

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. “(No change)” indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 8. TEXAS JUDICIAL COUNCIL

CHAPTER 171. REPORTING REQUIREMENTS

1 TAC §§171.2, 171.4 - 171.10

The Texas Judicial Council (the Council) proposes amendments to §§171.2 and 171.4 - 171.8 and new §171.9 and §171.10 regarding requirements for case activity reports and other reports required to be submitted to the Office of Court Administration (OCA). The purpose of the proposed changes to Chapter 171 is to include all requirements provided by statute or by Supreme Court of Texas rule regarding reporting to OCA.

Notwithstanding the effective date of the adoption of the proposed rules and amendments, the reporting requirements of §171.9(a)(1) take effect with the reports beginning September 1, 2016.

Glenna Bowman, chief financial officer of the Office of Court Administration (OCA), has determined that for each year of the first five-year period the new sections and amendments are in effect, there will be no significant fiscal implication for the state. Because most of the proposed provisions are for reporting requirements that are already required by statute and the new reporting requirements are few, OCA does not anticipate that the fiscal implication for local governments will be significant. The actual cost as a result of compliance with the new and amended sections will depend on 1) the existence and terms of any contract with a case management system vendor concerning implementation of changes in reporting case activity information to OCA; and 2) the level of sophistication of the government's current case management system and the degree to which changes will need to be made.

Scott Griffith, director of research and court services with OCA, has determined that for each year of the first five years the new and amended sections are in effect, the public benefit anticipated as a result of the sections will be clarity in what is required by law and rule for reporting case activity and other information to OCA. There will be no cost to small business or individuals.

Maria Elena Ramon, general counsel of OCA, has reviewed the proposed new rules and amendments and found them to be within the Council's authority to adopt.

Comments on the proposal may be submitted to Scott Griffith at scott.griffith@txcourts.gov, at P.O. Box 12066, Austin, Texas 78711-2066 or at fax number (512) 463-1648.

The amendments and new rules are proposed under the following Government Code Sections: §71.019, which authorizes the Council to adopt rules expedient for the administration of its functions; §71.035, which authorizes the Council to require a state

justice, judge, clerk, or other court official, as an official duty, to comply with reasonable requirements for supplying statistics pertaining to the amount and character of the civil and criminal business transacted by the court or other information on the conduct, operation, or business of the court or the office of the clerk of the court; §71.0352, which requires justice and municipal courts to report juvenile data; §71.0353, which requires district and county courts at law to report data regarding trafficking of persons; §72.031, which requires local governments and appellate courts that charge a \$2 filing fee to certify to OCA that the fee is necessary to recover system operating costs to implement e-filing; §36.004, which requires courts to report the appointment of and payment made to attorneys ad litem, guardians ad litem, guardians, mediators or competency evaluators; §72.087, which requires the submission of jury charges and sentences in capital cases; and §29.013(a), which requires municipalities to report the name of each person who is elected or appointed mayor, municipal court judge or clerk of a municipal court and each person who vacates these offices. The amendments and rules are also proposed under §11.104 of the Civil Practice and Remedies Code, which requires the submission of orders declaring persons to be vexatious litigants; §574.014 of the Health and Safety Code, which requires the reporting of mental health commitments; §33.003(l) of the Family Code, which requires the submission of a report regarding the filing of an application for a court order authorizing a minor to consent to the performance of an abortion without notification and consent of a parent, managing conservator or guardian; Art. 102.017 of the Code of Criminal Procedure, which requires a local administrative judge to report incidents involving court security; and §1104.306 of the Estates Code, which requires the county clerk of each county to submit to the Judicial Branch Certification Commission the name and business address of each private professional guardian who has satisfied the registration requirements of §1104.303 of the Estates Code.

No other statutes, articles, or codes are affected by these sections.

§171.2. General Reporting Requirements.

District clerks, county clerks, justices of the peace, and municipal judges shall submit a summary-level court activity report and other required reports each month to the Office of Court Administration (OCA) using the methods required by this chapter. Unless specifically provided otherwise in this chapter, all reports are due no later than 20 days following the end of the month reported. [The revised reporting requirements of this chapter concerning district courts, statutory county courts, and constitutional county courts will take effect with reports beginning September 1, 2010. The revised reporting requirements of this chapter concerning justice courts and municipal courts will take effect with reports beginning September 1, 2011.] OCA shall maintain and update reporting instructions and forms initially approved by the Texas Judicial Council, and shall continually make

the instructions and forms available by publishing them on its website and by other appropriate means.

§171.4. *District Court Reports.*

(a) Method. The district clerk of each county shall submit a district court activity report of the criminal, civil, family law and juvenile cases in the county's district courts. A separate report may be submitted for each district court or a single report may be submitted showing the combined activity of all the district courts in the county. Unless OCA grants a waiver for good cause, the district clerk shall submit the reports by electronic means approved by OCA. The maximum duration of a waiver is one year, but OCA may approve successive waivers.

(b) Reporting Categories.

(1) Criminal Cases.

(A) Criminal case type categories. The monthly report contains the following categories of felony case types: capital murder, murder, other homicides, aggravated assault or attempted murder, sexual assault of an adult, indecency with or sexual assault of a child, family violence assault, aggravated robbery or robbery, burglary, theft, automobile theft, drug sale or manufacture, drug possession, felony D.W.I., and other felonies; and a misdemeanor case type category for all misdemeanors.

(B) Criminal case activity categories. The monthly report contains sections for reporting cases on docket, dispositions, supplemental information and additional court activity.

(C) Report of a request for a hate crime finding. This section of the monthly report requests information pursuant to Article 2.211 of the Code of Criminal Procedure.

(D) Other Case Activity Reporting. Pursuant to Section 71.0353 of the Government Code, the clerk shall also report the number of cases filed for the following offenses:

- Code,
- (i) trafficking of persons under Sec. 20A.02, Penal Code,
 - (ii) prostitution under Sec. 43.02, Penal Code; and
 - (iii) compelling prostitution under Sec. 43.05, Penal Code.

