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AGENDA ITEM MEMO

BOARD MEETING DATE: July 23, 2024

TO: Board Members

THROUGH: Bryan McMath, Interim Executive Administrator
Ashley Harden, General Counsel

FROM: Marvin Cole-Chaney, Director, Program Administration and Reporting
Jessica Peña, Deputy Executive Administrator, Water Supply and Infrastructure

SUBJECT: Adoption of rulemaking for 31 Texas Administrative Code Chapter 365, relating to the Rural Water Assistance Fund

ACTION REQUESTED

Consider authorizing the publication of the adoption of amendments to 31 Texas Administrative Code Chapter (TAC) 365, relating to the Rural Water Assistance Fund.

BACKGROUND

Chapter 365 contains the agency's programmatic rules related to the Rural Water Assistance Fund ("RWAFF"). The amendments implement legislation, clarify requirements for borrowers, modernize the rules language, and provide consistency with TWDB's general financial assistance program's rules.

KEY ISSUES

This amendment implements Senate Bill 469's "rural political subdivision" definition and Senate Bill 28's expansion of allowable technical assistance under the RWAFF. This amendment clarifies that the interest rates for RWAFF loans funded by a source other than bond proceeds will be determined by the Executive Administrator. This amendment also includes substantive and non-substantive changes and updates to make this chapter more consistent with TWDB rules and to clarify requirements for TWDB borrowers.

Publication of proposed amendments to 31 TAC Chapter 365 was approved by the Board on April 11, 2024. The proposed rules were posted to the *Texas Register* on April 26, 2024 (49 *Texas Register* 2680). Public comment was accepted for 30 days until May 27, 2024.

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water future for Texas

Brooke T. Paup, Chairwoman | George B. Peyton V, Board Member | L'Oreal Stepney, P.E., Board Member
Bryan McMath, Interim Executive Administrator

One public comment was received, which resulted in the following modifications:

- The rules have been modified to allow for Water Supply Corporations and Sewer Service Corporations whose total outstanding loans with the TWDB do not exceed \$1,000,000 to satisfy the annual financial audit requirement by submitting an annually filed Internal Revenue Form 990.
- The rules have been modified to clarify that the requirement for continuing disclosure substantially in the manner of the Securities and Exchange Commission (SEC) rule 15c2-12 only applies when a rural political subdivision is issuing bonds or other authorized securities.
- The rules have been modified to remove the requirement of an attorney opinion when a loan agreement and promissory note are used for closing.

The original public comment is found in Attachment 2 while the TWDB's responses to the comment may be found within Attachment 1.

RECOMMENDATION

The Executive Administrator recommends adoption of the previously proposed amendments to 31 TAC Chapter 365 relating to the Rural Water Assistance Fund.

Attachments:

1. Adoption of rulemaking to be filed with the *Texas Register*.
2. Public Comment from the Texas Rural Water Association.

The Texas Water Development Board (TWDB) adopts 31 Texas Administrative Code §§365.2, 365.3, 365.5, 365.21, 365.22, 365.23, 365.41, 365.43, 365.44, and 365.45.

Sections 365.22 and 365.41 are adopted with changes as published in the April 26, 2024, issue of the *Texas Register* (49 Texas Register 2680). The rules will be republished.

Sections 365.2, 365.3, 365.21, 365.23, 365.43, 365.44, and 365.45 are adopted without changes as published in the April 26, 2024, issue of the *Texas Register* (49 Texas Register 2680). The rules will be republished.

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

Chapter 365 contains the agency's programmatic rules related to the Rural Water Assistance Fund.

The adopted amendments implement legislation and clarify the method in which interest rates will be set for loans when the source of funding is other than bond proceeds. Additionally, the adopted amendments modernize the language, provide consistency with TWDB's general financial assistance programs' rules, and clarify requirements for borrowers.

Senate Bill 469, 88th R.S. (2023), amended Chapters 15 and 17 of the Water Code by adding a general definition of "rural political subdivision." This general definition replaces the current definition applicable to the Rural Water Assistance Fund. The adopted amendments implement SB 469's definition of "rural political subdivision" applicable to the Rural Water Assistance Fund.

Senate Bill 28, 88th R.S. (2023), amended Chapter 15 of the Water Code to authorize the TWDB to use money in the Rural Water Assistance Fund to contract for outreach, financial, planning, and technical assistance to assist rural political subdivisions for a purpose described by Section 15.994 (Use of Fund), including obtaining and using financing from funds and accounts administered by TWDB. The adopted amendment in 31 Texas Administrative Code §365.3 implements SB 28's expansion of allowable technical assistance applicable to the Rural Water Assistance Fund.

