

TO: Board Members

THROUGH: Dan Hardin, Interim Deputy Executive Administrator,
Water Resources Planning and Information

Rebecca Trevino, Chief Financial Officer

Ken Petersen, General Counsel, Legal Services

David Carter, Agency Contract Administrator,
Contracting and Purchasing

FROM: Matt Nelson, Manager, Regional Water Planning,
Water Resources Planning Division

SUBJECT: Resolution of Conflict Between Region C and Region D

DATE: August 7, 2013

ACTION REQUESTED

(a) Authorize the Executive Administrator to negotiate and execute a contract with the State Office of Administrative Hearings in an amount not to exceed \$15,000 for mediation services in support of conflict resolution between Regions and C and D; (b) increase the Region C and Region D Regional Water Planning Contracts for administrative costs associated with conducting public hearings and other costs of mediation in a total amount not to exceed \$17,000; and (c) transfer funds in an amount not to exceed \$32,000 from the Water Assistance Fund to the Research and Planning Fund.

BACKGROUND

The Travis County District Court (*Ward Timber, et al., v. Texas Water Development Board* Cause No. D-GN-11-00121) and the eleventh court of Appeals (No. 11-12-00030-CV) have determined that there is a conflict between the regional water plans for Region C and Region D. General Counsel briefed the Board on this topic and a conflict resolution process at the July 18, 2013 Board Meeting (Board Agenda #29, Attachment A.) At that time, staff proposed that facilitation of the conflict resolution will be mediated by the State Office of Administrative Hearings (SOAH). To conduct a mediation process, SOAH would need to execute a contract with TWDB for hourly mediation services.

Our Mission : **Board Members**

- | | | | |
|--|--|---|---|
| <p>To provide leadership, planning, financial assistance, information, and education for the conservation and responsible development of water for Texas</p> | <ul style="list-style-type: none"> : Billy R. Bradford Jr., Chairman : Joe M. Crutcher, Vice Chairman : Melanie Callahan, Executive Administrator | <ul style="list-style-type: none"> : Lewis H. McMahan, Member : Edward G. Vaughan, Member | <ul style="list-style-type: none"> : Monte Cluck, Member : F.A. "Rick" Rylander, Member |
|--|--|---|---|

On July 24, 2013, TWDB staff sent a letter to the chairmen of the Region C and D planning groups to inform them of a process, mediated by SOAH, for conflict resolution between the two plans (Attachment B). The letter requested that three representatives of each planning group be designated to participate in mediation commencing in September 2013. If successful, the outcome of the conflict resolution process will ultimately need to be included in the 2011 Region C and Region D Regional Water Plans with an associated public hearing being held for each plan. Public hearings are administered by the respective designated political subdivisions of each regional water planning group and have associated costs for public notice that are eligible costs for reimbursement by TWDB.

KEY ISSUES

With the Board's authorization, the Executive Administrator will a) negotiate and execute a new contract with the SOAH for hourly mediation services; and b) execute contract amendments with the Region C and Region D planning groups' political subdivisions to incorporate additional administrative funds for public notice costs.

RECOMMENDATION

Staff recommends: (a) authorizing the Executive Administrator to negotiate and execute a contract with the State Office of Administrative Hearings in an amount not to exceed \$15,000 for mediation services in support of conflict resolution between Regions and C and D; (b) increasing the Region C and Region D Regional Water Planning Contracts for administrative costs associated with conducting public hearings in a total amount not to exceed \$17,000; and (c) transfer funds in an amount not to exceed \$32,000 from the Water Assistance Fund to the Research and Planning Fund.

This recommendation has been reviewed by legal counsel and is in compliance with applicable statutes and Board rules.

