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AGENDA ITEM MEMO

BOARD MEETING DATE: March 31, 2026

TO: Board Members

THROUGH: Bryan McMath, Executive Administrator
Ashley Harden, General Counsel
Georgia Sanchez, Chief Financial Officer
John T. Dupnik, P.G., Deputy Executive Administrator, Water Science & Conservation

FROM: Erika Mancha, Director, Conservation and Innovative Water Technologies

SUBJECT: Proposed rulemaking for 31 TAC Chapters 358 and 363 related to water loss audit validation and mitigation plans for large municipally owned utilities

ACTION REQUESTED

Consider authorizing the publication of proposed amendments to 31 Texas Administrative Code (TAC) Chapters 358 and 363 relating to water loss audit validation and mitigation plans.

BACKGROUND

In 2025, the 89th Texas Legislature passed House Bill 29 (HB 29), codified in Texas Water Code §16.0122, which requires a municipally owned utility that provides potable water through more than 150,000 service connections, as reflected on their most recent water loss audit, to:

- (1) validate their annual water loss audits within 180 days of filing,
- (2) develop water loss mitigation plans and submit them to the Texas Water Development Board (TWDB) within one year of filing their audits,
- (3) complete a more detailed validation of their most recent water loss audit by December 31, 2030, and every 10 years thereafter,
- (4) update the mitigation plan based on the findings of the detailed validation, and
- (5) incorporate the mitigation plan into the water conservation plan and report progress of implementing the plan in the annual report.

Both the water loss validation and the detailed validation must be completed by a third party that is certified in water loss validation and follows TWDB validation guidelines.

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L'Oreal Stepney, P.E., Chairwoman | W. Brady Franks, Board Member | Ashley Morgan, Board Member
Bryan McMath, Executive Administrator

KEY ISSUES

To implement the statutory requirements, the TWDB will repeal Section 358.6 to reorganize and add a new subchapter to separate water use surveys and water loss audits into their own subchapters. The new subchapter on water loss audits will transfer and keep the same language with a few additions or updates to address HB 29.

The subchapter will include six sections on definitions, water loss audits, water loss validations, water loss thresholds, water loss enhanced technical assistance, and water loss mitigation plans.

In the definitions section, the TWDB will add and define “large municipally owned utilities,” which are the utilities impacted by HB 29. The water loss audit validation requirements will move to its own section (§ 358.12). In this new section, the TWDB will (1) clarify that water loss audit validation applies only to retail public utilities that provide potable water, (2) add validation requirements per HB 29, and (3) indicate that a HB 29 validation can also be used to meet the validation requirements when applying for financial assistance from the TWDB. In the water loss thresholds section, total water loss will be replaced with real or apparent water loss thresholds to clarify the specific thresholds being used when a retail water utility requests a water loss waiver. Additionally, a section will be added to include the water loss mitigation plan requirements per HB 29.

The TWDB will also amend 31 TAC Chapter 363, Financial Assistance Programs, to add the water loss mitigation plan requirements per HB 29 in the existing section on water conservation plans (§ 363.15).

RECOMMENDATION

To meet the statutory requirements of HB 29, the Executive Administrator recommends publishing rules as proposed.

Attachments:

1. Proposed repeal for Chapter 358.6 to be filed with *Texas Register*
2. Proposed rulemaking for Chapter 358 to be filed with *Texas Register*
3. Proposed rulemaking for Chapter 363 to be filed with *Texas Register*

The Texas Water Development Board (TWDB) proposes the repeal of 31 Texas Administrative Code (TAC) §358.6 as part of a reorganization.

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

This rulemaking implements House Bill (HB) 29 from the 89th Texas Legislative Session, codified as Texas Water Code §16.0122. HB 29 created certain new responsibilities for municipally owned utilities that provide potable water through more than 150,000 service connections. This rulemaking covers the portions of Texas Water Code §16.0122 that deal with the Texas Water Development Board's responsibilities.

In a separate filing with the *Texas Register*, the TWDB proposes new sections within 31 TAC Chapter 358, within a new Subchapter C (relating to Water Loss Audits). With that rulemaking, the TWDB proposes to reorganize the subchapter. The existing text of §358.6, with some proposed amendments, will remain in those proposed new sections.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Section 358.6. Water Loss Audits.