31 Texas Administrative Code §365.5 contains rules related to the setting of interest rates. Under the adopted amendment, the Executive Administrator determines the lending rate scales for loans funded by a source other than bond proceeds.

These adopted amendments include substantive and non-substantive changes and updates to make Chapter 365 more consistent with TWDB rules and to clarify requirements for TWDB borrowers.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

Chapter 365 Rural Water Assistance Fund

Subchapter A. Introductory Provisions

Section 365.2. Definitions of Terms.

The adopted amendment revises the definition of rural political subdivision in §365.2(6) to implement SB 469. The amendment includes as a rural political subdivision those municipalities with a population of 10,000 or less.

Section 365.3. Use of Funds.

The adopted amendment revises §365.3(c) to implement SB 28's technical assistance requirements applicable to the Rural Water Assistance Fund, which broadens the TWDB's authority to provide technical assistance.

Section 365.5. Interest Rates for Loans.

The adopted amendment addresses the setting of interest rates for loans funded by a source other than bond proceeds. For loans funded by a source other than bond proceeds the Executive Administrator will determine the lending rate scale.

Subchapter B. Application Procedures.

Section 365.21. Preapplication Meeting.

The adopted amendment requires an applicant to schedule a preapplication conference with board staff.

Section 365.22. Application for Assistance.

The adopted amendment modernizes the rule language, provides consistency with TWDB's general financial assistance programs' rules, and clarifies requirements for borrowers. The amendment removes the requirement that an application be in writing and replaces it with the requirement that an application be in the form and numbers prescribed by the executive administrator. The adopted amendment deletes the list of information required for an application to be considered an administratively complete and instead cites to 31 Texas Administrative Code §363.12 for the applicable requirements. The adopted amendment clarifies that the executive administrator may request any additional information needed to evaluate an application and may return an incomplete application.

Section 365.23. Pre-design Funding Option.

The adopted amendment modernizes the rule language, provides consistency with TWDB's general financial assistance programs' rules, and corrects citations.

Subchapter C. Closing and Release of Funds

Section 365.41. Loan Closing.

The adopted amendment modernizes the rule language, provides consistency with TWDB's general financial assistance programs' rules, and clarifies requirements for borrowers. The adopted amendment requires the transcript of proceedings within 60 days of closing. The adopted amendment removes the requirement of obtaining an opinion from a Water Supply Corporation's or Sewer Service Corporation's attorney when a loan agreement and promissory note are used for closing. The adopted amendment allows for Water Supply Corporations and Sewer Service Corporations whose total outstanding loans with the TWDB do not exceed \$1,000,000 to satisfy the annual financial audit requirement by submitting an annually filed Internal Revenue Form 990. The adopted amendment clarifies that the requirement to comply with requirements for continuing disclosure on an ongoing basis substantially in the manner required by the Securities and Exchange Commission rule 15c2-12 only applies if the rural political subdivision is issuing bonds or other authorized securities.

Section 365.43. Release of Funds.

The adopted amendment modernizes the rule language, provides consistency with TWDB's general financial assistance programs' rules, clarifies requirements for borrowers, and corrects citations. Under the adopted amendment for release of funds for building purposes, prior executive administrator approval is required if the applicant is relying on evidence of its legal authority to complete necessary acquisitions. The adopted amendment clarifies, for projects constructed through one or more construction contracts, that the executive administrator may approve the release of funds only for a construction contract that has been approved for construction.

Section 365.44. Loan Agreements for Nonprofit Water Supply or Sewer Service Corporations. The adopted amendment deletes the current list of information required and cites to §15.996 of the Water Code for applicable requirements.

Section 365.45. Engineering Design Approvals.

The adopted amendment modernizes the rules language, deletes the current list of information required, and cites to 31 Texas Administrative Code §363.41 for applicable contract document requirements.

REGULATORY IMPACT ANALYSIS DETERMINATION (Texas Government Code §2001.0225)

The TWDB 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 adopted rulemaking is to clarify eligibility, requirements, and methodology for TWDB borrowers.

Even if the adopted rulemaking 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 §15.995. Therefore, this adopted rulemaking 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 adopted rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to clarify eligibility, requirements, and methodology for TWDB borrowers. The adopted rules would substantially advance this stated purpose by aligning the rule’s definitions and permissible use of funds with Water Code, Chapter 15, clarifying how interest rates will be set for TWDB borrowers, and providing greater consistency between TWDB program rules.

