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AGENDA ITEM MEMO

BOARD MEETING DATE: November 6, 2024

TO: Board Members

THROUGH: Bryan McMath, Executive Administrator
Ashley Harden, General Counsel
Rebecca Trevino, Chief Financial Officer

FROM: Jessica N. Peña, Deputy Executive Administrator, Water Supply & Infrastructure
Marshall Walters, Office of General Counsel

SUBJECT: Proposed rulemaking for 31 Texas Administrative Code Chapter 363 related to the creation of a new subchapter for the New Water Supply Fund for Texas.

ACTION REQUESTED

Consider authorizing the publication of proposed amendments to 31 Texas Administrative Code Chapter 363 relating to the creation of a new subchapter for the New Water Supply Fund for Texas.

BACKGROUND

Chapter 363 contains the agency's programmatic rules related to financial assistance programs. The proposed creation of subchapter N will implement legislation enacted by the 88th Texas Legislature under Senate Bill 28, amending the Texas Water Code Chapter 15, Texas Water Assistance Program, to undertake the financing of projects that will lead to seven million acre-feet of new water supplies by December 31, 2033.

KEY ISSUES

Related to the creation of the new subchapter, the following are proposed:

This rulemaking adds subchapter N to 31 Texas Administrative Code Chapter 363 to implement Senate Bill 28 establishing the procedures by which the TWDB will administer the New Water Supply for Texas Fund.

The rulemaking includes definition of terms, use of funds, determination of availability, including the publication of notice requesting applications, application requirements, consideration of applications, findings required and terms.

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 | Tonya R. Miller, Board Member
Bryan McMath, Executive Administrator

RECOMMENDATION

The Executive Administrator recommends authorizing the publication of proposed new rules to 31 Texas Administrative Code Chapter 363 relating to the creation of the New Water Supply for Texas Fund.

Attachment:

1. Proposed rulemaking to be filed with Texas Register 31 Texas Administrative Code §§ 363.1401-1408

The Texas Water Development Board (TWDB) proposes new rules in 31 Texas Administrative Code (TAC) Chapter 363 by adding new §363.1401, §363.1402, §363.1403, §363.1404, §363.1405, §363.1406, §363.1407, §363.1408.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED NEW RULES.

The 88th Texas Legislature enacted Senate Bill 28, amending Texas Water Code Chapter 15, Texas Water Assistance Program, to add a new subchapter creating the New Water Supply Fund for Texas. The new legislation directs the Board, by rule, to undertake to finance projects through the fund that will lead to seven million acre-feet of new water supplies by December 31, 2033.

SECTION BY SECTION DISCUSSION OF THE PROPOSED NEW RULES.

Subchapter N is added to 31 Texas Administrative Code Chapter 363

Section 363.1401. Scope

The proposed new section provides that the programs of financial assistance under Texas Water Code, Chapter 15, Subchapter C-1 will be governed by this subchapter and, unless in conflict with this subchapter, the provisions of 31 Tex. Admin. Code 363 Subchapter A will be applied to the financial assistance and projects under this subchapter.

Section 363.1402. Definition of Terms

The proposed new section includes new definitions for terms commonly used in the Subchapter to provide clarity of the terms in the context used.

Section 363.1403. Use of Funds

The proposed new section provides the ways that the Board may or may not use the Fund.

Section 363.1404. Determination of Availability

The proposed new section provides the methods that the Board will obtain the amount within the Fund and how the Board will seek New Water Supply projects.

Section 363.1405. Complete Application Requirements

The proposed new section provides what information must be included in a project application under the Fund.

Section 363.1406. Consideration of Applications

The proposed new section lists what the Board may consider when evaluating an application.

Section 363.1407. Findings

The proposed new section identifies what the Board must find when granting financial assistance for an application and the process for placing the application before the Board for approval.

Section 363.1408. Terms of Financial Assistance

The proposed new section provides what the Board must determine when granting financial assistance and limits the term length to up to 30 years.

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 because the rules will not change any substantive requirements of other entities. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code, §2001.0045 to repeal a rule does not apply. Furthermore, the requirement in §2001.0045 does not apply because these rules are necessary to implement legislation.

The TWDB invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS (Texas Government Code §2001.024(a)(5))

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as it clarifies requirements for TWDB borrowers and is necessary to implement a new financial assistance program. 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 and the requirements set forth by the rules are imposed by statute.

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 establish the procedures by which the TWDB will implement the New Water Supply for Texas Fund.

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 §15.154. 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 establish the procedures by which the TWDB will implement the New Water Supply for Texas Fund. . The proposed rule would substantially advance this stated purpose by providing the procedures and requirements associated with TWDB's implementation of the New Water Supply for Texas Fund.

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 is directed to implement the New Water Supply for Texas Fund.

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 establishes the procedures by which the TWDB will implement the Fund. 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) expand, limit, or repeal an existing regulation; or (6) increase or decrease the number of individuals subject to the rule's applicability. The proposed rule will: (1) create new regulation, that regulation being 31 Tex. Admin. Code 363 Subchapter N New Water Supply for Texas Fund; and (2) the proposed rule will positively affect the state's economy by providing a funding source for projects to identify and produce new water for the state's residents and economy.