(2) Civil Cases.

(A) Civil case type categories. The monthly report contains the following categories of civil cases: injury or damage--motor vehicle, injury or damage--medical malpractice, injury or damage--other professional malpractice, injury or damage--asbestos/silica product liability, injury or damage--other product liability, other injury or damage, real property--eminent domain, other real property, contract--consumer/commercial/debt, other contract, civil cases relating to criminal matters, other civil cases, and tax cases.

(B) Civil case activity categories. The monthly report contains sections for reporting cases on docket, dispositions and additional court activity.

(3) Family Law Cases.

(A) Family law case type categories. The monthly report contains the following categories of family law cases: divorce--children, divorce--no children, parent/child--no divorce, child protective services, termination of parental rights, adoption, protective orders--no divorce, Title IV-D--paternity, Title IV-D--support order, and Title IV-D--UIFSA, all other family law cases, and post-judgment actions for modification--custody, modification--other, enforcement, and Title IV-D.

(B) Family law case activity categories. The monthly report contains sections for cases on docket, dispositions and additional court activity section.

(4) Juvenile Cases.

(A) Juvenile case type categories. The monthly report contains a category for conduct indicating a need for supervision (C.I.N.S.) cases and the following categories of delinquent conduct cases: capital murder, murder, other homicides, aggravated assault or attempted murder, assault, indecency with a child or sexual assault, aggravated robbery or robbery, burglary, theft, automobile theft, felony drug offenses, misdemeanor drug offenses, D.W.I., contempt of court, and all other offenses.

(B) Juvenile case activity categories. The monthly report contains sections for reporting cases on docket, adjudications, dispositions and additional court activity.

§171.5. *Statutory County Court Reports.*

(a) Method. Each district clerk or county clerk who maintains the records for the statutory county courts (including statutory probate courts) of a county shall submit a court activity report of criminal, civil, family law, juvenile, probate and guardianship, and mental health cases for these courts. A separate report may be submitted for each statutory county court or a single report may be submitted for all statutory county courts in the county. Unless OCA grants a waiver for good cause, the clerk shall submit the reports by electronic means approved by the OCA. The maximum duration of a waiver is one year, but OCA may approve successive waivers.

(b) Reporting Categories.

(1) Criminal Cases.

(A) Criminal case type categories. The monthly report for criminal cases is divided into sections for misdemeanors and felonies.

(i) Misdemeanor case types. The report contains the following categories for reporting misdemeanor cases: D.W.I.--first offense, D.W.I.--second offense, theft, theft by check, drug possession--marijuana, drug offenses--other, family violence assault, other assault, traffic, D.W.L.S./D.W.L.I., and other misdemeanor cases.

(ii) Felony case types. The report contains the following categories for reporting felony cases: capital murder, murder, other felony homicides, aggravated assault or attempted murder, sexual assault of an adult, indecency with or sexual assault of a child, family violence assault, aggravated robbery or robbery, burglary, theft, automobile theft, drug sale or manufacture, drug possession, felony D.W.I., and other felonies.

(B) Criminal case activity categories. The monthly report contains sections for reporting cases on docket, dispositions, supplemental information and additional court activity.

(C) Report of a request for a hate crime finding. This section of the monthly report requests information pursuant to Article 2.211 of the Code of Criminal Procedure.

(D) Other case activity reporting. Pursuant to Section 71.0353 of the Government Code, the clerk shall also report the number of cases filed for the following offenses:

- Code;
- (i) trafficking of persons under Sec. 20A.02, Penal Code;
 - (ii) prostitution under Sec. 43.02, Penal Code; and
 - (iii) compelling prostitution under Sec. 43.05, Penal Code.

(2) Civil Cases.

(A) Civil case type categories. The monthly report contains the following categories of civil cases: injury or damage--motor vehicle, injury or damage--medical malpractice, injury or damage--other professional malpractice, injury or damage--asbestos/silica product liability, injury or damage--other product liability, other injury or damage, real property--eminent domain, other real property, contract--consumer/commercial/debt, other contract, civil cases relating to criminal matters, all other civil cases, and tax cases.

(B) Civil case activity categories. The monthly report contains sections for reporting cases on docket, dispositions and additional court activity.

(3) Family Law Cases.

(A) Family law case type categories. The monthly report contains the following categories of family law cases: divorce--children, divorce--no children, parent/child--no divorce, child protective services, termination of parental rights, adoption, protective orders--no divorce, Title IV-D--paternity, Title IV-D--support order, Title IV-D--UIFSA, all other family law cases, and post-judgment actions for modification--custody, modification--other, enforcement, and Title IV-D.

(B) Family law case activity categories. The monthly report contains sections for reporting cases on docket, dispositions and additional court activity.

(4) Juvenile Cases.

(A) Juvenile case type categories. The monthly report contains a category for C.I.N.S. cases and the following categories of delinquent conduct cases: capital murder, murder, other homicides, aggravated assault or attempted murder, assault, indecency with a child or sexual assault, aggravated robbery or robbery, burglary, theft, automobile theft, felony drug offenses, misdemeanor drug offenses, D.W.I., contempt of court, and all other offenses.

(B) Juvenile case activity categories. The monthly report contains sections for reporting juvenile case activity for cases on docket, adjudications, dispositions and additional court activity.

(5) Probate and Guardianship Cases.

(A) Probate and guardianship case type categories. The monthly report contains the following categories for reporting probate and guardianship case types: decedents' estates (independent administration, dependent administration, and all other estate proceedings), guardianships (minor and adult), and other cases.

(B) Probate and guardianship activity categories. The monthly report contains activity report categories for cases on docket and additional information.

(6) Mental Health Cases.

(A) Mental health case type categories. The monthly report contains the following categories for reporting mental health cases: temporary mental health services, extended mental health services, modification--inpatient to outpatient, modification--outpatient to inpatient, and orders to authorize psychoactive medications.