The TWDB’s analysis indicates that Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking 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 implements the Rural Water Assistance Fund Program.

Nevertheless, the TWDB further evaluated this adopted rulemaking and performed an assessment of whether it constitutes a taking under Texas Government Code Chapter 2007. Promulgation and enforcement of this rulemaking would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted rulemaking 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 rulemaking is merely an amendment to conform with statutory changes and clarify program methodology. It does not require regulatory compliance by any persons or political subdivisions. Therefore, the adopted rulemaking does not constitute a taking under Texas Government Code, Chapter 2007.

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

The following comments were received from the Texas Rural Water Association (TRWA).

Regarding

Section 365.3 Use of Funds.

Comment

The TRWA commented that one of the permissible uses of Rural Water Assistance Fund (RWAFF) is for interim financing of construction projects. The TRWA comments there is not an expedited application process under the rules to accommodate this use. The TRWA requests the TWDB to promulgate rules that would implement an expedited application process for interim funding.

Response

TWDB appreciates this comment. No changes were made in response to this comment. The TWDB notes that it anticipates RWAFF funds to be limited and available on a competitive basis and therefore interim financing is not a feasible approach under the program at this time.

Regarding

Section 365.22 Application for Assistance.

Comment

The TRWA commented that the application requirements pertaining to the Preliminary Engineering Feasibility Report and Environmental Assessment increase the cost of RWAFF applications and add unnecessary burden and complication for small rural projects. The TRWA requested that the Preliminary Engineering Feasibility Report and Environmental Assessment requirements be omitted from the RWAFF application process.

Response

The TWDB appreciates this comment. No direct changes have been made in response to this comment, but the TWDB notes the rule has been modified to delete the list of information required for an application to be considered administratively complete and instead cites to 31

Texas Administrative Code §363.12 for the applicable requirements. The TWDB notes that under 31 Texas Administrative Code §363.14, only preliminary environmental data is required at the application phase for projects that qualify for pre-design funding. The TWDB additionally notes that it is considering revisions to the Preliminary Engineering Feasibility Report and Environmental Assessment sections under 31 Texas Administrative Code §363.13 and §363.14. The TWDB notes that RWAf funding can be utilized for costs related to preparing an RWAf application, including the preparation of the Preliminary Engineering Feasibility Report and requirements related to an Environmental Assessment.

Comment

The TRWA commented that under the current rules, RWAf financing is not available to Rural Political Subdivisions with compliance issues as the application requires a certification that a system is currently, and will remain, in compliance.

Response

The TWDB appreciates this comment. No direct changes have been made in response to this comment, but the TWDB notes the rule has been modified to delete the list of information required for an application to be considered administratively complete and instead cites to 31 Texas Administrative Code §363.12 for the applicable requirements. The TWDB notes that the application affidavit requirement includes a certification in which the applicant can identify compliance issues. The TWDB notes that RWAf projects can include projects intended to address compliance issues if identified on the application affidavit. The TWDB notes that it is considering revisions to 31 Texas Administrative Code §363.12 for clarification.

Regarding

Section 365.41 Loan Closing.

Comment

The TRWA commented that requiring a financial audit for the life of an RWAf loan imposes a significant expense on Water Supply Corporations (WSCs) and Sewer Supply Corporations (SSCs). Additionally, the TRWA commented that rural WSCs and SSCs may have trouble locating and retaining an accounting firm to perform these types of audits. The TRWA suggests that the rule be amended to provide that WSCs and SSCs may instead submit annual certified financial statements.

Response

The TWDB appreciates this comment. The rules have been modified to allow for Water Supply Corporations and Sewer Service Corporations whose total outstanding loans with the TWDB do not exceed \$1,000,000 to satisfy the annual financial audit requirement by submitting an annually filed Internal Revenue Form 990.

Comment

The TRWA commented that the requirement to disclose financial information and events, on an ongoing basis, substantially in the manner of the Securities and Exchange Commission (SEC) rule 15c2-12 has little bearing on WSCs and SSCs. The TRWA commented that WSCs and SSCs should be exempt from this requirement.

Response

The rules have been modified to clarify that the requirement for continuing disclosure substantially in the manner of the Securities and Exchange Commission (SEC) rule 15c2-12 only applies when a rural political subdivision is issuing bonds or other authorized securities. In the case of WSCs or SSCs who issues bonds or other authorized securities, the requirement enables TWDB to meet its continuing disclosure obligations if a WSC or SSC were to become a significant borrower.

