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AGENDA ITEM MEMO

BOARD MEETING DATE: August 15, 2024

TO: Board Members

THROUGH: Bryan McMath, Interim Executive Administrator
Ashley Harden, General Counsel
Jessica Peña, Deputy Executive Administrator, Water Supply & Infrastructure
Rebecca Trevino, Chief Financial Officer

FROM: Marvin Cole-Chaney, Director of Program Administration and Reporting
T. Clay Schultz, Ph.D., Director, Regional Water Project Development
Joe Koen, Manager, Regional Water Project Development

SUBJECT: Proposed rulemaking for 31 Texas Administrative Code Chapters 363 and 375 related to the Water Loan Assistance Fund and the Texas Water Development Board's review and approval of design criteria for plans and specifications for sewage collection, treatment, and disposal systems

ACTION REQUESTED

Consider authorizing the publication of proposed amendments to 31 Texas Administrative Code Chapters 363 and 375 relating to the Water Loan Assistance Fund and the Texas Water Development Board's (TWDB) review and approval of design criteria for plans and specifications for sewage collection, treatment, and disposal systems.

BACKGROUND

Chapter 363 contains the agency's programmatic rules related to the Water Loan Assistance Fund ("WLAF"). The proposed amendments will implement legislation, clarify requirements for borrowers, and provide consistency with TWDB's general financial assistance program's rules.

As a result of the TWDB's Sunset review for the 2022-2023 Review Cycle, 88th Legislative Session, the Texas Sunset Advisory Commission adopted a recommendation that the legislature authorize TWDB to implement a risk-based approach to project review. Prior to the 88th legislative session and the passage of TWDB's Sunset legislation, House Bill (HB) 1565, the agency was required by Texas Water Code § 17.276 to review and approve or disapprove plans and specifications for all wastewater projects being funded by the TWDB.

Our Mission

Leading the state's efforts
in ensuring a secure
water future for Texas

Board Members

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

The agency's review and approval ensured compliance with design criteria and permit conditions as well as programmatic requirements.

HB 1565 amended Texas Water Code § 17.276 so that the Board by rule may adopt procedures allowing the use of different standards of review and approval of design criteria for plans and specifications for wastewater systems.

The rules require an individualized assessment that applies risk-based considerations to each project associated with the plans and specifications, including:

- (1) any potential financial risk associated with the project;
- (2) any risk to public health associated with the project; or
- (3) other relevant financial considerations associated with the project.

KEY ISSUES

Related to the WLAF amendments, the following are proposed:

This rulemaking proposes an amendment to implement Senate Bill 28, Senate Bill 30, and Senate Joint Resolution 75's by providing an ability to prioritize and provide grant funding to water conservation projects using funds from the Texas Water Fund.

This rulemaking proposes an amendment to add definitions for a community water system, a rural political subdivision, the Water Infrastructure Fund (WIF) and the WLAF.

This rulemaking proposes various amendments to clarify requirements for borrowers, modernize the rules language, and provide consistency with TWDB's general financial assistance program's rules.

Related to the Risk-Based Reviews, these proposed rules implement HB 1565 by proposing procedures for an alternative risk-based standard of review and approval for plans and specifications for wastewater systems.

TWDB staff conducted a risk assessment based on the criteria laid out in HB 1565, and has developed an alternate review process with the following criteria:

- A) The applicant's internal risk score rating is 2B or higher; and
- B) The design scope is limited to in-situ replacement or rehabilitation of existing facilities, or new gravity sewer lines and manholes, and project work is not located within the Edwards Aquifer recharge zone; or the applicant has approval authority granted by the Texas Commission on Environmental Quality (TCEQ) for collection systems pursuant to 30 Texas Administrative Code (TAC) §217.8.

TWDB's alternative review standard will rely on the entity's design engineer to certify that the plans and specifications for qualifying projects are in substantial compliance with all the requirements of 30 TAC Ch. 217 (Design Criteria for Domestic Wastewater Systems) or accept approvals conducted by an authority or city with approval authority granted by the TCEQ for collection systems. TWDB staff will conduct full programmatic reviews for all plans and specifications funded by the TWDB.

In preparation of the risk-based review standard, TWDB staff has drafted revisions to the Clean Water State Revolving Fund Loan Program Guidance Manual (TWDB-0100), Texas Water Development Fund Program Guidance Manual (TWDB-0140) and Plans and Specifications Design Submittal Form (TWDB-0300).

As recognized during the agency's Sunset review, the risk-based alternative review process is intended to reduce review times and workload for TWDB staff with minimal impact to financial and public safety risks.

RECOMMENDATION

The Executive Administrator recommends authorizing the publication of amendments to 31 Texas Administrative Code Chapters 363 and 375 relating to the TWDB's review and approval of design criteria for plans and specifications for sewage collection, treatment, and disposal systems.

Attachments:

1. Proposed rulemaking to be filed with Texas Register: 31 Texas Administrative Code §§ 363.2 and 363.41.
2. Proposed rulemaking to be filed with Texas Register: 31 Texas Administrative Code § 375.82.

The Texas Water Development Board (TWDB) proposes amendments to 31 Texas Administrative Code (TAC) §§363.2, 363.12, 363.13, 363.14, 363.17, 363.19, 363.33, and 363.41.

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

The TWDB proposes amendments to 31 TAC Chapter 363, containing the agency's rules related to the Financial Assistance Programs, to implement legislative changes from Senate Bill (SB) 28, SB 30, and SJR 75 by modernizing the language, providing consistency with TWDB's general financial assistance programs' rules, and clarifying requirements for borrowers for the water loan assistance program.