TWDB proposes to repeal this section to renumber the section with proposed changes to the text filed separately in this issue of the *Texas Register*.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS (Texas Government Code §2001.024(a)(4))

Ms. Georgia Sanchez, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rule. 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 because this repeal is proposed to renumber sections. 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. Georgia Sanchez 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 other stakeholders. Ms. Georgia Sanchez 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 these requirements 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 and that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to clarify requirements for TWDB borrowers and other stakeholders by better organizing these rules.

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 §16.0121. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

The TWDB invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT (Texas Government Code §2007.043)

The TWDB evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to clarify requirements for TWDB borrowers and other stakeholders. The proposed rule would substantially advance this stated purpose by reorganizing the rules in an easier to read manner.

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 certain provisions related to water loss audits and validations included in HB 29.

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 repeals certain sections for renumbering. 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. If sent via email, all public comments should be sent directly to rulescomments@twdb.texas.gov. Please do not submit comments through any third-party forms or websites. Receipt of third-party submissions cannot be guaranteed. Comments will be accepted until 5:00 p.m. of the 31st day following publication in the Texas Register. Include Chapter 358 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 §16.0121.

This rulemaking affects Water Code, Chapter 16.

<rule>

§358.6. Water Loss Audits.

The Texas Water Development Board (TWDB) proposes new 31 Texas Administrative Code (TAC) §§358.10, 358.11, 358.12, 358.13, 358.14, and 358.15.

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

This rulemaking implements House Bill (HB) 29 from the 89th Texas Legislative Session, codified as Texas Water Code §16.0122. HB 29 created certain new responsibilities for municipally owned utilities that provide potable water through more than 150,000 service connections. This rulemaking covers the portions of Texas Water Code §16.0122 that deal with the TWDB's responsibilities.

In a separate filing with the *Texas Register*, the TWDB proposes a repeal within 31 TAC Chapter 358. With this proposed rulemaking, the TWDB proposes to reorganize that chapter and add a new subchapter. The existing text of § 358.6, with some proposed amendments, will remain in the new sections proposed in this rulemaking.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Subchapter C. Water Loss Audits.

The TWDB proposes to add a new subchapter within chapter 358 to better organize the chapter.

Section 358.10 Definitions.

The TWDB proposes to include definitions for the subchapter for ease of reading. All but one of these definitions were previously included in old §358.6 with no proposed changes. The definitions are proposed to be reordered alphabetically. The TWDB proposes to add one new defined term in subsection (6) for "Large Municipally Owned Utilities." As some requirements from HB 29 only apply to certain utilities, the TWDB proposes to add a defined term for "large municipally owned utilities" to cover the applicability of those statutory requirements. This term would be defined as "A municipally owned utility, as defined by Texas Water Code §13.002, that provides potable water through more than 150,000 service connections," which directly implements the language of HB 29.

Section 358.11. Water Loss Audits.

The TWDB proposes to move previously numbered §358.6 to new §358.11. The TWDB proposes to move the defined terms to a new definitions section. The TWDB proposes to move the provisions related to water loss audit validations, water loss thresholds, and technical assistance to separate sections within the same chapter.

The TWDB proposes to update the language within new §358.11 to correct cross references for the provisions that the TWDB proposes to move. This rulemaking does not include any other changes to the text of previously numbered §358.6.

Section 358.12. Water Loss Audit Validations.

The TWDB proposes to move previously numbered §358.6(b)(5) to its own new section. The TWDB proposes to extend the deadline for water loss audit validations from 3 months to 180

days to better align with HB 29. The TWDB proposes to add the requirements from HB 29 to this rule text. The TWDB also proposes to update internal cross references and add clarifying language. New subsection (b) within this new section reflects the new requirements from HB 29.

Section 358.13. Water Loss Thresholds.

The TWDB proposes to move previously numbered §358.6(e) and (f) to their own new section related to water loss thresholds. The only proposed language changes are to change the reference to “total water loss” to reference “real or apparent water loss,” which matches agency practice and to update internal cross-references based on renumbering.

Section 358.14. Water Loss Audit Technical Assistance.

The TWDB proposes to move previously numbered §358.6(g) and (h) to their own new section related to water loss technical assistance. TWDB does not propose any changes to the language.

Section 358.15. Water Loss Mitigation Plan.

The TWDB proposes new section 358.15 to include a new requirement for water loss mitigation plans from HB 29.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS (Texas Government Code §2001.024(a)(4))

Ms. Georgia Sanchez, 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. The cost for municipally owned water utilities with more than 150,000 service connections to complete a water loss audit validation conducted by a third-party certified validator is required by legislation and is not a new requirement imposed by these rules.