Comment

The TRWA commented that omitting the loan closing requirement that WSCs and SSCs produce an opinion from its attorney that is acceptable to the Executive Administrator would lower the cost of closings.

Response

The rules have been modified to remove the requirement of an attorney opinion when a loan agreement and promissory note are used for closing.

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 also under the authority of Water Code §15.995.

This rulemaking affects Texas Water Code, Chapter 15.

<rule>

§365.2. Definitions of Terms

Words and terms used in this chapter shall have the following meanings, unless the context clearly indicates otherwise. Words defined in Texas Water Code Chapter 15 or 17 and not defined here shall have the meanings provided by the appropriate Texas Water Code chapter.

(1) Applicant--A rural political subdivision, including a rural political subdivision which has entered into an agreement with a Federal Agency or State Agency for the purpose of submitting a joint application.

(2) District--A conservation or reclamation district created under Texas Constitution, Section 52, Article III, or Section 59, Article XVI.

(3) Federal agency--An agency or other entity of the United States, including the United States Department of Agriculture or an agency or entity that is acting through or on behalf of that department.

(4) Fund--The Rural Water Assistance Fund.

(5) Nonprofit water supply or sewer service corporation--A water or sewer service corporation operating under Texas Water Code, Chapter 67.

(6) Rural political subdivision--

(A) A nonprofit water supply or sewer service corporation created and operating under Chapter 67 of the Texas Water Code or a district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, no part of the service area of which is located in an urban area with a population of more than 50,000;

(B) a municipality;

(i) with a population of 10,000 or less; or

(ii) located wholly in a county in which no urban area has a population of more than 50,000;

(C) a county in which no urban area has a population of more than 50,000; or

(D) an entity that:

(i) is a nonprofit water supply or sewer service corporation created and operating under Chapter 67 of the Texas Water Code, a district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, a municipality, county, or other political subdivision of the state, or an interstate compact commission to which the state is a party; and

(ii) demonstrates in a manner satisfactory to the board that the entity is rural or the area to be served by the project is a wholly rural area despite not otherwise qualifying under subparagraph (A), (B), or (C) of this paragraph.

(7) State agency--An agency or other entity of the state, including the Texas Department of Agriculture and the Texas Department of Housing and Community Affairs and any agency or authority that is acting through or on behalf of the Texas Department of Agriculture or the Texas Department of Housing and Community Affairs.

§365.3. Use of Funds

(a) The fund may be used to provide low-interest loans to rural political subdivisions for:

(1) water or water-related projects and for water quality enhancement projects, including but not limited to:

(A) the construction of infrastructure facilities for wholesale or retail water or sewer service;

- (B) desalination projects;
 - (C) the purchase or lease of water well fields;
 - (D) property necessary for water well fields;
 - (E) the purchase or lease of rights to produce groundwater;
 - (F) onsite or wetland wastewater treatment facilities; and
 - (G) the interim financing of construction projects;
- (2) water projects included in the state water plan or a regional water plan;
 - (3) development of groundwater sources and acquisition of water rights, including groundwater and surface water rights;
 - (4) the acquisition of retail public utilities as defined by §13.002 of the Texas Water Code;
 - (5) the acquisition of water supply or sewer services facilities or systems owned by municipalities or other political subdivisions;
 - (6) construction, acquisition, or improvement of water and wastewater projects to provide services to an economically distressed area;
 - (7) planning and design costs, permitting costs, and other costs associated with state or federal regulatory activities with respect to a project; and
 - (8) obtaining water or wastewater service supplied by other political subdivisions or financing the consolidation or regionalizing of neighboring political subdivisions, or both.
- (b) The fund may be used to provide zero interest loans, negative interest loans, loan forgiveness, or grants for any purpose described in subsection (a) of this section under criteria developed by the board.
 - (c) The board may use money in the fund to contract for outreach, financial, planning, and technical assistance to assist rural political subdivisions for a purpose described by §15.994 of the Texas Water Code, including in obtaining and using financing from funds and accounts administered by the board.
 - (d) The fund may be used to buy down interest rates on loans.
 - (e) The fund may be used to finance a joint application submitted by a rural political subdivision and a federal agency, a state agency, or another rural political subdivision where the parties have entered into an agreement to submit a joint application for financial assistance.
 - (f) The fund may be used as a source of revenue for the repayment of principal and interest on water financial assistance bonds issued by the board if the proceeds of the sale of these bonds will be deposited into the fund.