The TWDB proposes to amend the rules to 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.

In addition, the 88th Texas Legislature enacted House Bill 1565, amending Tex. Water Code §17.276(d), Action on Application, to add new subsections relating to TWDB's review and approval or disapproval plans and specifications for all wastewater projects funded by the TWDB. The new legislation allows the Board to adopt, by rule, an alternative standard of review and approval of design criteria for plans and specifications for sewage collection, treatment, and disposal systems.

This rulemaking includes substantive and non-substantive changes and updates to make this chapter more consistent with TWDB rules and to clarify requirements for TWDB borrowers.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Section 363.2. Definitions of Terms.

The proposed amendment adds the definition of community water system consistent with 30 TAC Chapter 290, Subchapter D.

The proposed amendment adds the definition of rural political subdivision to reflect the amendment of §365.2(6) and includes as a rural political subdivision those municipalities with a population of 10,000 or less.

The proposed amendment adds the definition of risk-based review to implement HB 1565. The proposed amendment allows the use of different standards of review and approval of design criteria for plans and specifications for sewage collection, treatment, and disposal systems.

The proposed amendment adds the definition WIF for the water infrastructure fund for Texas.

The proposed amendment adds the definition WLAF for the water loan assistance fund for Texas.

The remaining sections in §363.2 are proposed to be renumbered to accommodate the addition of §363.32(9).

Section 363.12. General, Legal, and Fiscal Information.

The proposed amendment updates the financial requirements for applicants receiving grant funding to make the requirements consistent with other TWDB rules.

Section 363.13. Preliminary Engineering Feasibility Report.

The proposed amendment adds authority for the board to waive or modify the requirements of the preliminary engineering feasibility report for programs or categories of applications for the agency's financial assistance programs.

Section 363.14. Environmental Assessment.

The proposed amendment adds authority for the board to waive or modify the requirements of the environmental assessment for programs or categories of applications for the agency's financial assistance programs.

Section 363.17. Grants from Water Loan Assistance Fund.

The proposed amendment adds water conservation projects as eligible projects to receive grant funds from the water loan assistance fund and adds the definition of conservation for those projects.

The proposed amendment updates outdated references to other titles and sections of the TAC and modernizes the rule language.

Section 363.19. Priority of Projects.

The proposed amendment clarifies that this section only applies to water infrastructure fund projects.

Section 363.33. Interest Rates for Loans and Purchase of Board's Interest in State Participation and Board Participation Projects.

The proposed amendments update the title of the rule, reflecting that the rule is for setting interest rates for certain of the Board's state financial assistance programs, modernize the rule language, and update how the Board sets interest rates for financial assistance to better align with the process used for other programs offered by the Board.

Section 363.41. Engineering Design Approvals.

The proposed amendment seeks to authorize the risk-based review method of review of plans, specifications, and related documents for certain sewage collection, treatment, and disposal system projects that are compliant with existing state statutes and good public health engineering practices pursuant to §17.276(d).

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 state or local governments as the rules are necessary to implement legislation and participation in TWDB's financial assistance programs is 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 amended to reduce the burden or responsibilities imposed on regulated persons by the rule; are necessary to protect water resources of this state as authorized by the Texas Water Code; and are necessary to protect the health, safety, and welfare of the residents of this state.

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 eligibility, requirements, and methodology for TWDB borrowers. 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 TWDB financial assistance programs 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 eligibility, requirements, and methodology for TWDB borrowers.

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 §§15.011, 15.102, 15.439, 15.537, 15.977, 17.276, and 17.9225. 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 eligibility, requirements, and methodology for TWDB borrowers. The proposed rules would substantially advance this stated purpose by aligning the rule’s definitions and permissible use of funds with Water Code, Chapter 15, by ensuring consistency with current law and improving the effectiveness of the financial assistance programs.

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 implements the applicable financial assistance programs.

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 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 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 the Texas Register. Include "363.2, 363.12, 363.13, 363.14, 363.17, 363.19, 363.33, and 363.41" 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, 15.439, 16.342, and 16.4021. Additionally, this rulemaking is adopted under the authority of Texas Water Code Chapters 15, 16, and 17.

This rulemaking affects Water Code, Chapters 15, 16, and 17.

<rule>

§363.2. Definitions of Terms.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in the Texas Water Code, Chapter 15, 16 or 17, and not defined here shall have the meanings provided by the appropriate Texas

Water Code chapter.

(1) Applicant--The entity applying for financial assistance, including the entity that receives the financial assistance, the entity that owns the project funded under this chapter, or an entity authorized to act on behalf of the applicant.

(2) Alternative Delivery Guidance--A document prepared by the Board after public review and comment and reviewed periodically that identifies alternative methods of project delivery available to applicants for financial assistance and the requirements for utilizing an alternative delivery method.

(3) Board--Texas Water Development Board.

(4) Building--Erecting, building, acquiring, altering, remodeling, improving, or extending a water supply project, treatment works, or flood control measures.

(5) Certification of trust--An instrument executed by a home-rule municipality pursuant to Chapter 104, Local Government Code, governing the management of the loan proceeds in accordance with §114.086, Texas Property Code.

(6) Closing--The time at which the requirements for loan closing have been completed under §363.42 of this title (relating to Loan Closing) and an exchange of debt for delivery of funds to either the applicant, an escrow agent bank, or a trust agent has occurred.