These rules are not expected to result in reductions in costs to either state or local governments. These rules are not expected to have any impact on state or local revenues. The rules do not require an 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.

Although these rules themselves do not impose any requirements that would increase or decrease costs to local governments, the rules do implement legislation that could result in additional costs for certain municipally owned utilities.

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. Georgia Sanchez 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 certain municipally owned utilities and encourages better data and analysis related to water loss. Ms. Georgia Sanchez 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 these requirements 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 and that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to clarify requirements for certain municipally owned utilities and encourage better data and analysis related to water loss.

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 §16.0121. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

The TWDB invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT (Texas Government Code §2007.043)

The TWDB evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to clarify requirements for certain municipally owned utilities and encourage better data and analysis related to water loss. The proposed rule would substantially advance this stated purpose by reorganizing the subchapter in a clearer way and delineating responsibilities and duties for different utilities.

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 receives water loss audits, receives and conducts certain water loss audit validations, establishes water loss thresholds, and receives and reviews water conservation plans.

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 implements legislation that requires certain municipally owned water utilities to conduct water loss audit validations and develop water loss mitigation plans. 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.

This rule implements state legislation.

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. If sent via email, all public comments should be sent directly to rulescomments@twdb.texas.gov. Please do not submit comments through any third-party forms or websites. Receipt of third-party submissions cannot be guaranteed. Comments will be accepted until 5:00 p.m. of the 31st day following publication in the Texas Register. Include "Chapter 358" 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 §16.0121.

This rulemaking affects Water Code, Chapter 16.

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TITLE 31. NATURAL RESOURCES AND CONSERVATION PART 10. TEXAS WATER DEVELOPMENT BOARD CHAPTER 358. STATE WATER PLANNING GUIDELINES

SUBCHAPTER C. WATER LOSS AUDITS.

§358.10. Definitions.

Unless otherwise indicated, in this subchapter the following terms shall have the meanings assigned.

(1) Allowed apparent loss--A unique number for allowable apparent loss calculated for each utility.

(2) Annual real loss--A unique number calculated for each utility based on the utility's real loss on an annualized basis.

(3) Apparent loss--Unauthorized consumption, meter inaccuracy, billing adjustments, and waivers.

(4) Average system operating pressure--System operating pressure in pounds per square inch calculated using a weighted average approach as identified in the American Water Works Association M36 Manual.

(5) Executive Administrator--The executive administrator of the board.

(6) Large Municipally Owned Utility—A municipally owned utility, as defined by Texas Water Code §13.002, that provides potable water through more than 150,000 service connections.

(7) Mitigation--An action or actions taken by a retail public utility to reduce the amount of total water loss in a system. Mitigation may include a detailed water loss assessment, pipe or meter replacement, or addition or improvement of monitoring devices to detect water loss.

(8) Real loss--Loss from main breaks and leaks, storage tank overflows, customer service line breaks, and line leaks.

(9) Retail public utility or utility--A retail public utility as defined by Texas Water Code §13.002.

(10) Service connection density--The number of a retail public utility's connections on a per mile basis.

(11) Total water loss--The sum of a utility's real loss and apparent loss.

(12) Validation--The process of examining water loss audit inputs to identify and correct inaccuracies in water loss audit data and the application of methodology to evaluate and communicate the uncertainty inherent in water loss audit data.

§358.11. Water Loss Audits.

(a) A retail public utility that provides potable water shall perform a water loss audit and file with the executive administrator a water loss audit computing the utility's system water loss during the preceding calendar year, unless a different 12-month period is allowed by the executive administrator. The water loss audit may be submitted electronically.

(1) Audit required annually. The utility must file the water loss audit with the executive administrator annually by May 1st if the utility:

(A) has more than 3,300 connections; or

(B) is receiving financial assistance from the board, regardless of the number of connections. A retail public utility is receiving financial assistance from the board if it has an outstanding loan, loan forgiveness agreement, or grant agreement from the board.

(2) Audit required every five years. The utility must file the water loss audit with the executive administrator by May 1, 2016, and every five years thereafter by May 1st if the utility has 3,300 or fewer connections and is not receiving financial assistance from the board.

(3) The water loss audit must be performed in accordance with methodologies developed by the executive administrator based on the population served by the utility and taking into consideration the financial feasibility of performing the water loss audit, population density in the service area, the retail public utility's source of water supply, the mean income of the service population, and any other factors determined by the executive administrator. The executive administrator will provide the necessary forms and methodologies to the retail public utility.