§365.5. Interest Rates for Loans

The procedure and method for setting fixed interest rates includes the following.

(1) The executive administrator will set fixed interest rates under this section for loans on a date that is five business days prior to the political subdivision's adoption of the ordinance or resolution authorizing its bonds and not more than 45 days before the anticipated closing of the loan from the board. After 45 days from the establishment of the interest rate of a loan, rates will be reconsidered, and may be extended only with the approval of the executive administrator.

(2) For loans from the Rural Water Assistance Fund, the executive administrator will set the interest rates in accordance with the following:

(A) to the extent that the source of funding is provided from bond proceeds issued through the Water Development Fund specifically designated for this fund, the lending rate scale(s) will be determined as provided under §363.33(b) of this title (relating to Interest Rates for Loans and Purchase of Board's Interest in State Participation Projects);

(B) for loans where the interest rates calculated in subparagraph (A) of this paragraph results in a true interest cost that is less than the minimum true interest cost of the lending rate scale established for those funds, interest will be calculated at a rate increased to match the minimum true interest costs so the board may recover all costs attributed to the bonds sold by the board;

(C) for loans funded by the board with proceeds of bonds, the interest for which is intended to be tax exempt for purposes of federal tax law, the executive administrator will limit the interest set pursuant to this subsection at no higher than the rate permitted under federal tax law to maintain the tax exemption for the interest on the board's bonds; or

(D) for loans funded without bond proceeds, the lending rate scale(s) will be determined by the executive administrator.

(3) The board, at its discretion, may require applicants to receive a portion of the project funding from other board loan programs.

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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 §15.995.

This rulemaking affects Water Code, Chapter 15.

<rule>

§365.21. Preapplication Meeting

An applicant seeking financial assistance must schedule a preapplication conference with the board staff to obtain guidance and establish basic eligibility of the project and of the rural political subdivision for financial assistance.

§365.22. Application for Assistance

- (a) An application must be in the form and numbers prescribed by the executive administrator.
- (b) The executive administrator may request any additional information needed to evaluate the application and may return any incomplete applications.
- (c) The information required under §363.12 of this title (relating to General, Legal, and Fiscal Information) is required on all applications to the board for financial assistance to be considered an administratively complete application.
- (d) A rural political subdivision may enter into an agreement with a federal agency, a state agency, or another rural political subdivision to submit a joint application for financial assistance under this subchapter.

§365.23. Pre-design Funding Option

- (a) This loan application option will provide an eligible applicant that meets all applicable board requirements an alternative to secure a commitment and close a loan for the pre-design, design or building costs associated with a project. Under this option, a loan may be closed and funds necessary to complete planning and design activities released. If planning requirements have not been satisfied, design and building funds will be held or escrowed and released in the sequence described in this section. Following completion of planning activities and environmental assessment, the executive administrator may require the applicant to make changes in order to proceed with the project. If the portion of a project associated with funds in escrow cannot proceed, the loan recipient must use the escrowed funds to pay off the obligations to the board in inverse order of maturity.
- (b) The executive administrator may recommend to the board the use of this section if, based on available information, there appear to be no significant permitting, social, environmental, engineering, or financial issues associated with the project. An application for pre-design funding may be considered by the board despite a negative recommendation from the executive administrator.
- (c) Applications for pre-design funding must include the following information:
 - (1) for loans including building cost, a preliminary engineering feasibility report which will include at minimum: a description and purpose of the project; area maps or drawings as necessary to fully locate the project area(s); a proposed project schedule; estimated project costs and budget including sources of funds; current and future populations and projected water needs and sources; alternatives considered; and a discussion of known permitting, social or environmental issues which may affect the alternatives considered and the implementation of the proposed project;
 - (2) contracts for engineering services, which may be in draft form;
 - (3) evidence that an approved water conservation plan will be adopted prior to the release of loan funds;
 - (4) all information required in §365.22 of this title (relating to Application for Assistance); and

(5) any additional information the executive administrator may request to complete evaluation of the application.

(d) After board commitment and completion of all closing and release prerequisites as specified in §365.41 of this title (relating to Loan Closing), §365.42 of this title (relating to Deed of Trust and Other Required Documentation), and §365.43 of this title (relating to Release of Funds), funds will be released in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase;

(2) for design costs, after receipt of executed contracts for the design phase and upon approval of an engineering feasibility report as specified in §363.13 of this title (relating to Engineering Feasibility Data) and compliance with §363.14 of this title (relating to Environmental Assessment);

(3) for building costs, after issuance of any applicable permits, and after bid documents are approved and executed construction documents are contingently awarded.