Ken Petersen
General Counsel

Attachment A: TWDB Material in Support of Board Item #29 to Board Members, July 18, 2012

Attachment B: July 24, 2013 Letter to Chairmen of Region C and Region D Regional Water Planning Groups

Attachment A

- Identify the controversy to be resolved as: “Controversy between Region C and Region D regional water plans relating to the inclusion of Marvin Nichols Reservoir as a recommended water management strategy in the Region C plan.”
- Request the chairs of the respective regional water planning groups (RWPGs) to recommend three members of their respective groups to represent their regions in mediation to attempt to facilitate coordination between the RWPGs to resolve the controversy. These representatives should have appropriate authority to negotiate a resolution, though any such resolution would be subject to approval by their RWPG. Additionally, the RWPG representatives may be supported through the mediation process by a member of the RWPG’s consultant team.
- Designate a place for mediation and designate the mediator to be contracted by TWDB. [The State Office of Administrative Hearings is available. Another possibility is to provide three mediators, with the RWPG chairs to select, and barring agreement, TWDB selects.]
- TWDB staff will be available as a resource to the RWPG representatives and the mediator, but will take no position with respect to resolution of the controversy.
- The mediator will declare whether mediation has resulted in a resolution of the controversy and will set forth that resolution, or, barring agreement, the mediator will declare that there is no resolution of the controversy and forward the matter to the TWDB for resolution.

If there is resolution:

- Schedule public hearings for Region C and Region D planning groups to adopt the agreed modifications to their respective regional water plans under the process in the TWDB rules and forward to the TWDB.
- TWDB staff will then forward to the Board for approval and incorporation into the 2012 State Water Plan at a public meeting, with opportunity for comment by interested persons.

If there is no resolution:

- TWDB staff will develop and propose a recommendation for resolution of the conflict and set a time and place for a public meeting on the proposal.
- Notice required by [former] 31 TAC Sec. 356.14(9)(B) will be provided; such notice will identify the opportunity for interested persons to file written comments on the proposed recommendation for resolution of the conflict, a timeframe for submitting such written comments, and the time and place for the public meeting.
- Comments at the public meeting will be received. TWDB staff will consider these comments and finalize the staff recommendation to the Board. TWDB will provide a copy of the staff’s

Attachment A

final recommendation and a notice of the formal meeting of the Texas Water Development Board to take final action on the proposed recommendation for resolving the conflict.

- Notice will be afforded to all persons receiving mailed notice per 31 TAC 357.14(8), and all commenters.
- TWDB staff will inform the regional planning groups of how their respective plans must be amended.
- Following action by the regional groups, the Board will consider approval of the Region C and Region D plans and incorporate the plans into the 2012 State Water Plan.

Attachment A

July 15, 2013

Bret McCoy
700CR3347
Omaha, Texas 75571

Texas Water Development Board
1700 North Congress Avenue
P.O. Box 13231
Austin, Texas 78711-3231

To TWDB members,

As Chairnan of the Region D Water Planning Group I am hopeful the conflict between the Region C Water Plan and the Region D Water Plan will be resolved. I suggest the following parameters for the committee to resolve the connct between the Region C Water Plan and the Region D Water Plan:

- The chairs of each WPG shall appoint three representatives from among the WPG's members or past members
- At the firSt meeting, the representatives will decide such parameters as
 - o Whether to engage an independent mediator and what parameters to use in choosing that mediator
 - o The timeline for the resolution process
 - o When and where additional meetings will be held

My request that representatives be selected from among past members of the WPG, as well as cutTent members, is based on the fact that, unlike Region C, Region D members have a tenn limit. While a number of Region C members have served a long period of time, giving them the benefit of a considerable history, many of Region D's members have begun serving since the conflict was initiated.

It is my sincere hope that this resolution process will provide the opportunity to address the larger issue of how the two regions can work together to meet future water demands, while at the same time protecting the water resources, agricultural resources, and natural resources of North East Texas.

