- (5) Conserved water--That amount of water saved by a holder of an existing permit, certified filing, or certificate of adjudication through practices, techniques, and technologies that would otherwise be irretrievably lost to all consumptive beneficial uses arising from storage, transportation, distribution, or application. Additionally, that amount of ground water made available for alternative or future uses through practices, techniques, and technologies that reduce the consumption of ground water, reduce the loss or waste of ground water, improve the efficiency in use of ground water, or increase the availability of ground water through recycling

or reuse.

(6) Department--The Texas Parks and Wildlife Department.

(7) Deposit--The authorized placement of a water right or the right to use water in the bank for transfer.

(8) Depositor--A person who deposits or has on deposit a water right in the bank.

(9) Lease--To convey by contract the right to use water for a specified time period in accordance with the authorized right and other applicable law.

(10) Person--Includes, but is not limited to, any individual, corporation, organization, government, or governmental subdivision or agency, including the board, business trust, estate, trust, partnership, association, and any other legal entity.

(11) Political subdivision--A state agency, a county, city, or other body politic or corporate of the state, including any district or authority created under the Texas Constitution, Article III, §52, or Article XVI, §59, and including any interstate compact commission to which the state is a party and any nonprofit water supply corporation created and operating under Texas Water Code, Chapter 67~~[Acts of the 43rd Legislature, Chapter 76, First Called Session, 1933 (Texas Civil Statutes, Article 1434a)]~~.

(12) Transfer--The conveyance of a water right or the right to use water under a water right in any of the following manners:

(A) the conveyance of legal title to a water right; or

(B) a contract or option contract to allow use of a water right.

(13) Water right--A right acquired or authorized under the laws of this state to impound, divert, or use state water, underground water, or water from any source to the extent authorized by law.

§359.5. Procedures for Deposit.

A potential depositor must~~shall~~ file a completed application for deposit with the administrator on forms or in a format provided by the administrator and provide such information as the administrator may require to evaluate the proposed application for deposit. The administrator must~~shall~~ notify the potential depositor within 30 calendar days of receipt of the application for deposit if additional information is needed to complete the application. The date of deposit is the date of receipt of a completed application for deposit. Within 30 calendar days following the receipt of a completed application for deposit, the administrator must~~shall~~ notify the executive director of the commission and depositor of the acceptance or refusal of the deposit.

§359.7. Appeal of Findings.

Decisions of the administrator under §§359.5, 359.6, and 359.8 of this title (relating to Procedures for Deposit, Bank Review, and Deposits, Transfers, Cancellation Protection, and Withdrawals) may be appealed to the board by filing notice with the administrator. The administrator must~~[shall]~~ bring such appeals before the board at the earliest practicable board meeting for consideration, and notify the appellant, not less than 14 calendar days before the meeting, of the date, time, and place of the board meeting. Appeals under this section are~~[shall]~~ not ~~[be]~~ considered contested hearings under the Texas Administrative Procedure and Texas Register Act. The appellant and administrator may present written material to the board, in advance of the date of board consideration, with copies of such written material provided to the other party at least three days prior to the board meeting. The appellant and administrator may present brief oral remarks to the board after which the board will~~[shall]~~ decide on disposition of the appeal.

§359.9. Registry of Buyers.

Persons who are potential buyers of water rights or the right to use water may request to be listed by the administrator in a registry at the bank. The request for registry listing must~~[shall]~~ be in a form or format provided by the administrator, and must~~[shall]~~ include all information the administrator deems necessary to prepare the registry of buyers.

§359.10. Registry of Sellers.

Persons who wish to disclose the availability of a water right or the right to use water or portion thereof for transfer, but do not wish to deposit the right in the bank, may request to be listed by the administrator in a registry at the bank. The request must ~~[shall]~~ be in a form or ~~[the]~~ format provided by the administrator ~~[of a request for deposit]~~ and must ~~[shall]~~ include all information the administrator deems necessary to prepare the registry of sellers. Any person who has listed a water right or the right to use water for sale in the registry must ~~[shall]~~ notify the administrator within 30 calendar days of the date a contract to transfer a water right or the right to use water or portion thereof is signed.

§359.11. Information.