(e) Board staff will use preliminary environmental data provided by the applicant, as specified in subsection (d) of this section and make a written report to the executive administrator on known or potential significant social or environmental concerns. Subsequently, these projects must have a favorable executive administrator's recommendation which is based upon a full environmental review during planning, as provided under §363.14 of this title.

(f) The executive administrator will advise the board concerning projects that involve major economic or administrative impacts to the applicant resulting from environmentally related special mitigative or precautionary measures from an environmental assessment under §363.14 of this title.

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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 §15.995.

This rulemaking affects Water Code, Chapter 15.

<rule>

§365.41. Loan Closing

(a) Instruments Needed for Closing. The documents which shall be required at the time of closing 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 must 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 must be created that must be separate from all other accounts and funds, as follows:

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

(ii) funds must 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 must be provided to the executive administrator;

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

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

(B) that a construction account must be created, which must 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, or if a promissory note and loan agreement is used and the rural political subdivision is a Water Supply Corporation or Sewer Service Corporation, then in lieu of an annual audit a filed Internal Revenue Service Form 990 may be provided annually so long as the balance of all outstanding loans from the board to the Water Supply Corporation or Sewer Service Corporation does not exceed \$1,000,000;

(E) that the rural political subdivision must 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 must document the adoption and implementation of an approved water conservation program for the duration of the loan, in accordance with §363.15 of this title;

(G) that the rural political subdivision must 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) if the rural political subdivision is issuing bonds or other authorized securities, 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 must 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 must 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;

(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; and

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

(b) Certified Transcript. Within 60 days of closing, the rural political subdivision must submit a transcript of proceedings relating to the debt purchased by the board which must contain those instruments normally furnished a purchaser of debt.

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

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

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

(3) the rural political subdivision must 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 must 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 must 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.

§365.43. Release of Funds

(a) Release of Funds for Planning, Design, and Permits. Prior to the release of funds for planning, design, and permits, the rural political subdivision must submit for approval to the executive administrator the following documents:

(1) a statement as to sufficiency of funds to complete the activity;

(2) certified copies of each contract under which revenues for repayment of the rural political subdivision's debt will accrue;

(3) executed consultant contracts relating to services provided for planning, design, and permits;

(4) unless funds are released under the pre-design funding option, evidence that the requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations; and

(5) other such instruments or documents as the board or executive administrator may require.

(b) Pre-design Funding. The funds needed for the total estimated cost of the engineering, planning, and design cost if the engineering feasibility report required under §363.13 of this title (relating to Preliminary Engineering Feasibility Data) and the environmental assessment required under §363.14 of this title (relating to Environmental Assessment) have been approved, the cost of issuance associated with the loan, and any associated capitalized interest will be released to the loan recipient and the remaining funds will be escrowed to the escrow agent until all applicable requirements in subsections (a) and (c) of this section and §365.23 of this title (relating to Pre-design Funding Option) have been met.

(c) Release of Funds for Building Purposes. Prior to the release of funds for building purposes, the rural political subdivision must submit for approval to the executive administrator the following documents:

(1) a tabulation of all bids received and an explanation for any rejected bids or otherwise disqualified bidders;

(2) one executed original copy of each construction contract the effectiveness and validity of which is contingent upon the receipt of board funds;

(3) evidence that the necessary acquisitions of land, leases, easements and rights-of-way have been completed or, with prior approval by the executive administrator if all acquisitions have not been completed, evidence that the applicant has the legal authority necessary to complete the acquisitions;

(4) a statement as to sufficiency of funds if additional funds are necessary to complete the project;

(5) certified copies of each contract under which revenues to the project will accrue;

(6) evidence that all requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including permits and authorizations; and

(7) other such instruments or documents as the board or executive administrator may require.

(d) Water Rights Certification. Prior to release of construction funds, the executive administrator shall make a written finding that the applicant:

(1) has the necessary water rights authorizing the applicant to appropriate and use the water that the project will provide, if the applicant is proposing surface water development; or

(2) has the right to use water that the project will provide, if the applicant is proposing groundwater development.

(e) Release of Funds for Projects Constructed Through One or More Construction Contracts. For projects constructed through one or more construction contracts, the executive administrator may approve the release of funds for all or a portion of the estimated project cost, provided all requirements of subsection (c) of this section have been met, only for the construction contract that has been approved for construction.