(7) Commission--Texas Commission on Environmental Quality.

(8) Commitment--An offer by the board to provide financial assistance to an applicant who timely fulfills the conditions required in a board resolution.

(9) Community Water System – Has the meaning assigned by 30 TAC §290.38.

(10) [(9)] Construction account--A separate account created and maintained for the deposit of loan funds and utilized by the applicant to pay eligible expenses of the project.

(11) [(10)] Corporation--A nonprofit water supply corporation created and operating under Texas Water Code, Chapter 67.

(12) [(11)] Debt--All bonds, notes, certificates, book-entry obligations, and other obligations authorized to be issued by any political subdivision.

(13) [(12)] Department--Texas Department of State Health Services.

(14) [(13)] Escrow account--A separate account maintained by an escrow agent for the board's deposit of escrowed funds until such funds are eligible for release to the construction account.

(15) [(14)] Escrow agent--Any of the following:

(A) a state or national bank designated by the comptroller as a state depository institution in accordance with Texas Government Code, Chapter 404, Subchapter C;

(B) a custodian of collateral as designated in accordance with Texas Government Code, Chapter 404, Subchapter D; or

(C) a municipal official responsible for managing the fiscal affairs of a home-rule municipality in accordance with Local Government Code, Chapter 104.

(16) [(15)] Executive administrator--The executive administrator of the board or a designated representative.

(17) [(16)] Financial assistance--Loans, grants, or state acquisition of facilities by the board pursuant to the Texas Water Code, Chapters 15, Subchapters B, C, E, G, H, O, P, and Q; Chapter 16, Subchapters E, and F; Chapter 17, Subchapters D, F, G, I, K, and L; and Chapter 36, Subchapter L.

(18) [(17)] Grants--Financial assistance provided by the board for which repayment is not required.

(19) [(18)] Innovative technology--Nonconventional methods of treatment such as rock reed, root zone, ponding, irrigation or other technologies which represent a significant advance in the state of the art.

(20) [(19)] Legislative Designation--A designation made by the legislature in accordance with §16.051(f) and (g), Texas Water Code.

(21) [(20)] Municipal use in gallons per capita per day--The total average daily amount of water diverted or pumped for treatment for potable use by a public water supply system. The calculation is made by dividing the water diverted or pumped for treatment for potable use by population served. Indirect reuse volumes shall be credited against total diversion volumes for the purpose of calculating gallons per capita per day for targets and goals developed pursuant to a water conservation plan.

(22) [(21)] Pre-design commitment--A commitment by the board prior to completion of planning or design pursuant to §363.16 of this title (relating to Pre-design Funding Option).

(23) [(22)] Private placement memorandum--A document functionally similar to an official statement used in connection with an offering of municipal securities in a private placement.

(24) [(23)] Release--The time at which funds are made available to the loan or grant recipient or to a state participation recipient pursuant to a master agreement.

(25) Risk-Based Review-- Method of review of plans, specifications, and related documents for sewage collection, treatment, and disposal system projects that are compliant with existing state statutes and good public health engineering practices pursuant to Texas Water Code §17.276.

(26) 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 [municipality with a service area of 10,000 or less in population or that otherwise qualifies for financing from a federal agency or a county in] which is located in an [no] urban area with a population of more than [exceeds] 50,000 [in population];

(27) [(24)] SWIFT--The state water implementation fund for Texas.

(28) [(25)] SWIRFT--The state water implementation revenue fund for Texas.

(29) [(26)] Water Plan--The current state water plan prepared and adopted in accordance with Texas Water Code, §16.051.

(30) WIF--The water infrastructure fund.

(31) WLAF--The water loan assistance fund.

§363.12. General, Legal, and Fiscal Information.

An application will be in the form and in numbers prescribed by the executive administrator.

(1) The executive administrator may request any additional information needed to evaluate the application and may return any incomplete applications.

(2) The following information is required on all applications to the board for financial assistance to be considered an administratively complete application:

(A) General, fiscal and legal information required includes:

(i) the name and address of the political subdivision;

(ii) a citation of the law under which the political subdivision operates and was created;

(iii) the total cost of the project;

(iv) the amount of financial assistance being requested;

(v) a description of the project;

(vi) the name, address, e-mail, and telephone number of the authorized representative, engineer and any other consultant(s);

(vii) for financial assistance requiring repayment, the source of repayment and the status of legal authority to pledge selected revenues;

(viii) for financial assistance requiring repayment, the financing plan for repaying the total cost of the project;

(ix) the political subdivision's default history;

(x) an audit of the applicant for the preceding year prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant, unless an alternative method of establishing a reliable accounting of the financial records of the applicant is approved by the executive administrator [the most recent annual financial statements and latest monthly and year-to-date financial reports for the General Fund and Utility Fund of the political subdivision];

(xi) a certified copy of a resolution of the political subdivision's governing body requesting financial assistance from the board, authorizing the submission of the application, and designating the authorized representative for executing the application, and for appearing before the board;

(xii) a notarized affidavit from the authorized representative stating [that]:

(I) for a political subdivision, the decision to request financial assistance from the board was made in a public meeting held in accordance with the Open Meetings Act (Texas Government Code, Chapter 551);

(II) the information submitted in the application is true and correct according to the best knowledge and belief of the representative;

(III) the applicant has no litigation or other proceedings pending or threatened against the applicant that would materially adversely affect the financial condition of the applicant or the ability of the applicant to issue debt;

(IV) all [the applicant has no] pending, threatened, or outstanding judgments, orders, fines, penalties, taxes, assessment or other enforcement or compliance issue of any kind or nature by EPA, Texas Commission on Environmental Quality, Texas Comptroller of Public Accounts, Texas Secretary of State, or any other federal, state or local government[, except for such actions identified in the affidavit];

(V) the applicant is, or will become, in compliance with all of its material contracts; and

(VI) the applicant is and will remain during the term of any financial assistance received from the board, in compliance with all applicable federal laws, rules, and regulations as well as the laws of this state and the rules and regulations of the board.