(B) Mental health activity categories. The monthly report contains activity report categories for intake, hearings, and other information.

(C) Mental health commitments. Pursuant to Section 574.014 of the Health and Safety Code, the clerk shall report the number of applications for commitment orders for involuntary mental health services filed with the court and the disposition of those cases,

including the number of commitment orders for inpatient and outpatient mental health services.

§171.6. Constitutional County Courts Reports.

(a) Method. County clerks shall submit a court activity report of criminal, civil, juvenile, probate and guardianship, and mental health cases for each constitutional county court. Unless OCA grants a waiver for good cause, county clerks shall submit the reports by electronic means approved by the OCA. The maximum duration of a waiver is one year, but OCA may approve successive waivers.

(b) Reporting Categories.

(1) Criminal Cases.

(A) Criminal case type categories. The monthly report contains the following categories of misdemeanor case types: D.W.I.--first offense, D.W.I.--second offense, theft, theft by check, drug possession--marijuana, drug offenses--other, family violence assault, other assault, traffic, D.W.L.S./D.W.L.I., and other misdemeanor cases.

(B) Criminal case activity categories. The monthly report contains sections for reporting cases on docket, dispositions, supplemental information and additional court activity.

(C) Report of a request for a hate crime finding. This section of the monthly report requests information pursuant to Article 2.211 of the Code of Criminal Procedure.

(2) Civil Cases.

(A) Civil case type categories. The monthly report contains the following categories of civil cases: injury or damage--motor vehicle, other injury or damage, real property, contract--consumer/commercial/debt, contract--landlord/tenant, other contract, civil cases relating to criminal matters, and all other civil cases.

(B) Civil case activity categories. The monthly report contains sections for reporting cases on docket, dispositions and additional court activity.

(3) Juvenile Cases.

(A) Juvenile case type categories. The monthly report contains a category for C.I.N.S. cases and the following categories of delinquent conduct cases: capital murder, murder, other homicides, aggravated assault or attempted murder, assault, indecency with a child or sexual assault, aggravated robbery or robbery, burglary, theft, automobile theft, felony drug offenses, misdemeanor drug offenses, D.W.I., contempt of court, and all other offenses.

(B) Juvenile case activity categories. The monthly report contains sections for reporting cases on docket, adjudications, dispositions and additional court activity.

(4) Probate and Guardianship Cases.

(A) Probate and guardianship case type categories. The monthly report contains the following categories for reporting probate and guardianship case types: decedents' estates--independent administration, decedents' estates--dependent administration, and all other decedents' estate proceedings, guardianships--minor, guardianships--adult, and other cases.

(B) Probate and guardianship activity categories. The monthly report contains activity report categories for cases on docket and additional information.

(5) Mental Health Cases.

(A) Mental health case type categories. The monthly report contains the following categories for reporting mental health

cases: temporary mental health services, extended mental health services, modification--inpatient to outpatient, modification--outpatient to inpatient, and orders to authorize psychoactive medications.

(B) Mental health activity categories. The monthly report contains the activity report categories for intake, hearings, and other information.

(C) Mental health commitments. Pursuant to Section 574.014 of the Health and Safety Code, the clerk shall report the number of applications for commitment orders for involuntary mental health services filed with the court and the disposition of those cases, including the number of commitment orders for inpatient and outpatient mental health services.

§171.7. Justice Court Reports.

(a) Method. Each justice of the peace shall submit a justice court activity report of the criminal and civil cases in the judge's court. Unless OCA grants a waiver for good cause, the justice of the peace shall submit the reports by electronic means approved by OCA. The maximum duration of a waiver is one year, but OCA may approve successive waivers.

(b) Reporting Categories.

(1) Criminal case type categories. The monthly report contains the following categories of criminal case types: traffic misdemeanors--subdivided into non-parking, parking, and county ordinance offenses; and non-traffic misdemeanors--subdivided into Penal Code violations, other state law violations, and county ordinance violations.

(2) Civil case type categories. The monthly report contains the following categories of civil case types: debt claim, landlord/tenant, and small claims suits.

(3) Juvenile/minor activity. The monthly report contains a section for reporting court activity related to juveniles and minors. Pursuant to Section 71.0352 of the Government Code, the report must include:

(A) the number of cases filed for:

(i) truant conduct under Sec. 65.003(a), Family Code; and

(ii) the offense of parent contributing to nonattendance under Sec. 25.093, Education Code; and

(B) in cases in which a child fails to obey an order of the court under circumstances that would constitute contempt of court, the number of incidents in which a child is:

(i) referred to juvenile court for delinquent conduct as provided under Art. 45.050(c)(1), Code of Criminal Procedure, or Sec. 65.251, Family Code; or

(ii) held in contempt, fined, or denied driving privileges as provided by Art. 45.050(c)(2), Code of Criminal Procedure, or Sec. 65.251, Family Code.

(4) Additional activity. The monthly report contains a section for reporting additional court activity such as magistrate activities and information on fines, court costs and fees collected or otherwise satisfied.

§171.8. Municipal Court Reports.

(a) Method. Each municipal court shall submit a municipal court activity report of the criminal and civil or administrative cases in the court. Unless OCA grants a waiver for good cause, the court shall submit the reports by electronic means approved by OCA. The maximum duration of a waiver is one year, but OCA may approve successive waivers.

(b) Reporting Categories.

(1) Criminal case type categories. The monthly report contains the following categories of criminal case types: traffic misdemeanors--subdivided into non-parking, parking, and city ordinance offenses; and non-traffic misdemeanors--subdivided into Penal Code violations, other state law violations, and city ordinance violations.

(2) Civil/administrative case type category. The monthly report contains a civil/administrative case type category for civil or administrative cases.