Sincerely

Bret McCoy
Region D Chainnan



P.O. Box 13231, 1700 N. Congress Ave.
Austin, TX 78711-3231, www.twdb.texas.gov
Phone (512) 463-7847, Fax (512) 475-2053

July 24, 2013

Mr. James Parks
Chairman and Administrator, Region C Regional Water Planning Group
North Texas Municipal Water District
P.O. Box 2408
Wylie, TX 75098

Mr. Bret McCoy
Chairman, Region D Regional Water Planning Group
Edward Jones Investments
700 CR 3347
Omaha, TX 75571

Dear Sirs:

The Travis County District Court (*Texas Water Development Board v. Ward Timber, et al.*, Cause No. D-GN-11-00121) and the Eleventh Court of Appeals (No. 11-12-00030-CV) have determined that there is a conflict between the regional water plans for Region C and Region D and the Texas Water Development Board’s (TWDB) approval of those plans has been reversed. Accordingly, the TWDB will be facilitating a resolution of this conflict. As directed by the courts, this effort will be in accordance with the TWDB’s rules that were in place at the time of the Board’s approval (31 Texas Administrative Code Sec. 357.14(a)(1) – (11), copy attached). The specific conflict to be resolved is: “Conflict between the Region C and Region D regional water plans over the inclusion of Marvin Nichols reservoir as a recommended water management strategy in the Region C plan.” Please note that this is the only matter in conflict between the respective plans; all other elements of the respective plans are not at issue.

TWDB will be contracting with the State Office of Administrative Hearings (SOAH) to mediate the efforts at conflict resolution. TWDB intends to request that SOAH initiate mediation commencing in September 2013. By this letter, TWDB asks that you designate three current or former voting members as representatives of your respective regional water planning groups (RWPGs) to take part in the SOAH mediation, and that at least one of those representatives be a current voting member of the RWPG. The designated representatives are expected to cooperate with the SOAH mediator and to fully participate in a good faith effort to resolve the stated conflict.

Our Mission : Board Members

To provide leadership, planning, financial assistance, information, and education for the conservation and responsible development of water for Texas

Billy R. Bradford Jr., Chairman
Joe M. Crutcher, Vice Chairman
Melanie Callahan, Executive Administrator

Lewis H. McMahan, Member
Edward G. Vaughan, Member

Monte Cluck, Member
F.A. "Rick" Rylander, Member

Mr. James Parks, Chairman and Administrator, Region C Region Water Planning Group
Mr. Bret McCoy, Chairman, Region D Regional Water Planning Group
July 24, 2013
Page 2

To this end, TWDB requests that the representatives be designated by resolution duly adopted by the respective RWPGs, and that such resolutions confirm the full authority of the designated representatives to mediate toward a resolution of the conflict subject to a subsequent vote of their RWPG to approve the resolution.

Please note that TWDB staff will be available as a resource to the mediator and the RWPG representatives throughout the SOAH process. In addition, the designated representatives of the RWPGs may be assisted by members of the engineering firms that assisted in preparation of the regional plans (although TWDB will not reimburse these expenses).

There are two possible outcomes to the mediation process. The first is that the conflict may be resolved. Any such resolution will be specifically documented by the SOAH mediator. The RWPGs will need to resubmit their respective plans, incorporating the terms of the resolution, to the TWDB for Board approval and incorporation into the 2012 State Water Plan. The second possible outcome is that there is no resolution of the stated conflict. (The determination of "no resolution" will be documented by the SOAH mediator.) In the absence of resolution, and as provided in the TWDB rule, agency staff will determine a proposed recommendation for resolution of the conflict and will proceed with hearing and opportunity for comment, to a final decision by the Board, as provided in the rule. Under either scenario, however, final approval of the plans by the TWDB Board will be required.

This process was discussed with the TWDB Board at its meeting on July 18, 2013, and the working draft of the specific actions that need to take place may be reviewed at <http://www.twdb.texas.gov/board/2013/07/Board/Brd29.pdf>.