(f) Escrow of Funds. The executive administrator may require the escrow of an amount of project funding related to contracts which have not met the requirements of subsection (c) of this section at the time of loan closing.

(g) Release of Funds in Installments. Funds may be released to rural political subdivisions in installments and pursuant to the provisions of this section.

§365.44. Loan Agreements for Nonprofit Water Supply or Sewer Service Corporations

The board may provide financial assistance to a nonprofit water supply or sewer service corporation by entering into a loan agreement in accordance with §15.996 of the Water Code.

§365.45. Engineering Design Approvals

A rural political subdivision must obtain executive administrator approval of contract documents, including engineering plans and specifications, prior to receiving bids and awarding the contract. The contract documents must be consistent with the engineering information submitted with the application and must contain the requirements in §363.41 of this title (relating to Engineering Design Approvals).



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May 27, 2024

Office of General Counsel
Attn: Ashley Harden
Texas Water Development Board (TWDB)
P.O. Box 13231
Austin, Texas 78711-3231

Via Email: rulescomments@twdb.texas.gov

Re: Proposed Rulemaking for 31 TAC Chapter 365 Related to the Rural Water Assistance Fund.

Dear Ms. Harden:

The Texas Rural Water Association (“TRWA”) thanks the Texas Water Development Board (TWDB) for working with us to help small rural political subdivisions access state funds. TRWA believes the updating, and funding, of the Rural Water Assistance Fund (RWAF) will pave the way for a more level playing field for small rural systems to compete for state dollars for infrastructure repairs and upgrades.

1. Introduction.

The TRWA is a nonprofit trade association whose membership includes more than 850 retail water and sewer utilities that collectively provide potable water and wastewater services to approximately three million Texan residents. Most of our members are non-profit water supply corporations (WSCs) and sewer service corporations (SSCs), water districts, and small cities. TRWA relies upon its experience and background in making the following observations and comments on the proposed rulemaking for 31 TAC Chapter 365 related to the RWAF. TRWA requests changes to the RWAF rules that would remove impediments to small rural systems applying for RWAF loans and grants. Specifically, TRWA requests that TWDB remove certain loan application and closing requirements that are not required by state law, thereby creating a more streamlined process for Rural Political Subdivisions to obtain funding.

2. TRWA Rule Comments.

TRWA commends the TWDB and its staff on updating the RWAF to implement the directive of the Texas Legislature set forth in Senate Bill 28 to fund rural projects. TRWA appreciates being a partner in this process and is supportive of the rulemaking. TRWA's requested changes to the current and proposed rules are to make the RWAF more accessible and useful to small rural water and wastewater systems.

One of the biggest pain points TRWA hears from our member systems is their difficulty with obtaining funding from government sources that provide low interest loans and grants, and their need for assistance with this process. TRWA was involved with the formation of and amendments to RWAF. The goal was to create a state fund with all the flexibility and capabilities of other TWDB funds, which can act as a set-aside for small systems where they don't have to compete for funding with the large utilities. Another goal was for RWAF to be simpler to access, without all the requirements tied to other TWDB loan programs and federal funding programs.

TRWA understands that process conformity across the different TWDB loan programs leads to higher efficiency. However, by conforming processes, the TWDB may be adding impediments to rural systems seeking to access RWAF funding, which would be counterproductive to the goals of the RWAF.

The current RWAF rule requires a Rural Political Subdivision to certify in its loan application that it is compliant with all applicable federal laws, rules, and regulations as well as the laws of this state and the rules and the regulations of the TWDB, *see 31 TAC section 365.22(c)(1)(L)(vi)*; that it will submit a Preliminary Engineering Feasibility Report, *see 31 TAC section 365.22(c)(2)*; and an Environmental Assessment, *see 31 TAC section 365.22(c)(3)*. In closing a RWAF loan, the RWAF rule also requires a Rural Political Subdivision to certify that it will annually submit a full financial audit to TWDB for the life of its RWAF loan, *see 31 TAC 365.41(a)(2)(D)*; disclose specified financial information and events on an ongoing basis substantially in the manner of the Securities and Exchange Commission (SEC) rule 15c2-12, *see 31 TAC*

365.41(a)(2)(I); and produce an opinion from its attorney which is acceptable to the TWDB executive administrator, *see 31 TAC 365.41(a)(5)*. These requirements may not be strictly necessary, or required by statute, and may deny small systems access to RWAF funding, which is counterproductive to the goals of the Fund. TRWA asks that the TWDB consider amending these rules to remove federal requirements not tied to state funds, and other impediments not otherwise required by state law as further set forth below.