(3) Juvenile/minor activity. The monthly report contains a section for reporting court activity related to juveniles and minors. Pursuant to Section 71.0352 of the Government Code, the report must include:

(A) the number of cases filed for:

(i) truant conduct under Sec. 65.003(a), Family Code; and

(ii) the offense of parent contributing to nonattendance under Sec. 25.093, Education Code; and

(B) in cases in which a child fails to obey an order of the court under circumstances that would constitute contempt of court, the number of incidents in which a child is:

(i) referred to juvenile court for delinquent conduct as provided under Art. 45.050(c)(1), Code of Criminal Procedure, or Sec. 65.251, Family Code; or

(ii) held in contempt, fined, or denied driving privileges as provided by Art. 45.050(c)(2), Code of Criminal Procedure, or Sec. 65.251, Family Code.

(4) Additional activity. The monthly report contains a section for reporting additional court activity such as magistrate activities and information on fines, court costs and fees collected or otherwise satisfied.

§171.9. Other Reports Required from the Courts.

(a) Judicial Appointments and Fees. The clerk of each court shall submit a monthly report to OCA in the format prescribed by OCA. The report must:

(1) pursuant to Section 36.004 of the Government Code, list every appointment made for an attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator and the compensation paid, if any. Appointments made by the court for positions exempted from reporting under Sec. 36.003, Tex. Gov't Code, are not required to be reported. The requirements of §171.9(a)(1) become effective September 1, 2016.

(2) pursuant to Supreme Court Order 07-9188, list every appointment in a civil, probate or family case for any other position for which a fee may be paid and the compensation paid, if any.

(3) The report shall include the case number and style, and the name of the judge and date of order approving compensation. The report is due no later than 15 days following the end of the month reported. If no appointments were made or fees were approved by the courts in the preceding month, the clerk shall file a report indicating that no appointments or payments were made in that month.

(b) Jury Charges and Sentences in Capital Cases. Pursuant to Section 72.087 of the Government Code, the judge or clerk of a court in which a capital case is heard must submit to OCA a written record of the case that includes the content of the trial court's charge to the jury and the sentence issued in the case. The information must be submitted no later than 30 days after the date of judgment of conviction or acquittal.

(c) Vexatious Litigants. Pursuant to Section 11.104 of the Civil Practice and Remedies Code, the clerk of each court shall submit to OCA within 30 days a copy of any order declaring a person a vexatious litigant and prohibiting the person from filing new litigation without the consent of the local administrative judge.

(d) Judicial Bypass. Pursuant to Section 33.003(l) of the Family Code, the district clerk or county clerk shall submit a report to OCA on a form prescribed by OCA listing the case number and style of each case in which a minor files an application for a court order authorizing the minor to consent to the performance of an abortion without notification and consent of a parent, managing conservator, or guardian.

(e) Court Security Incident. Pursuant to Article 102.017 of the Code of Criminal Procedure, a local administrative judge is required to submit a report to OCA regarding any incident involving court security that occurs in or around a building housing a court for which the judge serves as local administrative judge. The report is due no later than three business days after the date the incident occurred.

(f) Private Professional Guardians. Pursuant to Section 1104.306 of the Estates Code, the clerk of each county shall annually submit to the Judicial Branch Certification Commission the name and business address of each private professional guardian who has satisfied the registration requirements of Sec. 1104.303, Tex. Estates Code. The report is due no later than January 31 of each year.

(g) E-filing Fee. Pursuant to Section 72.031 of the Government Code, an appellate court that charges a \$2 fee for each electronic filing must certify annually to OCA on a form prescribed by OCA that the amount of the fee is necessary to recover the actual system operating costs incurred by the appellate court. The report is due 30 days after the last day of the county's fiscal year.

§171.10. Other Reports Required by Non-Court Personnel.

(a) Municipal Officers. Pursuant to Section 29.013(a) of the Government Code, the secretary of a municipality with a municipal court, including a municipal court of record, or the person responsible for maintaining the records of the municipality's governing body, shall submit the name of each person who is elected or appointed mayor, municipal court judge, or clerk of a municipal court and each person who vacates these offices. This information must be reported no later than 30 days after the person's election or appointment to the office or vacancy from office.

(b) E-filing Fee. Pursuant to Section 72.031 of the Government Code, each local government that charges a \$2 fee for each electronic filing must certify annually to OCA on a form prescribed by OCA that the amount of the fee is necessary to recover the actual system operating costs incurred by the local government. The report is due 30 days after the last day of the county's fiscal year.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601303

Mena Ramon

General Counsel

Texas Judicial Council

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-1682



PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 25. SCHOOL HEALTH AND RELATED SERVICES

1 TAC §354.1342

The Texas Health and Human Services Commission (HHSC) proposes amendments to §354.1342, concerning Conditions for Participation.

BACKGROUND AND JUSTIFICATION

School and Health Related Services (SHARS) is a joint program of HHSC and the Texas Education Agency that allows school districts to obtain federal Medicaid reimbursement for the provision of health-related services to students in special education. The proposed amendment is designed to hold school districts accountable if they do not follow current SHARS policy for billing requirements.

Current SHARS policy requires that the enrolled independent school districts bill the Texas Medicaid and Healthcare Partnership (TMHP) by filing claims for interim reimbursement as the allowable services are delivered. Many districts are not billing as they deliver the services but presenting their costs for the services on the annual cost report, thus avoiding the process that allows for the audit of their claim(s). The proposed amendment clarifies billing requirements and allows HHSC to disallow any costs reported for cost categories for which a district did not bill TMHP during the cost reporting period.

SECTION-BY-SECTION SUMMARY

Proposed §354.1342 is amended to require school districts to bill for services at the time the services are delivered and requires billing for each cost category for which the district will seek reconciliation through the annual cost report.

The proposed rule also corrects a minor grammatical error.

FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for HHSC, has determined that during the first five-year period the amended rule is in effect there will not be an impact to costs or revenues of state or local governments.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Rymal has also determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of the proposed rule amendment, as school districts do not meet the definition of small businesses or micro-businesses.

PUBLIC BENEFIT AND COSTS

Pam McDonald, Director of Rate Analysis, has determined that for each year of the first five years the proposed rule amendment is in effect, the public benefit from the adoption of this rule will be the increased transparency that results from clarifying the language of the rule.