SUBMISSION OF COMMENTS (Texas Government Code §2001.024(a)(7))

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov, or by fax to (512) 475-2053. Comments will be accepted until 5:00 p.m. of the 31st day following publication in the Texas Register. Include "Chapter 363" in the subject line of any comments submitted.

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

The new rules are 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 §15.154

This rulemaking affects Water Code, Chapter 15.

SUBCHAPTER N. NEW WATER SUPPLY FOR TEXAS FUND.

§363.1401. Scope of Subchapter N.

This subchapter shall govern the board's programs of financial assistance under Texas Water Code, Chapter 15, Subchapter C-1. Unless in conflict with the provisions of this subchapter, the provisions of Subchapter A of this chapter (relating to General Provisions) applies to projects under this subchapter.

§363.1402. Definition of Terms.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(a) Fund--The New Water Supply for Texas Fund.

(b) Brackish--Water above 1,000 milligrams per liter of total dissolved solids (TDS).

(c) New Water Supply--means only:

(1) Marine and Brackish water desalination projects;

(2) Produced water treatment projects, other than projects that are only for purposes of disposal of or supply of water related to oil and gas exploration;

(3) Aquifer storage and recovery projects;

(4) Water supply projects of any type, that result in the acquisition or delivery of water from states other than Texas to locations within Texas; and

(5) The development of infrastructure to transport water that is made available by a project listed in (1) - (4).

(d) Water Conservation--The reduction of water consumption, loss, and waste via improved efficiency, recycling, and reuse.

(e) Water Need--Has the meaning assigned by §357.10 of this Title.

(f) Water User Group-- Has the meaning assigned by §357.10 of this Title.

§363.1403. Use of Funds.

(a) The board may use the Fund for financial assistance to an eligible political subdivision for a New Water Supply project.

(b) The board may use the Fund to make transfers to eligible programs.

(c) The board reserves the right to limit the amount of financial assistance available to an individual entity.

(d) Financial assistance may not be used for expenses associated with the maintenance or operation of a New Water Supply project.

§363.1404. Determination of Availability.

(a) Periodically, or at the request of the board, the executive administrator will present to the board:

- (1) a statement of the total money available to the Fund;
- (2) a recommendation identifying the amount of money from the Fund that may be made available to eligible applicants for financial assistance, including any subsidies.

(b) The board may approve the final allocations of money from the Fund for different purposes;

(c) Upon the approval of the board, the executive administrator will publish notice requesting applications for projects, which will identify the timing for mandatory preapplication meetings, and must include:

- (1) the funds available for New Water Supply projects;
- (2) the types of projects for which applications are being solicited;
- (3) eligibility criteria;
- (4) structure of financial assistance;
- (5) the method and criteria for evaluation and approval of applications by the board;
- (6) any requirements to be applied to the use of financial assistance in addition to the requirements set forth in this chapter; and
- (7) the date by which the application must be submitted to the executive administrator.

§363.1405. Complete Application Requirements.

(a) All applications must include:

- (1) Evidence the applicant has conducted, with appropriate notice, a public hearing concerning the project;
- (2) Information, sufficient for the board's consideration of the application, regarding the intended end users of the water supply, the needs of the area to be served by the project, the expected benefit of the project to the area, the relationship of the project to the water supply needs of this state overall, and the relationship of the project to the state water plan; and
- (3) The total cost of the project, the total volume of annual water supply, the unit cost of the water supply, the reliability of the water supply, the timeline for development, and the potential impacts of the project, all of which must be developed and provided by the applicant as part of the application in accordance with all requirements of §357.34(e) of this Title (related to Identification and Evaluation of Potentially Feasible Water Management Strategies and Water Management Strategy Projects) and associated guidance

(b) Applications may include letters of support from regional water planning groups, wholesale or retail water suppliers, customers, or any other member of the public that would be affected by the project

§363.1406. Consideration of Applications.

When evaluating applications the board may consider:

- (a) Whether the project is a recommended project in the most recently adopted state water plan;
- (b) The sponsor of the project;
- (c) The availability of money or revenue to the political subdivision from all sources for the ultimate repayment of the cost of the project, including all interest;
- (d) The Water User Groups to be served by the project and the volume of water supply allocated to each;
- (e) The identified Water Needs of the benefitting Water User Groups to be served by the project;
- (f) The expected water supply benefit relative to the Water Needs associated with the Water User Group beneficiaries;
- (g) The relationship of the project to the Water Needs of the state overall as defined by §357.10;.
- (h) The relationship of the project to the state water plan; and
- (i) Any information contained in the application.

§363.1407. Findings Required.

- (a) The executive administrator must submit applications for financing under this subchapter to the board with comments concerning financial assistance. The application will be scheduled on the agenda for board consideration at the earliest practical date. The applicant and other interested parties known to the board must be notified of the time and place of such meeting.
- (b) The board may grant the application only if the board finds that at the time the application for financial assistance was made:
 - (1) The public interest is served by state assistance for the project; and
 - (2) For an application for financial assistance for which repayment is expected, the money or revenue pledged by the political subdivision will be sufficient to meet all obligations assumed by the political subdivision during the term of the financial assistance.

§363.1408. Terms of Financial Assistance.

- (a) The board must determine the amount and form of financial assistance and the amount and form of repayment.
- (b) The board will determine the method of evidence of debt.
- (c) Financial assistance from the Fund may provide for repayment terms of up to 30 years, in the board's discretion.