(4) A water loss audit must be performed by a person who has completed water loss audit training developed by the executive administrator. The executive administrator will make such training available without charge on the agency website and may also provide such training in person or by video.

(b) The executive administrator shall determine if the water loss audit is administratively complete. A water loss audit is administratively complete if all required responses are provided, the audit is completed by a person who has been trained to conduct water loss auditing as described in subsection (a)(4) of this section, and the audit has been validated as described in §358.12 of this subchapter. In the event the executive administrator determines that a retail public utility's water loss audit is incomplete, the executive administrator shall notify the utility.

(c) A retail public utility that provides potable water that fails to submit a water loss audit or that fails to correct a water loss audit that is not administratively complete within the timeframe provided by the executive administrator is ineligible for financial assistance for water supply projects under Texas Water Code, Chapter 15, Subchapters C, D, E, F, G, H, J, O, Q, and R; Chapter 16, Subchapters E and F; and Chapter 17, Subchapters D, I, K, and L. The retail public utility will remain ineligible for financial assistance until a complete water loss audit has been filed with and accepted by the executive administrator.

(d) The executive administrator shall publicly post on the board's official website a summary of:

(1) the information included in the water audits required by Texas Water Code §16.0121(b) and §16.0121(b-1) according to category of retail public utility and according to regional water planning area;

(2) the measures taken by retail public utilities to reduce water loss; and

(3) a list of those retail public utilities receiving technical assistance as established under §358.14 of this subchapter, including details related to use of the board's financial assistance to mitigate a retail public utility's total water loss.

§358.12. Water Loss Audit Validations.

(a) A retail public utility that provides potable water required to submit a water loss audit annually as described in §358.11(a)(1)(B) of this subchapter or that is applying for financial assistance will be required to have its most current water loss audit validated within 180 days of submittal or prior to consideration of a request for financial assistance from the board, in accordance with TWDB's validation guidance. The executive administrator will validate the submitted water loss audit in conference with the retail public utility. Alternatively, the utility may elect to have the water loss audit validated by a person other than the executive administrator. Should a water loss audit be validated by a person other than the executive administrator's staff, validation must follow TWDB's validation guidelines and be performed by a person other than the person submitting the water loss audit, who has completed water loss audit validation training and is certified to conduct such validation.

(b) A large municipally owned utility required to submit a water loss audit annually as described in §358.11(a)(1) of this subchapter will be required to have its most current water loss audit for the current reporting year validated within 180 days of submittal. The validation must be conducted by someone other than the executive administrator. Validation must follow TWDB's validation guidelines and be performed by a person other than the person submitting the water loss audit, who has completed water loss audit validation training and is certified to conduct such validation. A validation conducted under this subsection can be used to satisfy the requirements of subsection (a) if done according to the deadlines in subsection (a).

§358.13. Water Loss Thresholds.

(a) The following thresholds shall apply to certain retail public utilities:

(1) For a retail public utility with a service connection density more than or equal to 32 connections per mile:

(A) Apparent loss expressed as gallons per connection per day must be less than the utility's allowed apparent loss.

(B) Real loss expressed as gallons per connection per day must be less than 30 gallons per connection per day.

(2) For a retail public utility with a service connection density less than 32 connections per mile:

(A) Apparent loss expressed as gallons per connection per day must be less than the utility's allowed apparent loss.

(B) Real loss expressed as gallons per connection per day must be less than 57 gallons per connection per day.

(3) For a utility that has a volume of wholesale water sales that flow through the retail water distribution system:

(A) Apparent loss expressed as gallons per connection per day must be less than the utility's allowed apparent loss.

(B) Real loss, expressed as gallons per connection per day and including a wholesale factor that takes into account the wholesale water volume, must be less than the applicable real loss threshold described in subsections (a)(1)(B) or (a)(2)(B) of this section.

(b) If a retail public utility meets or exceeds the real or apparent water loss threshold for that utility, the retail public utility must use a portion of any financial assistance received from the board for a water supply project to mitigate the utility's water loss. Mitigation will be in a manner determined by the retail public utility and the executive administrator in conjunction with the project proposed by the utility and funded by the board. On the request of a retail public utility, the board may waive the requirements of this subsection if the board finds that the utility is satisfactorily mitigating the utility's system water loss. The request for waiver should be addressed to the executive administrator and include information about the utility's current or planned activities to mitigate their water loss and their source of funding for that mitigation.