There is no anticipated economic cost to persons who are required to comply with the proposed rule amendment. There is no anticipated negative impact on local employment.

REGULATORY ANALYSIS

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. A "major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Texas Government Code.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Nadia Bobb, Rate Analyst of Acute Care, Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 149030, MC-H400, Austin, Texas 78714-9030; by fax to (512) 730-7475; or by e-mail to RADAcuteCare@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The proposed amendment affects the Human Resources Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§354.1342. *Conditions for Participation.*

To claim for school health and related services (SHARS) provided to Medicaid-enrolled students eligible for services provided under the Individuals with Disabilities Education Act (IDEA), school districts must:

- (1) ensure that services are provided in a manner and environment consistent with:
 - (A) the student's physical and mental condition;
 - (B) the overall goals and objectives of the student's individual education program (IEP); and
 - (C) other services and schedules prescribed in the student's IEP;
- (2) ensure that services are provided by persons licensed, accredited, or certified by the appropriate federal or state agency or recognized professional organization to deliver the specific service(s);

(3) meet Texas Education Agency (TEA) standards for the delivery of SHARS;

(4) abide by the rules and regulations of TEA related to service delivery, record-keeping, documentation, client confidentiality, and access to client records by other professionals involved in the implementation of the student's IEP;

(5) comply with all applicable federal, state, and local laws and regulations regarding the services provided;

(6) be enrolled and approved for participation in the Texas Medical Assistance Program (Medicaid);

(7) sign a written provider agreement with the Texas Health and Human Services Commission (the Commission) or its designee agreeing[- By signing the agreement, the provider agrees] to comply with the terms of the agreement and all requirements of Medicaid, including regulations, rules, handbooks, standards, and guidelines published by the Commission or its designee;

(8) bill for services reimbursable [covered] by Medicaid in the manner and format prescribed by the Commission or its designee, at the time services are delivered, including billing for each cost category for which the district will seek reimbursement through the annual cost report required by paragraph (11) of this section;

(9) participate in the Commission-administered time study;

(10) certify each quarter the Total Computable Expenditure (Total Computable Expenditure = amount paid (Federal share) + calculated State/Local share); and

(11) submit an annual cost report, as described in §355.8443 of this title (relating to Reimbursement Methodology for School Health and Related Services (SHARS)).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601305

Karen Ray

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 424-6900



TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 102. EDUCATIONAL PROGRAMS

SUBCHAPTER JJ. INNOVATION DISTRICT

19 TAC §§102.1301, 102.1303, 102.1305, 102.1307, 102.1309, 102.1311, 102.1313, 102.1315

The Texas Education Agency (TEA) proposes new §§102.1301, 102.1303, 102.1305, 102.1307, 102.1309, 102.1311, 102.1313, and 102.1315, concerning districts of innovation. The proposed new sections would outline the applicable processes and procedures related to an Innovation District to reflect the changes in statute made by House Bill (HB) 1842, 84th Texas Legislature, 2015.

The 84th Texas Legislature, Regular Session, 2015, passed HB 1842, which amended the Texas Education Code (TEC) by adding Chapter 12A, Districts of Innovation, authorizing an eligible school district to be designated as a district of innovation following adoption of a local innovation plan that exempts the district from certain TEC requirements that inhibit the goals of the plan. The local innovation plan must be reported to the TEA. The proposed new section would provide the applicable processes and procedures related to innovation districts. The proposed sections include a non-comprehensive list of allowable exemptions. A list of prohibited exemptions is also included. TEC, §12A.009, authorizes the commissioner to adopt rules to implement the entire chapter.

Proposed new 19 TAC §102.1301, Definitions, would define terms for implementation of the subchapter. In accordance with the TEC, §§12A.001, 12A.005, and 12A.007, paragraph (1) would define the district-level committee as the committee established under the TEC, §11.251. TEC, Chapter 12A, does not define the composition of the committee to develop the local innovation plan so proposed new paragraph (2) would address the composition of that committee. TEC, Chapter 12A, does not define what constitutes a "public hearing" but does distinguish between a public hearing and a public meeting. Proposed new paragraph (3) would define a public hearing as an open meeting that allows the public an opportunity to provide comments and opinions. Accordingly, proposed new paragraph (4) would define a public meeting as an open meeting that provides the public an opportunity to hear facts about a proposed plan. TEC, Chapter 12A, focuses on unacceptable performance for both academic and financial accountability purposes. Proposed new paragraphs (5) and (6) would clarify the meaning of "unacceptable performance" by linking with the corresponding ratings adopted by the TEA under the accountability statutes.

Proposed new 19 TAC §102.1303, Eligibility, would clarify that a district cannot be designated as a district of innovation if it receives either a preliminary or final hearing of below "acceptable performance." TEC, §12A.001, authorizes districts to be designated as a district of innovation only if the district's most recent performance rating under TEC, §39.054, is at least "acceptable performance."

Proposed new 19 TAC §102.1305, Process Timeline, would recognize the statutory methods for designating a district of innovation and the requirement that the district hold a public hearing if one of those methods is realized in accordance with the TEC, §12A.001 and §12A.002. As the statutory provisions lack a requisite timeline for action and to ensure a timely review process, proposed new subsection (b) would require the board of trustees to either decline to pursue a district of innovation or to appoint an innovation committee to develop an innovation plan not later than 30 days after the public hearing. Proposed new subsection (c) would require a district's innovation plan to meet the requirements imposed by the TEC, §12A.003.

Statutory provisions under the TEC, §12A.005, authorize the board of trustees to adopt or reject the plan after meeting certain procedural requirements. However, statutory provisions do not define a planning committee's authority when pursuing the creation of a plan; therefore, the proposed new rule would make clear that when pursuing a district of innovation plan, the board of trustees may establish parameters in which the planning committee must operate. As various statutory provisions, including TEC, §§12A.002, 12A.004 and 12A.005, emphasize public awareness and the necessity for the commissioner to maintain

a list of exempted provisions and report to the legislature, proposed new subsection (d) would require the district to clearly post the innovation plan on the district website for the term of the designation as an innovation district in order to promote transparency to the public.