Should you have any questions concerning this matter, please contact Matt Nelson, TWDB Manager of Regional Water Planning, 512-936-3550, matt.nelson@twdb.texas.gov.

Sincerely,



Melanie Callahan
Executive Administrator

Attachment: (Former) 31 TAC §357.14

c: Mr. Walt Sears, Administrator, Region D Regional Water Planning Group
Mr. Ken Petersen, TWDB General Counsel
Mr. Dan Hardin, Interim Deputy Executive Administrator, TWDB
Mr. Matt Nelson, TWDB Project Manager, Region C
Ms. Temple McKinnon, TWDB Project Manager, Region D

- (2) is meeting a need in a manner consistent with the plan developed under §357.7(a)(5) of this title.

- (b) For the purposes of the Texas Water Code, §16.053(j), projects proposed to the board for funding to meet any need identified in an approved regional water plan for which there is not a recommended water management strategy in such plan will be considered by the board not to be consistent with the approved regional water plan.

- (c) For purposes of the Texas Water Code, §16.053(k), the board may consider, among other factors, changed conditions if a political subdivision requests a waiver of the Texas Water Code, §16.053(j) for a project proposed to the board for funding to meet a need in a manner that is not consistent with the manner the need is addressed in an approved regional water plan. The board shall request the members of any affected regional water planning group to provide input on the request for waiver of the Texas Water Code, §16.053(j).

§357.14. Approval of Regional Water Plans by the Board.

Upon receipt of a regional water plan adopted by the regional water planning group, the board will consider approval of such plan based on the following criteria.

- (1) The board shall verify adoption of the regional water plan by the regional water planning group.

- (2) The board shall approve the plan only after it has determined that:
 - (A) the regional water plan meets the requirements contained in the Texas Water Code, Chapter 16, this chapter, and Chapter 358 of this title (relating to State Water Planning Guidelines);

 - (B) the plan includes water conservation practices and drought management measures incorporating, at a minimum, the provisions of §357.7(a)(7)(A) and (B) and §357.7(c) and (d) of this title (relating to Regional Water Plan Development); and

 - (C) the plan is consistent with long-term protection of the state's water resources, agricultural resources, and natural resources as embodied in the guidance principles in Chapter 358 of this title (relating to State Water Planning Guidelines). The regional water plan is consistent with the guidance principles if it is developed in accordance with §358.3 of this title (relating to Guidelines), §357.5 of this title (relating to Guidelines for Development of Regional Water Plans), §357.7 of this title (relating to Regional Water Plan Development), §357.8 of this title (relating to Ecologically Unique River and Stream Segments), and §357.9 of this title (relating to Unique Sites for Reservoir Construction).

- (3) The board shall approve the plan only after it considers information from regional water planning groups of the existence of an interregional conflict and finds that no interregional conflict exists. The board shall not consider approval of a regional water plan unless all regional water plans which could contain conflicts have also been submitted to the board for approval, or the board determines that such plans are not likely to be submitted.
- (4) In the event the board finds that the regional water plan does not meet the requirements contained in the Texas Water Code, Chapter 16, this chapter, and Chapter 358 of this title (relating to State Water Planning Guidelines) the executive administrator shall:
- (A) notify the affected regional water planning group of the nature of the problems; and
 - (B) request the affected regional water planning group's assistance in resolving the problems.
- (5) In the event negotiations fail to produce a plan the executive administrator considers to resolve compliance problems noted under paragraph (4) of this subsection, the executive administrator shall:
- (A) describe the remaining problems and recommended actions needed to resolve them;
 - (B) provide notice of its intent to hold a public hearing on remaining problems and proposed recommendations for resolution of the problems by publishing notice of the proposed change in the *Texas Register* and in a newspaper of general circulation in each county located in whole or in part in the regional water planning areas involved in the dispute 30 days before the public hearing and by mailing notice of the public hearing 30 days before public hearing to those persons or entities listed in §357.12(a)(5)(A) through (E) of this title (relating to Notice and Public Participation) in the affected regional water planning areas, and to each affected regional water planning group;
 - (C) hold a public comment hearing on the remaining problems and proposed recommendation for resolution of the problems at a time and place determined by the executive administrator. At the hearing, the executive administrator shall take comments from the regional water planning groups, political subdivisions, and members of the public on the issues identified by the board as unresolved problems; and
 - (D) make a recommendation to the board as to whether or not problems remain.