A. Removing Federal Requirements for Small System Projects under RWAF.

The RWAF rules require a Rural Political Subdivision to submit a Preliminary Engineering Feasibility Report and an Environmental Assessment as part of its loan application. These are requirements for large and federally funded projects that may add unnecessary burden and complication for small rural projects. Requiring both a Preliminary Engineering Feasibility Report and an Environmental Assessment also exponentially increases the cost of RWAF applications, which may be disproportionate to the amount of funding being requested. Both these requirements necessitate the retention of costly professionals. TRWA requests that these requirements be omitted from the RWAF application process.

B. Providing an Alternative to the Certified Annual Financial Statements Requirement for WSCs and SSCs.

The RWAF rule requires all Rural Political Subdivisions to annually submit a full financial audit to TWDB for the life of its RWAF loan, *see 31 TAC 365.41(a)(2)(D)*. Unlike water districts and small cities, WSCs and SSCs are not legally required to perform annual audits, although some opt to do so. Requiring an annual audit would force WSCs and SSCs to incur a significant additional annual expense, conservatively estimated to be between \$10,000-\$20,000 for a small or midsize system. Further, rural systems may have trouble locating and retaining an accounting firm that performs these types of audits. Therefore, the TRWA suggests that the RWAF rule be amended to provide that WSCs and SSCs may instead submit annual certified financial statements.

**C. RWAF Closing Requirements of SEC 15c2-12 Disclosure and Legal Review
Shouldn't apply to Water Supply and Sewer Service Corporations.**

When closing a RWAf loan, all Rural Political Subdivisions would be required to certify that they will disclose financial information and events, on an ongoing basis, substantially in the manner of the Securities and Exchange Commission (SEC) rule 15c2-12, *see 31 TAC 365.41(a)(2)(I)*. This disclosure requirement specifically relates to municipal bonds and has little bearing upon a WSC or an SSC; therefore, they should be exempted from this requirement.

Further, TRWA suggests that the TWDB lower the cost of the closing of the RWAf loan or grant by omitting the requirement for a corporation to produce an opinion from its attorney which is acceptable to the TWDB executive administrator, pursuant to 31 TAC 365.41(a)(5). Requiring these actions of WSCs and SSCs seems to contradict language in Section 15.996(c) of the Texas Water Code which specifically excludes a WSC or SSC from the requirement to retain, or employ, a financial advisor or a bond counsel to apply for a loan under chapter 15 of the Water Code.

**D. Making RWAf Financing Available to Rural Political Subdivisions with
Compliance Issues.**

The way the RWAf rules are currently written, RWAf financing is not available to Rural Political Subdivisions that have compliance issues. A RWAf loan or grant application requires certification that a system is currently, and will remain, in compliance. TRWA believes this may be too limiting.

One of the main reasons a system seeks financing is to fix a problem that results in an enforcement action. TRWA understands that there are State Revolving Funds (SRF funds) for this purpose; however, obtaining SRF funds can be difficult and take several funding cycles. The SRF program is also oversubscribed. Often qualifying systems, with a true need for funds to bring their systems back into compliance with TCEQ and EPA rules, do not score high enough to qualify for SRF funds the first time they apply. TRWA requests that RWAf funding be made available to Rural Political Subdivisions to resolve a compliance issue, or to address the issue on an interim basis, while the system is waiting to receive SRF or other longer-term funds that may have a grant component or more favorable interest rate.

E. Adopting Rules to Implement the Interim Financing Provision in the Law.

One of the stated uses for RWAF funding is for interim financing of construction projects, *see 31 TAC Section 365.3(a)(1)(G)*. The RWAF rules allow interim funding; however, there is no provision for an expedited application process to accommodate this use. Interim financing is a tool that can bring relief to small rural communities sooner, and reduce project costs, by enabling a system to start a project sooner rather than later, as they wait to qualify for more favorable funding options. Therefore, TRWA also requests the TWDB to promulgate rules that would implement an expedited loan application process for interim funding.

In conclusion, TRWA appreciates the opportunity to comment on these rules and welcomes further discussion about ensuring that the RWAF rules work optimally for small rural water and wastewater systems.

Best Regards,

A handwritten signature in cursive script that reads "Lara Zent". The signature is written in black ink and is positioned above a horizontal line.

Lara Zent

TRWA Executive Director and General Counsel