In response to requests, the administrator must ~~[shall]~~ provide information available from the bank, unless such information is required to be withheld under the Texas Public Information ~~[Open Records]~~ Act. The bank may act as a clearinghouse for water marketing information, including water availability, pricing of water transactions, environmental considerations, and potential buyers and sellers of water rights. The administrator may provide technical assistance as possible, to potential depositors, depositors, or potential buyers, concerning water conservation and may prepare and publish a manual on structuring water transactions.

§359.13. Regional Banks.

(a) The board may establish regional water banks, as necessary, to fulfill the requirements of

the Texas Water Code, Chapter 15, Subchapter K. The board, by contract or agreement, may designate state agencies, political subdivisions, or other entities or persons it may deem appropriate to act as regional banks. Regional banks must ~~[shall]~~ utilize the same procedures and meet the same requirements that are specified by this chapter, unless otherwise specifically authorized by the board. Regional banks must ~~[shall]~~ report all activities to the administrator in a manner and frequency specified by the administrator. Fees specified in §359.14 of this title (relating to Fees) must ~~[shall]~~ be collected by the regional bank, in accordance with the contract or agreement executed with the board. In evaluating the designation of and necessity for regional banks, the board may consider the regional bank's proposed rules and procedures for the following:

- (1) determining the method of allocation among competing buyers to lease or purchase water rights;
- (2) determining the method of allocation among the depositors for reimbursement;
- (3) determining the fees and their allotment under the Texas Water Code, §15.705;
- (4)~~(3)~~ method of notification of the board, commission, and department of regional bank activities; and
- (5)~~(4)~~ such other factors as are deemed appropriate by the board.

(b) Deposits into a duly authorized regional bank ~~[shall]~~ enjoy the same protection and limitations as deposits made into the bank established by these rules. The administrator may periodically review a regional bank for its performance and continuing necessity. The board may dissolve any regional bank that ~~[which]~~ it has established under this section.

§359.14. Fees.

(a) The executive administrator may ~~[shall]~~ develop and implement, with board approval, a fee to be paid either upon deposit of a water right or right to use water into the bank, upon transfer of the water right or right to use water or portion thereof while on deposit in the bank, or upon both such occurrences. Such fee must ~~[shall]~~ not exceed 1.0% of the value placed upon the water right or right to use water by the depositor upon deposit into the bank, and 1.0% of the value of the water right or right to use water transferred while on deposit in the water bank. Fees are ~~[shall be]~~ due within 60 days of deposit of the water right or right to use water into the bank, and within 60 days of transfer of such rights. Upon deposit, the ~~[The]~~ value of the water right or right to use water will ~~[shall]~~ be ~~[calculated upon deposit into the bank as]~~ the value placed on the water right or right to use water by the depositor. Upon transfer, the ~~[The]~~ value of the water right or right to use water will ~~[shall]~~ be ~~[calculated upon transfer as]~~ the value of the water right sale or total value of any contract or contracts to use the water.

(b) Fees associated with deposits to or transfer from the Texas Water Trust of water rights or rights to use water are waived.

(c) As necessary, the executive administrator must [~~shall~~] obtain board approval of the fee schedule. The executive administrator must [~~shall~~] provide notice [~~in the Texas Register 30 days~~] before board action considering approval of such fee schedule, and must [~~shall~~] provide copies of the proposed fee schedule upon request. In approving such fee schedule, the board must [~~shall~~] consider the expenses of operating the bank.

§359.15. Texas Water Trust.

(a) The Texas Water Trust is established within the water bank to hold water rights dedicated to environmental needs, including instream flows, water quality, fish and wildlife habitat, or bay and estuary inflows.

(b) The administrator may not place a surface water or groundwater right [~~No water right shall be placed~~] into the Texas Water Trust without the review and approval of the commission after appropriate consultation with the department and board. Additionally, the administrator may not place a groundwater right into the Texas Water Trust without:

(1) an applicable groundwater operating permit or other groundwater use authorization; and

(2) the review and written acknowledgment of the relevant groundwater district.

(c) A surface water right will [~~shall~~] be held in trust under this section for the term specified by the commission in its approval under subsection (b) of this section or, if the commission does not specify a term, for the term agreed upon between the administrator and the depositor. A groundwater operating permit or other groundwater use authorization will be held in trust under this section for the term specified by the groundwater district in its acknowledgment under subsection (b) of this section or, if the district does not specify a term, for the term agreed upon between the administrator and the depositor.