(xiii) any special request for repayment structure that reflects the particular needs of the political subdivision.

(B) Preliminary Engineering feasibility report. An applicant shall submit an engineering

feasibility report in accordance with §363.13 of this title (relating to Preliminary Engineering Feasibility Report).

(C) Environmental assessment. An applicant shall submit an environmental assessment in accordance with §363.14 of this title (relating to Environmental Assessment).

(D) Required water conservation plan. An applicant shall submit a water conservation plan prepared in accordance with §363.15 of this title (relating to Required Water Conservation Plan).

(E) Required water loss audit. An applicant that is a retail public utility that provides potable water shall submit its most recent water loss audit in accordance with §358.6 of this title (relating to Water Loss Audits), unless it has previously been submitted.

(F) Funding from other sources. If additional funds are necessary to complete the project, or if the applicant has applied for and/or received a commitment from any other source for the project or any aspect of the project, an applicant shall submit a listing of those sources, including total project costs, financing terms, and current status of the funding requests.

(G) Additional application information. An applicant shall submit any additional information requested by the executive administrator as necessary to complete the financial, legal, engineering, and environmental reviews.

§363.13. Preliminary Engineering Feasibility Report.

(a) An Applicant shall submit copies of a preliminary engineering feasibility report, signed and sealed by a professional engineer registered in the State of Texas. The report, based on guidelines provided by the executive administrator, shall provide:

- (1) a description and purpose of the project;
- (2) the entities to be served and current and future population;
- (3) the cost of the project;
- (4) a description of alternatives considered and reasons for the selection of the project proposed;
- (5) sufficient information to evaluate the engineering feasibility of the project;
- (6) maps and drawings as necessary to locate and describe the project area; and
- (7) a general description of the existing system.

(b) The executive administrator may request additional information or data as necessary to evaluate the project.

(c) The board may waive or modify the requirements of this section for any program or

category of applications covered by this subchapter.

§363.14. Environmental Assessment.

(a) Definitions of Terms. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Environmental regulation--The acts, statutes, or policies listed in subsection (c)(1) of this section and the acts, statutes, or policies identified by the executive administrator pursuant to subsection (c)(2) of this section.

(2) Regulatory agency--The governmental agency with the jurisdiction to review compliance with or to enforce an environmental regulation.

(3) Preliminary project information--The information submitted by an applicant to the executive administrator pursuant to subsection (e) of this section.

(4) Affected environmental regulation--An environmental regulation with which a proposed project potentially may not conform as determined by the executive administrator under this section after reviewing the preliminary project information or the environmental assessment document, if any.

(5) Unaffected environmental regulation--An environmental regulation with which a proposed project will likely conform as determined by the executive administrator under this section after reviewing the preliminary project information or the environmental assessment document, if any.

(b) Applicability and Purpose. This section applies to projects funded by the board under any of the programs identified in §363.1 of this title (relating to Scope of Subchapter). The purpose of this section is to provide the executive administrator with sufficient information to inform the board whether a proposed project has been adequately reviewed by the regulatory agencies and whether such review provides a reasonable level of certainty that the project will comply with the environmental regulations.

(c) Applicable Environmental Regulations.

(1) Uniform requirements. Prior to commitment of funds, the proposed project shall be coordinated, to the extent appropriate under the three-level review of subsection (f) of this section, with the regulatory agencies to determine the degree of compliance with the following:

(A) Texas Antiquities Code as administered by the Texas Historical Commission;

(B) Federal Endangered Species Act as administered by the United States Fish and Wildlife Service;

(C) resource protection under the Texas Parks and Wildlife Code and Chapter 57 of this title (relating to Fisheries), as administered by the Texas Parks and Wildlife Department; and

(D) Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act as administered by the United States Department of the Army, Corps of Engineers.

(2) Conditional requirements. Proposed projects under certain circumstances may impact other environmental acts, statutes, or policies requiring additional coordination, to the extent appropriate under subsection (f) of this section. The executive administrator may require an applicant to perform such additional coordination for the following environmental regulations:

(A) Migratory Bird Treaty Act as administered by the United States Fish and Wildlife Service;

(B) National Flood Insurance Act of 1968 as administered by the local floodplain protection manager;

(C) state land easements under Texas Natural Resources Code, Chapter 51, as administered by the Texas General Land Office;

(D) parks and recreational lands pursuant to the Texas Parks and Wildlife Code, Chapter 26;

(E) marl, sand, gravel, shell, and mudshell permits under the Texas Parks and Wildlife Code, Chapter 86, and Chapter 57 of this title as administered by the Texas Parks and Wildlife Department; and

(F) any other act, statute, or policies deemed applicable by the executive administrator.

(d) Filing of Assessment or Statement. If an agency of the state or federal government prepares or requires an environmental assessment or an environmental impact statement to be prepared for substantially the same project proposed for board financial assistance, then the applicant shall file with the executive administrator the assessment or the statement prepared or required by the state or federal government, and a copy of the state or federal agency's issued decision document or permit in lieu of the information or environmental assessment prepared in accordance with subsections (e) or (f) of this section. Nothing herein shall be construed to require an applicant to prepare an environmental assessment when the information required under this section is currently available in an environmental assessment, environmental impact statement, or other documents prepared in connection with the same project.