§358.14. Water Loss Technical Assistance.

(a) The board will provide technical assistance to retail public utilities to conduct water loss audits required to be submitted to the board and to apply for financial assistance from the board to mitigate a retail public utility's water loss.

(1) A retail public utility required to conduct and submit to the executive administrator a water loss audit in accordance with the provisions of this subchapter may request from the board assistance to:

(A) conduct a water loss audit as required by this subchapter; or

(B) apply for financial assistance from the board to mitigate a retail public utility system's total water loss, as determined by a recent water loss audit.

(2) In complying with the requirements in paragraph (1) of this subsection, the board may contract with or partner with other entities as permitted by law to conduct the water loss audit of a retail public utility or contract with or partner with other entities to assist with an eligible retail public water utility's application to the board for financial assistance to mitigate a system's total water loss, as determined by a recent water loss audit.

(b) The executive administrator shall prioritize technical assistance offered by the board according to the criteria identified in Texas Water Code §16.0121(k) including:

(1) the water loss audits submitted to the board;

(2) the population served by the retail public utility;

(3) the system integrity of the retail public utility as evidenced by the quality of data submitted in its water loss audit; and

(4) other relevant factors as determined by the executive administrator.

358.15. Water Loss Mitigation Plans.

A large municipally owned utility required to submit a water loss audit annually as described in Section 358.11(a)(1) of this subchapter will be required to develop and submit to the board a water loss mitigation plan, that meets the requirements of Texas Water Code §16.0122, not later than the first anniversary of the date the audit was filed.

The Texas Water Development Board (TWDB) proposes amendments to 31 Texas Administrative Code (TAC) §363.12 and §363.15.

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

This rulemaking implements House Bill (HB) 29 from the 89th Texas Legislative Session, codified as Texas Water Code §16.0122. HB 29 created certain new responsibilities for municipally owned utilities that provide potable water through more than 150,000 service connections, including changes to those entities' water conservation plans. This rulemaking covers the portions of Texas Water Code §16.0122 that deal with the TWDB's responsibilities.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Section 363.12. General, Legal, and Fiscal Information.

The TWDB proposes to renumber certain sections within Chapter 358 of this Title in a separate filing within this issue of the *Texas Register*. The TWDB proposes to amend this section to update a cross-reference that is renumbered in that separate filing.

Section 363.15. Required Water Conservation Plan.

The TWDB proposes to add language to §363.15 to implement HB 29. HB 29 requires large municipally owned utilities to develop water loss mitigation plans and incorporate those plans into their water conservation plans. Those utilities must also incorporate their progress in implementing that water loss mitigation plan in their annual reports. These new requirements included in Texas Water Code §16.0122 by HB 29 are proposed to be included in the TWDB's rule on water conservation plans.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS (Texas Government Code §2001.024(a)(4))

Ms. Georgia Sanchez, 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. 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.

Although these rules themselves do not impose any requirements that would increase or decrease costs to local governments, the rules do implement legislation that could result in additional costs for certain municipally owned utilities.

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. Georgia Sanchez 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 certain municipally owned utilities and encourages better data and analysis related to water loss and water conservation plans. Ms. Georgia Sanchez 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 these requirements 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 and that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to clarify requirements for certain municipally owned utilities and encourage better data and analysis related to water loss and water conservation plans.

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 §16.0121. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

The TWDB invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT (Texas Government Code §2007.043)

The TWDB evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to clarify requirements for certain municipally owned utilities and encourage better data and analysis related to water loss and water conservation plans. The proposed rule would substantially advance this stated purpose by delineating responsibilities and duties for certain utilities to clarify new requirements in statute.

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 reviews water conservation plans.

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 implements legislation that requires certain municipally owned water utilities develop water loss mitigation plans and incorporate those into their water conservation plans and report progress in implementing those water loss mitigation plans in their annual reports. 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.

This rule implements state legislation.

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. If sent via email, all public comments should be sent directly to rulescomments@twdb.texas.gov. Please do not submit comments through any third-party forms or websites. Receipt of third-party submissions cannot be guaranteed. 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 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 §16.402 and 16.4021.

This rulemaking affects Water Code, Chapter 16.

<rule>

§363.12. General, Legal, and Fiscal Information.