Proposed new 19 TAC §102.1307, Adoption of Local Innovation Plan, would implement the requirements imposed by the TEC, §12A.005, which include actions necessary prior to a board of trustee's vote on adopting the proposed innovation plan, voting requirement for adoption, status of the district once the plan is adopted, and the extent of the exemptions should future requirements be amended or redesignated.

As the TEC, §12A.003(b)(2), requires a district to identify the requirements from which it seeks to be exempted and the TEC, §12A.004(b), requires the commissioner to maintain a list of TEC provisions from which innovation districts are exempt and to notify the legislature of these provisions for districts enrolling a majority of students, proposed new 19 TAC §102.1307 would require, in addition to the notification of the commissioner of approval of the plan as required by the TEC, §12A.005, that the district report exemptions to the commissioner using a form developed by the commissioner. The reporting form, adopted as Figure: 19 TAC §102.1307(d), would emphasize the non-exclusive major TEC items from which an innovation district may exempt itself and would also provide a method to include items not specifically designated on the form.

Proposed new 19 TAC §102.1309, Prohibited Exemptions, would provide clarity regarding the statutory provisions from which districts of innovation may not exempt themselves in accordance with the TEC, §12A.004, and the commissioner's rulemaking authority. Prohibited exemptions are as follows.

19 TAC §§102.1309(a)(1), (4), (7), (8), (9), (10), (14), and (15)

TEC, §12A.004(a)(1), prohibits exemption of a district of innovation from any state or federal requirement applicable to an open-enrollment charter school operating under the TEC, Chapter 12, Subchapter D, which, among others, prohibits exemption from statutory sections imposed on an open-enrollment charter under the TEC, Chapter 12, including the requirements listed in the TEC, §§12.104(b), 25.001, 25.002, 25.0021, 25.0031, and 25.004; Chapter 30, Subchapter A; §30.104; Chapter 34; §§37.006(l), 37.007(e), and 37.020; §§44.0011, 44.002, 44.003, 44.004, 44.0041, 44.005, 44.0051, 44.006, 44.007, 44.0071, 44.008, 44.009, 44.011, 44.0312, 44.032, 44.051, 44.052, 44.053, and 44.054; and §§45.003, 45.0031, 45.005, 45.105, 45.106, 45.202, and 45.203. This list is not comprehensive; several additional statutes reference charters.

19 TAC §§102.1309(a)(3), (10), (12), (13), (14), (15), and (16)

TEC, §12A.004(a)(1), establishes a floor for exemptions for a district seeking to be a district of innovation. Several provisions of the TEC are inapplicable to an open-enrollment charter school, not because the legislature has intentionally limited the requirement, but because the inherent nature of an open-enrollment charter school makes application of the provision nonsensical. As the legislature clearly intended a floor to apply to the exemptions, consequently, districts may not seek an exemption from certain statutory provisions that lack a charter analog. As such, a district seeking to be a district of innovation may not seek an exemption from: TEC, Chapter 13, as open-enrollment charters have no exclusive boundaries vis-à-vis other charter schools nor are open-enrollment charters as a group required to cover all geographic boundaries of the

state; TEC, §§37.011, 37.012, and 37.013, because a district must allow an open-enrollment charter school student to be served at a Juvenile Justice Alternative Education program; TEC, Chapters 41 and 42, because open-enrollment charters have no taxing capacity, and HB 1842 contained no textual indication or legislative intent demonstrating that the legislature intended to alter current funding mechanisms; TEC, §§44.0011, 44.002, 44.003, 44.004, 44.0041, 44.005, 44.0051, 44.006, 44.007, 44.0071, 44.008, 44.009, 44.011, 44.0312, 44.032, 44.051, 44.052, 44.053, and 44.054; TEC, §§45.003, 45.0031, 45.005, 45.105, 45.106, 45.202, 45.203; and TEC, Chapter 46, as open-enrollment charters have no taxing capacity for interest and sinking purposes and, therefore, have no access to facility assistance.

19 TAC §102.1309(a)(2)

TEC, §12A.004(a)(2), prohibits an exemption from a requirement imposed by the TEC, Chapter 11, Subchapters A, C, D, and E, with exception of §11.1511(b)(5) and (14) and §11.162.

19 TAC §102.1309(a)(5)

TEC, §12A.004(a)(3), prohibits an exemption from a provision regarding state curriculum and graduation requirements adopted under the TEC, Chapter 28. A district of innovation may not seek an exemption from the TEC, §§28.002, 28.0021, 28.023, 28.005, 28.0051, 28.006, 28.016, 28.0211, 28.0213, 28.0217, 28.025, 28.0254, 28.0255, 28.0258, 28.0259 and 28.026, as those provisions constitute a state curriculum and graduation requirement under the TEC, Chapter 28. A district may not seek an exemption from the TEC, §30.104, because this provision implements the graduation requirements adopted under the TEC, Chapter 28.

19 TAC §102.1309(a)(6)

Some provisions of the TEC supersede the provisions of the TEC, Chapter 12A, and a district of innovation may not seek an exemption from those provisions. TEC, §29.201, applies the provisions of the TEC, Chapter 29, Subchapter G, notwithstanding any other law, which prohibits a district from seeking an exemption from the TEC, Chapter 29, Subchapter G.

19 TAC §102.1309(a)(11)

TEC, §12A.004(a)(4), prohibits an exemption from provisions of academic and financial accountability and sanctions under the TEC, Chapter 39. A district of innovation may not be exempt from any provision of the TEC, Chapter 39.

19 TAC §102.1309(b)(1)

TEC, §12A.004(a)(1), prohibits exemption from any state or federal requirement applicable to an open-enrollment charter school operating under the TEC, Chapter 12, Subchapter D. TEC, §12.104(d), imposes a requirement on open-enrollment charters to comply with all requirements of a state program in which the charter voluntarily participates. Consequently, a school district may not seek an exemption from a requirement of a grant or other voluntary benefit.