(e) Preliminary Project Information. Prior to or concurrently with the submission of an application, the applicant shall submit the information set forth in this section to enable the executive administrator to determine the level of review for the proposed project. Information submitted pursuant to and sufficient to comply with §363.16(d) of this title (relating to Pre-design Funding Option) shall be sufficient to comply with this provision. The applicant shall submit:

(1) a written description of the proposed project;

(2) a map of sufficient detail to accurately depict the location of each project element; and

(3) preliminary data on any known environmental, social, and permitting issues which may affect the alternatives considered for implementation of the project or which may impact the existing environment in a manner that is the subject of any environmental regulation.

(f) Environmental Review. Based on the preliminary project information and any information readily available to the executive administrator, the executive administrator shall require the applicant to comply with the provisions of this subsection for either categorical exclusion review, mid-level review, or full review depending on the complexity of the project and its environmental impacts. Upon submission by the applicant of the information required by this subsection, the executive administrator shall summarize all relevant environmental data and any regulatory agency comments and public comments received regarding the proposed project in a memorandum. Such memorandum shall include a finding regarding the proposed project's compliance with the environmental regulations and may include a recommendation on any avoidance, minimization, or mitigation measures recommended by a regulatory agency through this review process. Such memorandum shall be submitted to and considered by the board with the application for financial assistance.

(1) Categorical Exclusion. If the executive administrator determines from the preliminary project information that the proposed project would not appear to cause significant environmental impacts under any environmental regulation, the executive administrator shall notify all regulatory agencies of the executive administrator's intent to exclude the proposed project from further environmental review. Unless an objection is received from any regulatory agency within 30 days after such notification is sent by the executive administrator, the executive administrator shall notify the applicant that the proposed project is categorically excluded from further environmental review requirements.

(2) Mid-level Review. If the executive administrator determines from the proposed project information that the proposed project would appear to cause only significant environmental impacts which are limited in number or scope or which may be readily avoided, minimized, or mitigated, the proposed project shall be excluded from further review of unaffected environmental regulations while additional information for adequate review of affected environmental regulations shall be required in accordance with the following procedures.

(A) The executive administrator shall:

(i) notify the regulatory agencies administering the unaffected environmental regulations of the executive administrator's intent to exclude the proposed project from further review of the unaffected environmental regulations. Unless the executive administrator receives objections to the intent to exclude the project from review by such agency within 30 days after such notification is sent, the executive administrator shall deem the proposed project as excluded from further review of such unaffected environmental regulation; and

(ii) promptly notify the applicant of the unaffected environmental regulations which shall be excluded from further environmental review, the affected environmental regulations which shall require further environmental review, and any further information required by statute or the regulatory agencies administering the affected environmental regulations for adequate

environmental review.

(B) The applicant shall then choose between one of the two following options and promptly notify the executive administrator of the option selected.

(i) The applicant shall coordinate with the regulatory agencies administering the affected environmental regulations as identified pursuant to subparagraph (A)(ii) of this paragraph, provide to the executive administrator copies of all information submitted by the applicant to such regulatory agencies, provide to the executive administrator copies of all documents received by the applicant from such regulatory agencies regarding the proposed project and, if the executive administrator has determined that it is an affected environmental regulation, documentation establishing compliance with Texas Parks and Wildlife Code, Chapter 26.

(ii) The applicant shall provide to the executive administrator the information required by the regulatory agencies administering the affected environmental regulations for their review and, if the executive administrator has determined that it is an affected environmental regulation, documentation establishing compliance with Texas Parks and Wildlife Code, Chapter 26, whereupon the executive administrator shall coordinate the project review with such regulatory agencies and provide to the applicant copies of all documents received from such regulatory agencies regarding the proposed project.

(3) Full Review. If the executive administrator determines from the proposed project information that the proposed project would appear to cause extensive significant impacts that are not readily avoided, minimized, or mitigated or would appear to involve a probable or known significant public controversy relating to environmental or social impacts, the following procedure shall apply:

(A) the applicant shall prepare an environmental assessment document which shall include all the information required by the regulatory agencies for adequate review by such agencies, a technical description of all the alternatives to the proposed project considered by the applicant, and a discussion of the proposed project's impact on environmental, social, and economic issues compared to such impacts of the alternatives considered;

(B) upon approval by the executive administrator of the environmental assessment document, the executive administrator will provide notification regarding the unaffected environmental regulations in accordance with the procedures under paragraph (2)(A) of this subsection; and

(C) the applicant shall submit the approved environmental assessment document to the regulatory agencies administering the affected environmental regulations for review and comment and provide to the executive administrator copies of all the documents received by the applicant from the regulatory agencies regarding the proposed project and, if the executive administrator has determined that it is an affected environmental regulation, documentation establishing compliance with Texas Parks and Wildlife Code, Chapter 26. Alternatively, the applicant may request that the executive administrator submit the environmental assessment document to such agencies and, upon completion of such coordination, the executive administrator shall provide to the applicant copies of all documents received from such

regulatory agencies regarding the proposed project.

(4) Project Change. If the project is changed to include areas or issues that were previously unassessed, then the environmental review process identified in this section shall be employed for such unassessed areas or issues and the executive administrator shall determine the appropriate level of review for such changed project.