- (6) The board shall consider the executive administrator's recommendation and statements by a representative for the regional water planning group and others and determine whether the regional water plan meets the requirements contained in the Texas Water Code, Chapter 16, this chapter, and Chapter 358 of this title (relating to State Water Planning Guidelines).
- (7) The executive administrator shall notify affected regional water planning groups of the board's decision including details of how affected regional water plans must be amended.
- (8) In the event the board finds that an interregional conflict exists between adopted regional water plans, the executive administrator shall:
 - (A) notify the affected regional water planning groups of the nature of the interregional conflict;
 - (B) request affected regional water planning groups assistance in resolving the conflict; and
 - (C) negotiate resolutions of conflicts with regional water planning groups and other interested parties as determined by the executive administrator.
- (9) In the event negotiations conducted under paragraph (8) of this subsection to resolve conflicts between adopted regional water plans are unsuccessful, the executive administrator shall:
 - (A) determine a proposed recommendation for resolution of the conflict;
 - (B) provide notice of its intent to hold a public hearing on proposed recommendations for resolution of the conflict by publishing notice of the proposed change in the *Texas Register* and in a newspaper of general circulation in each county located in whole or in part in the regional water planning areas involved in the dispute 30 days before the public hearing and by mailing notice of the public hearing 30 days before public hearing to those persons or entities listed in §357.12(a)(5)(A)-(E) of this title (relating to Notice and Public Participation) in the regional water planning areas proposed to be impacted, and to each county judge of a county located in whole or in part in the regional water planning areas proposed to be impacted and to each affected regional water planning group;
 - (C) hold a public hearing on the proposed recommendation for resolution of the conflict at a time and place determined by the executive administrator. At the hearing, the executive administrator shall take comments from the regional water planning groups, political subdivisions, and members of the public on the issues identified by the board as unresolved problems; and

- (D) make a recommendation to the board for resolution of the conflict.
- (10) The board shall consider the executive administrator's recommendation and statements by a representative for each regional water planning group and others and determine the resolution of the conflict.
- (11) The executive administrator shall notify affected regional water planning groups of board's decision including details of how affected regional water plans must be amended.

§357.15. Interaction with Groundwater Conservation District Management Plans.

- (a) A groundwater conservation district may file a written petition with the executive administrator stating that a potential conflict exists between the district's approved management plan developed under Texas Water Code, §36.1071 and the approved state water plan. A copy of the petition shall be provided to the affected regional water planning group. The petition must state:
 - (1) the specific nature of the conflict;
 - (2) the specific sections and provisions of the approved management plan and approved state water plan that are in conflict; and
 - (3) the proposed resolution to the conflict.
- (b) If the executive administrator determines a conflict exists, the executive administrator will provide technical assistance to and coordinate with the groundwater conservation district and the affected regional water planning group to resolve the conflict. Coordination may include any of the following processes:
 - (1) requiring the regional water planning group to respond to the petition in writing;
 - (2) meeting with representatives from the groundwater conservation district and the regional water planning group to informally mediate the conflict; and/or
 - (3) coordinating a formal mediation session between representatives of the groundwater conservation district and the regional water planning group. Not later than the 45th day after the date on which the groundwater conservation district files a petition with the board, if the conflict has not been resolved, the district and the involved regional water planning group shall mediate the conflict. The district and the involved regional water planning group may seek the assistance of the Center for Public Policy Dispute Resolution at The University of Texas School of Law or an