19 TAC §102.1309(b)(2)

TEC, §12A.003(b)(2), requires a district to identify requirements imposed by the TEC from which the district should be exempt on adoption of an innovation plan. Several provisions of the TEC do not impose a requirement on districts but authorize discretionary participation by a district. However, a district that chooses to participate must meet certain conditions imposed by statute on the

operation of that authority. As those provisions only apply if a district chooses to operate under those provisions, those provisions do not constitute a requirement from which the district may seek an exemption under the TEC, Chapter 12A.

19 TAC §102.1309(b)(4)

TEC, §12A.003(b)(2), limits an innovation district to identifying requirements of the TEC. Requirements imposed by provisions outside the TEC may not be exempted, including requirements under the Texas Government Code, Chapter 822.

Proposed new 19 TAC §102.1311, Term, would implement the TEC, §12A.006, requirement that the term of designation as an innovation district may not exceed five years. As various provisions discuss a local innovation plan as singular, and the plan, under the TEC, §12A.003, must be "comprehensive," and multiple innovation plans would thwart the necessity for amendments under the TEC, §12A.007, proposed new 19 TAC §102.1311 would, therefore, limit a district to one innovation plan at a time. In accordance with the TEC, §12A.007, changes to a plan shall be handled through the amendment process rather than adopting multiple plans.

Proposed new 19 TAC §102.1313, Amendment, Rescission, or Renewal, would implement the TEC, §12A.007, which authorizes a local innovation plan to be amended, rescinded, or renewed if approved by vote of the district-level committee and board of trustees. The proposed new section would clarify that the requirement of the TEC, §12A.007, stating "in the same manner as required for initial adoption" imposes a two-thirds voting requirement of the board of trustees. As statute authorizes an amendment process but does not impose a requirement for total plan review, proposed new paragraph (1) would clarify in rule that exemptions already approved need not be reviewed during an amendment. To ensure proper notice and orderly return to statutory compliance and to allow the TEA to accurately comply with reporting requirements, proposed new paragraph (2) would require a district that rescinds its plan to notify the TEA of the rescission within five business days of the approved vote and provide a date for compliance with the TEC provisions, which may not be later than the following school year. To ensure orderly transition and ensure proper public notice, proposed new paragraph (3) would clarify in rule that a plan may be renewed within six months of expiration and that all sections of the plan must be reviewed during renewal.

Proposed new 19 TAC §102.1315, Termination, would reflect the statutory authorization under the TEC, §12A.008, for the commissioner to terminate an innovation district designation or permit a district to amend its innovation plan after two consecutive years of unacceptable academic or financial performance ratings. The proposed new section would require the commissioner to terminate an innovation district designation after three consecutive years of unacceptable academic or financial performance ratings, or any combination of the two rating systems. The proposed new section would also implement the statutory provision making the related commissioner decision final and not appealable.

As required by statute, the proposed new sections would require innovation districts to report a list of district-approved TEC exemptions to the TEA. The proposed new sections would require innovation districts to maintain the approved plan, available on the district website for public review.

FISCAL NOTE. Sally Partridge, associate commissioner for accreditation and school improvement, has determined that for the

first five-year period the proposed new sections are in effect there will be fiscal implications for state and local government as a result of enforcing or administering the proposed new sections. The TEA will incur additional personnel costs to fulfill the reporting requirements of statute. The estimated cost is \$100,000 each year for fiscal years 2016 and 2017. School districts could potentially save money depending upon the exemptions claimed and how they would be implemented, but the estimated savings cannot be determined at this time.

PUBLIC BENEFIT/COST NOTE. Ms. Partridge has determined that for each year of the first five years the proposed new sections are in effect the public benefit anticipated as a result of enforcing the new sections would be providing school districts with flexibilities that allow for district innovation based on their local innovation plans. There is no anticipated economic cost to persons who are required to comply with the proposed new sections.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND MICROBUSINESSES. There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins April 1, 2016, and ends May 2, 2016. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to rules@tea.texas.gov or faxed to (512) 463-5337. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on April 1, 2016.

STATUTORY AUTHORITY. The new sections are proposed under the Texas Education Code (TEC), §12A.001, which authorizes districts to be designated as a district of innovation if the district's most recent performance rating under TEC, §39.054, is at least acceptable performance. The designation as a district of innovation may be initiated by a resolution adopted by the board of trustees or a petition signed by a majority of the members of the district-level committee established under TEC, §11.251; TEC, §12A.002, which requires a board of trustees to hold a public hearing to consider if the district should develop a plan for the designation as a district of innovation after adopting a resolution or receiving a petition; TEC, §12A.003, which requires the development of a plan prior to a designation as a district of innovation. This section requires the local innovation plan to provide for a comprehensive educational program and to identify requirements of the TEC that inhibit the plan's goals and from which the district should be exempted. The section provides specific examples of the considerations the plan may include; and TEC, §12A.004, which prohibits a district of innovation from being exempt from requirements that apply to open-enrollment charters; from certain sections of the TEC, Chapter 11; from state curriculum and graduation requirements adopted under the TEC, Chapter 28; and from academic and financial accountability and sanctions under the TEC, Chapter 39. The section requires the commissioner to maintain a list of the exempted provisions and provide notice to the legislature of provisions where districts enrolling a majority of students are exempt; TEC, §12A.005,

which imposes requirements related to the local innovation plan that must be met prior to a board of trustees' vote on adopting the proposed innovation plan; TEC, §12A.006, which limits the term of designation as an innovation district to no more than five years; TEC, §12A.007, which authorizes a local innovation plan to be amended, rescinded, or renewed if approved by vote of the district-level committee and board of trustees; TEC, §12A.008, which authorizes the commissioner to terminate an innovation district designation or permit the district to amend its innovation plan after two consecutive years of unacceptable academic or financial performance ratings. The section requires termination after three consecutive years of unacceptable academic or financial performance ratings, or any combination of the two rating systems. This provision makes the commissioner's decision final and not appealable; and TEC, §12A.009, which authorizes the commissioner to adopt rules to implement districts of innovation.