(5) Review Change. If, at any time prior to the submission of an application to the board and upon reliable information, the executive administrator determines that the level of review being performed for a proposed project is inappropriate or that the determination that an environmental regulation was an unaffected environmental regulation was incorrect, the executive administrator shall promptly notify the applicant of the required level of review under this section or of the affected environmental regulation for which additional review is required.

(g) The board may waive or modify the requirements of this section for any program or category of applications covered by this subchapter.

§363.17. Grants from Water Loan Assistance Fund.

(a) The board may provide grants from the Water Loan Assistance Fund for projects that include supplying water or wastewater service to areas in which:

(1) water supply services:

(A) from a community water system[,], do not provide drinking water of a quality that meets the standards set forth by the commission in 30 TAC 290, Subchapter D [§§290.1-290.26, 30 TAC §§290.38-290.51], and any applicable standards of any governmental unit with jurisdiction over such area;

(B) from individual wells[,], after treatment[,], do not provide drinking water of a quality that meets the standards set forth by the commission in 30 TAC 290, Subchapter D [§§290.3, 290.4, 290.10, and 290.13], and any applicable standards of any governmental unit with jurisdiction over such area; or

(C) do not exist or are not provided, including a temporary interruption of service due to emergency conditions; and

(D) the financial resources are inadequate to provide water supply or sewer services that meet the standards and requirements of the commission as set forth herein; or

(2) sewer services:

(A) from any organized sewage collection and treatment facilities, do not comply with the standards and requirements set forth by the commission in 30 TAC Chapter 305;

(B) for on-site sewerage facilities, do not comply with the standards and requirements set forth by the commission in 30 TAC Chapter 285 [and 313]; or

(C) do not exist or are not provided, including a temporary interruption of service due to emergency conditions; and

(D) the financial resources are inadequate to provide water supply or sewer services that meet the standards and requirements of the commission as set forth herein; or

(3) for purposes of any federal funds for colonias deposited in the water assistance fund, such area meets the federal criteria for use of such funds.

(b) The board may also provide grants from the Water Loan Assistance Fund for projects:

(1) for which federal grant funds are placed in the loan fund;

(2) for which a specific legislative appropriation is made; or

(3) for water conservation, desalination, brush control, weather modification, and regionalization and for providing regional water quality enhancement services as defined by board rule, including regional conveyance systems.

(c) Grant funds will be administered according to the terms of an agreement between the board and the grantee.

(d) For purposes of this section, conservation means those practices, techniques, and technologies that will reduce the consumption of water, reduce the real or apparent loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

§363.19. Priority of Projects.

For WIF projects only, when [When] necessitated by a limitation of funds, the board shall give priority to applications for funds for implementation of water supply projects in the water plan by entities that:

(1) have already demonstrated significant water conservation savings; or

(2) will achieve significant water conservation savings by implementing the proposed project for which the financial assistance is sought.

§363.33. Interest Rates for Loans and Purchase of Board's Interest in State Financial Assistance Programs and Projects [Participation and Board Participation Projects].

(a) Procedure and method for setting interest rates.

(1) The executive administrator will set interest rates under this section for purchase of the board's interest in state and board participation projects or 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 or drawdown of state participation funds and not more than 45 days before the anticipated closing of the loan or state participation project 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 Texas Water Development Fund II or for rates for the purchase of the board's interest in state participation projects, the executive administrator will set the interest rate at:

(A) the rates established by the board under subsection (b) of this section;

(B) for loans funded by the board with proceeds of bonds, the interest of 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 bond; and

(C) the board may establish different interest rates for loans under this paragraph in order to facilitate a restructuring of an existing board loan that is in imminent risk of default as determined by the board.

(3) Interest rates for loans from the Water Loan Assistance Fund, or from funds from the board's sale of political subdivision bonds to the Texas Water Resources Finance Authority will be set and updated as necessary to meet changing market conditions according to the cost of funds to the board, risk factors of managing the board's loan portfolio, and market rate scales.[according to the Municipal Market Data A scale] To calculate the cost of funds, the board will weight the funds pro rata amount of funds available from each source, as applicable. The interest rate scale will include the program subsidy, if any, as determined by the board. The board may establish different interest rates for loans under this paragraph if it finds such rates are legislatively directed or are necessary to promote major water initiatives designed to provide significant regional benefit.

(b) Lending and interest rate scale. After each bond sale, or as necessary to meet changing market conditions, the board will set the interest [lending] rate scale for loans and the interest rate scale for the purchase of the board's interest in state and board participation projects based upon the cost of funds to the board, risk factors of managing the board's loan portfolio, and market rate scales. To calculate the cost of funds, the board will add new bond proceeds to those remaining bond funds that are not currently assigned to scheduled [schedule] loan closings, weighting the funds pro rata by the amount of funds available from [by dollars and true interest costs of] each source. The interest rate scale will [shall] include the program subsidy, if any, as approved by the board. The board will establish separate interest [lending] rate scales for tax-exempt and taxable loans [projects] from each of the following:

(1) loans from the Texas Water Development Fund II;

(2) loans from the Water Infrastructure Fund;

(3) purchase of the board's interest in state participation projects from the State Participation Account;

- (4) loans from the Economically Distressed Area Program Account;
- (5) if revenue bonds constitute the consideration for the purchase of the board's interest in a state participation project by a political subdivision, the revenue bonds shall bear interest at:
 - (A) the prevailing state participation interest [lending] rate, as set in subsection (b)(3) of this section;
 - (B) if there is outstanding board indebtedness related to the purchase of its state participation interest, then at the rate then in effect at the time the board provided funds, through the issuance of bonds, to participate in the project; or
 - (C) a different rate as established by the board, where no schedule for the purchase of the board's interest in the project was fixed at the time the board provided funds to participate in the project; and
- (6) loans from the SWIRFT; and [.]
- (7) loans from the WLAFF.