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

(1) (no change)

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

(A) (no change)

(B) (no change)

(C) (no change)

(D) (no change)

(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 §358.11[§358.6] of this title (relating to Water Loss Audits), unless it has previously been submitted.

(F) (no change)

(G) (no change)

§363.15. Required Water Conservation Plan.

(a) (no change)

(b) The water conservation plan required under subsection (a) of this section must be new or revised to include five-year and ten-year targets for water savings, unless the applicant has implemented an approved water conservation plan that meets the requirements of this section, and that has been in effect for less than five years. The water conservation plan shall include an evaluation of the applicant's water and wastewater system and customer water use characteristics to identify water conservation opportunities and shall set goals to be accomplished by water conservation measures. The water conservation plan shall provide information in response to the following minimum requirements. If the plan does not provide information for each minimum requirement, the applicant shall include in the plan an explanation of why the requirement is not applicable.

(1) Minimum requirements. Water conservation plans shall include the following elements:

(A) a utility profile including, but not limited to, information regarding population and customer data, water use data, water supply system data, and wastewater system data at the most detailed level of water use data currently available and in accordance with the methodology and guidance for calculating water use and conservation developed and maintained by the executive administrator in coordination with the commission under Water Code §16.403. The utility profile must include the classification of water sales and uses for the following sectors, as appropriate:

(i) residential;

(I) single-family;

(II) multi-family;

- (ii) commercial;
- (iii) institutional;
- (iv) industrial;
- (v) agricultural; and
- (vi) wholesale.

(B) specific, quantified five-year and ten-year targets for water savings to include goals for water loss programs and goals for municipal use in total gallons per capita per day and residential gallons per capita per day. As used herein, "municipal use" means the use of potable water or sewer effluent for residential, commercial, industrial, agricultural, institutional, and wholesale uses by an individual or entity that supplies water to the public for human consumption;

(C) a schedule for implementing the plan to achieve the applicant's targets and goals;

(D) a method for tracking the implementation and effectiveness of the plan;

(E) a master meter to measure and account for the amount of water diverted from the source of supply;

(F) a program for universal metering of both customer and public uses of water, for meter testing and repair, and for periodic meter replacement;

(G) measures to determine and control water loss (for example, periodic visual inspections along distribution lines; annual or monthly audit of the water system to determine illegal connections, abandoned services, etc.);

(H) a program of leak detection, repair, and water loss accounting for the water transmission, delivery, and distribution system;

(I) a program of continuing public education and information regarding water conservation;

(J) a water rate structure which is not "promotional," i.e., a rate structure which is cost-based and which does not encourage the excessive use of water;

(K) a means of implementation and enforcement which shall be evidenced by:

(i) a copy of the ordinance, resolution, or tariff indicating official adoption of the water conservation plan by the applicant; and

(ii) a description of the authority by which the applicant will implement and enforce the conservation plan;

(L) documentation that the regional water planning groups for the service area of the applicant have been notified of the applicant's water conservation plan; [and]

(M) a current drought contingency plan which includes specific water supply or water demand management measures and, at a minimum, includes[,] trigger conditions, demand management measures, initiation and termination procedures, a means of implementation, and measures to educate and inform the public regarding the drought contingency plan; and[.]

(N) for a large municipally owned utility, as that term is defined in §358.10 of this title, any water loss mitigation plan required under Texas Water Code §16.0122.

(2) Additional conservation strategies. The water conservation plan may also include any other water conservation practice, method, or technique that the applicant deems appropriate.

(c) (no change)

(d) (no change)

(e) (no change)

(f) (no change)

(g) Annual reports.

(1) Each entity that is required to submit a water conservation plan to the board or the commission, other than a recipient of financial assistance from the board, shall file a report annually not later than May 1st to the executive administrator on the entity's progress in implementing each of the minimum requirements in the water conservation plan.

(2) Recipients of financial assistance from the board shall maintain an approved water conservation plan in effect until all financial obligations to the state have been discharged and shall file a report with the executive administrator on the applicant's progress in implementing each of the minimum requirements in its water conservation plan and the status of any of its customers' water conservation plans required by contract, within one year after closing on the financial assistance and annually thereafter until all financial obligations to the state have been discharged.

(3) Annual reports prepared for the Commission providing the information required by this subsection may be provided to the board to fulfill the board's reporting requirements.

(4) A large municipally owned utility, as that term is defined in §358.10 of this title, must include in the annual report the utility's progress in implementing a water loss mitigation plan in accordance with Texas Water Code §16.0122.

(h) (no change)