§363.41. Engineering Design Approvals.

(a) An applicant with a commitment of financial assistance from the board shall obtain Executive Administrator approval of contract documents, including engineering plans and specifications and bid documents, prior to receiving bids and awarding construction contracts. The applicant shall submit two copies of contract documents, which shall be as detailed as would be required for submission to contractors bidding on the work, and which shall be consistent with the engineering feasibility information submitted with the application. These contract documents may be submitted in draft form. For water supply projects requiring commission review, the applicant shall send an additional copy to the commission. The contract documents must contain the following:

- (1) provisions assuring compliance with the board's rules and all relevant statutes;
- (2) provisions providing for the political subdivision to retain a minimum of 5.0% of the progress payments otherwise due to the contractor until the building of the project is substantially complete and a reduction in the retainage is authorized by the executive administrator;
- (3) a contractor's act of assurance form to be executed by the contractor which shall warrant compliance by the contractor with all laws of the State of Texas and all rules and published policies of the board;
- (4) a high-resolution digital, searchable copy of the plans and specifications; and
- (5) any additional conditions that may be requested by the executive administrator.

(b) An applicant with a commitment of financial assistance from the board may qualify for a risk-based review pursuant to Texas Water Code, § 17.276.

(1) The EA may perform a risk-based review when:

(A) the applicant's internal risk score rating is 2B or higher; and

(B) the design scope is limited to in-situ replacement or rehabilitation of existing facilities, or new gravity sewer lines and manholes, and project work is not located within the Edwards Aquifer recharge zone; or the applicant has approval authority granted by TCEQ for collection systems pursuant to 30 TAC §217.8.

(2) Designs qualifying for a risk-based review require the following:

(A) contract documents submitted for review and approval in accordance with this section; and

(B) certification from the applicant's design engineer verifying the plans and specifications comply with 30 TAC Chapter 217 requirements and include no variances, or the entity has approval authority granted by the TCEQ for collection systems.

(3) The EA may outline additional criteria in TWDB's guidance documents. [Engineering Design Approvals for those Projects Required to use Iron or Steel Products Produced in the United States.]

(c) Engineering Design Approvals for those Projects Required to use Iron or Steel Products Produced in the United States.

(1) Except as provided by subsections (d) and (e) [(c) and (d)] of this section, this section applies to Projects with the board and resulting bid documents submitted to the board or construction contracts entered into after September 1, 2017.

(2) In this section, the following terms have the assigned meanings:

(A) Iron and steel products--Products made primarily of iron or steel that are permanently incorporated into the public water system, treatment works, agricultural water conservation Project, or flood project, including, but not limited to: lined or unlined pipes and fittings, manhole covers and other municipal castings, hydrants, tanks, flanges, pipe clamps and restraints, valves, structural steel, reinforced precast concrete, construction materials.

(B) Manufacturing Process--The application of a process to alter the form or function of materials or elements of a product in a manner that adds value and transforms the materials or elements into a new finished product functionally different from a finished product produced merely from assembling the materials into a product or elements into a product.

(C) Mechanical and electrical components, equipment, systems, and appurtenances--Include,

but are not limited to, pumps, motors, gear reducers, drives (including variable frequency drives), electric/pneumatic/manual accessories used to operate valves (such as electric valve actuators), mixers, gates, motorized screens (such as traveling screens), blowers/aeration equipment, compressors, meters, sensors, controls and switches, supervisory control and data acquisition (SCADA), membrane bioreactor systems, membrane filtration systems, filters, clarifiers and clarifier mechanisms, rakes, grinders, disinfection systems, presses (including belt presses), conveyors, cranes, HVAC (excluding ductwork), water heaters, heat exchangers, generators, cabinetry and housings (such as electrical boxes/enclosures), lighting fixtures, electrical conduit, emergency life systems, metal office furniture, shelving, laboratory equipment, analytical instrumentation, dewatering equipment, electrical supports/covers/shielding, and other appurtenances related to an electrical system necessary for operation or concealment. An electrical system includes all equipment, facilities, and assets owned by an electric utility, as that term is defined in §31.002 Utilities Code.

(D) Political subdivision--Includes a county, municipality, municipal utility district, water control and improvement district, special utility district, and other types of water districts, including those created under Texas Constitution Article III, Section 52 or Article XVI, Section 59, and nonprofit water supply corporations created and operating under Texas Water Code, Chapter 67.

(E) Produced in the United States--With respect to iron or steel products, a product for which all manufacturing processes, from initial melting through application of coatings, occur in the United States, other than metallurgical processes to refine steel additives.

(F) Project--A contract between the board and a person or political subdivision.

(3) Political subdivisions and persons with Projects funded with financial assistance from the board shall obtain Executive Administrator approval of contract documents, including engineering plans and specifications and bid documents, prior to receiving bids and awarding construction contracts. Except as provided by subsections (d) and (e) [(c) and (d)] of this section, contract documents and bid documents provided to all bidders must include language requiring that any iron or steel products produced through a manufacturing process used in the Project, be produced in the United States, specifically where funds will be used to:

(A) construct, remodel, or alter buildings, structures, or infrastructure; or

(B) supply a material for a project between the board and a person or a political subdivision; or

(C) finance, refinance, or provide money from funds administered by the board for a project.

(d) [(c)] Exemptions from subsection (c) [(b)] of this section.

(1) Section 363.41(c)(3) [363.41(b)(3)] does not apply if the board or Executive Administrator has made a determination that:

(A) iron or steel products, produced in the United States, to be used in the Project are not:

(i) produced in sufficient quantities; or

(ii) reasonably available at the time contract documents and bid documents are executed with contractors or subcontractors; or

(iii) of a satisfactory quality to be used in the Project; or

(B) the use of iron or steel products produced in the United States will increase the total cost of the Project by more than 20 percent; or

(C) complying with the use of iron or steel products as required by this section is inconsistent with the public interest.

(2) The following components are exempt from complying with §363.41(c)(3) [§363.41(b)(3)] as they are not iron or steel products:

(A) mechanical and electrical components, equipment, systems, and appurtenances; and

(B) iron or steel products that are not permanently incorporated into a Project.

(e) [(d)] Section 363.41(c) [363.41(b)] does not apply where the board has adopted a resolution approving an application for financial assistance before May 1, 2019, for any portion of financing as described by §§15.432 or 15.472, Water Code.

The Texas Water Development Board (TWDB) proposes amendment to 31 Texas Administrative Code (TAC) §375.82.

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

The 88th Texas Legislature enacted House Bill 1565, amending Tex. Water Code §17.276(d), Action on Application, to add new subsections relating to TWDB's review and approval or disapproval plans and specifications for all wastewater projects funded by the TWDB. The new legislation allows the Board to adopt, by rule, an alternative standard of review and approval of design criteria for plans and specifications for sewage collection, treatment, and disposal systems.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Section 375.82. Contract Documents: Review and Approval.

The proposed amendment seeks to authorize the risk-based review method of review of plans, specifications, and related documents for certain sewage collection, treatment, and disposal system projects that are compliant with existing state statutes and good public health engineering practices pursuant to §17.276(d).

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 state or local governments as the rules are necessary to implement legislation and participation in TWDB's financial assistance programs is 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 amended to reduce the burden or responsibilities imposed on regulated persons by the rule; are necessary to protect water resources of this state as authorized by the Texas Water Code; and are necessary to protect the health, safety, and welfare of the residents of this state.

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 eligibility, requirements, and methodology for TWDB borrowers. 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 TWDB financial assistance programs is voluntary.

LOCAL EMPLOYMENT IMPACT STATEMENT (Texas Government Code §2001.022)

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 eligibility, requirements, and methodology for TWDB borrowers.

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

§17.956. 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 eligibility, requirements, and methodology for TWDB borrowers. The proposed rules would substantially advance this stated purpose by aligning the rule's definitions and permissible use of funds with Water Code, Chapter 17, clarifying how the risk-based review analysis will be used 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 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 implements the applicable financial assistance programs, including the risk-based review.

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 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 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 the Texas Register. Include “375.82” 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 §17.276.

This rulemaking affects Water Code, Chapter 17.

<rule>

§375.82. Contract Documents: Review and Approval.

(a) Contract documents include the documents that form the construction contracts and the documents that form the contracts for alternative methods of project delivery, which may include the construction phase or other phases of the project.

(b) Unless otherwise specified by the executive administrator, an Applicant must submit at least [one paper and] one electronic copy of proposed contract documents, including the engineering plans and specifications, which must be as detailed as would be required for submission to contractors bidding on the work. The Applicant must provide the executive administrator with all contract documents proposed for bid advertising. The executive administrator will review contract documents:

(1) to ensure consistency with the approved engineering feasibility report and with approved environmental planning documents;

(2) to ensure the proposed construction drawings and specifications provide adequate information so that a contractor can bid and construct the project without additional details or directions;

(3) to ensure compliance with Commission rules at 30 TAC Chapter 217 (relating to Design Criteria for Domestic Wastewater Systems) and other applicable state and federal laws and rules;

(4) to ensure the contract documents notify the contractor about the Board's authority to audit project files and inspect during construction; and

(5) to ensure compliance with other requirements as provided in guidance forms and

documents, including any additional documentation required by EPA for equivalency projects.

(c) An applicant with a commitment of financial assistance from the Board may qualify for a risk-based review pursuant to Texas Water Code, § 17.276.

(1) The EA may perform a risk-based review when:

(A) the applicant's internal risk score rating is 2B or higher; and

(B) the design scope is limited to in-situ replacement or rehabilitation of existing facilities, or new gravity sewer lines and manholes, and project work is not located within the Edwards Aquifer recharge zone; or the applicant has approval authority granted by TCEQ for collection systems pursuant to 30 TAC §217.8.

(2) Designs qualifying for a risk-based review require the following:

(A) contract documents submitted for review and approval in accordance with this section; and

(B) certification from the applicant's design engineer verifying the plans and specifications comply with 30 TAC Chapter 217 requirements and include no variances, or the entity has approval authority granted by the TCEQ for collection systems.

(3) The EA may outline additional criteria in TWDB's guidance documents.

(d) [(c)] Other approvals. The Applicant shall obtain the approval of the plans and specifications from any other local, state, and federal agencies having jurisdiction over the project. The executive administrator's approval is not an assumption of the Applicants' liability or responsibility to conform to all requirements of applicable laws relating to design, construction, operation, or performance of the project.