CROSS REFERENCE TO STATUTE. The new sections implement the TEC, §§12A.001 - 12A.009, as added by HB 1842, 84th Texas Legislature, 2015.

§102.1301. Definitions.

For purposes under this subchapter, the following words and terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) District-level committee--This term has the meaning assigned by the Texas Education Code (TEC), §11.251.

(2) Innovation Plan committee--An innovation plan committee shall consist of members designated by the board of trustees.

(3) Public hearing--An open meeting held by the board of trustees that allows members of the public to hear facts about the proposed plan and designation and provides the opportunity for the public to give opinions and comments on the proposed actions.

(4) Public meeting--An open meeting held by the board of trustees that allows members of the public to hear facts about the proposed plan and designation.

(5) Unacceptable academic performance rating--For the purposes of this chapter, the term "unacceptable academic" performance rating means a rating of Improvement Required or Unacceptable Performance or as otherwise indicated in the applicable year's academic accountability manual adopted under §97.1001 of this title (relating to Accountability Rating System).

(6) Unacceptable financial accountability rating--For the purposes of this chapter, the term "unacceptable financial" performance rating means a Financial Integrity Rating System of Texas (FIRST) rating of Substandard Achievement as indicated in the applicable year's financial accountability system manual adopted under §109.1001 of this title (relating to Financial Accountability Rating).

§102.1303. Eligibility.

(a) A district is eligible for designation as an innovation district if the district's most recent performance rating under the Texas Education Code (TEC), §39.054, is at least acceptable performance, as indicated in the applicable year's academic accountability manual adopted under §97.1001 of this title (relating to Accountability Rating System).

(b) A district may not begin operations as an innovation district if the district is assigned either a final or preliminary rating below acceptable performance, as indicated in the applicable year's academic accountability manual adopted under §97.1001 of this title.

§102.1305. Process Timeline.

(a) If a resolution is adopted by the board of trustees or a petition is signed by a majority of the members of the district-level committee, the board of trustees shall hold a public hearing as soon as possible, but no later than the next scheduled board of trustees meeting, to consider if the district should develop a local innovation plan for the designation of the district as an innovation district. The board resolution may outline the parameters around which the innovation committee may develop the plan.

(b) At the conclusion of the public hearing, or within 30 days after conclusion of the public hearing, the board of trustees may:

(1) decline to pursue designation of the district as an innovation district; or

(2) appoint an Innovation Plan committee to develop a local innovation plan in accordance with the TEC, §12A.003.

(c) Prior to the designation as an innovation district, a local innovation plan must be developed for the school district and shall meet the plan requirements as outlined in the TEC, §12A.003.

(d) The plan must be clearly posted on the district's website for the term of the designation as an innovation district.

§102.1307. Adoption of Local Innovation Plan.

(a) The board of trustees may not vote on adoption of a proposed local innovation plan unless:

(1) the final version of the proposed plan has been available on the district's website for at least 30 days;

(2) the board of trustees has notified the commissioner of education of the board's intention to vote on adoption of the proposed plan; and

(3) the district-level committee established under the Texas Education Code (TEC), §11.251, has held a public meeting to consider the final version of the proposed plan and has approved the plan by a majority vote of the committee members. This public meeting may occur at any time, including up to or on the same date at which the board intends to vote on final adoption of the proposed plan.

(b) A board of trustees may adopt a proposed local innovation plan by an affirmative vote of two-thirds of the membership of the board.

(c) On adoption of a local innovation plan, the district:

(1) is designated as a district of innovation under this chapter for the term specified in the plan but no longer than five calendar years, subject to the TEC, §12A.006;

(2) shall begin operation in accordance with the plan; and

(3) is exempt from state requirements identified under the TEC, §12A.003(b)(2).

(d) The district shall notify the commissioner of approval of the plan along with a list of approved TEC exemptions by completing the agency form provided in the figure in this subsection.

Figure: 19 TAC §102.1307(d)

(e) A district's exemption described by subsection (c)(3) of this section includes any subsequent amendment or redesignation of an identified state requirement, unless the subsequent amendment or redesignation specifically applies to an innovation district.

§102.1309. Prohibited Exemptions.

(a) An innovation district may not be exempted from the following sections of the Texas Education Code (TEC) and the rules adopted thereunder:

(1) a state or federal requirement, imposed by statute or rule, applicable to an open-enrollment charter school operating under the TEC, Chapter 12, Subchapter D, including, but not limited to, the requirements listed in the TEC, §12.104(b);

(2) TEC, Chapter 11, Subchapters A, C, D, and E, except that a district may be exempt from the TEC, §11.1511(b)(5) and (14) and §11.162;

(3) TEC, Chapter 13;

(4) TEC, Chapter 25, Subchapter A, §§25.001, 25.002, 25.0021, 25.0031, and 25.004;

(5) TEC, Chapter 28, §§28.002, 28.0021, 28.0023, 28.005, 28.0051, 28.006, 28.016, 28.0211, 28.0213, 28.0217, 28.025, 28.0254, 28.0255, 28.0258, 28.0259, and 28.026;

(6) TEC, Chapter 29, Subchapter G;

(7) TEC, Chapter 30, Subchapter A;

(8) TEC, §30.104;

(9) TEC, Chapter 34;

(10) TEC, Chapter 37, §§37.006(l), 37.007(e), 37.011, 37.012, 37.013, and 37.020;

(11) TEC, Chapter 39;

(12) TEC, Chapter 41;

(13) TEC, Chapter 42;

(14) TEC, Chapter 44, §§44.0011, 44.002, 44.003, 44.004, 44.0041, 44.005, 44.0051, 44.006, 44.007, 44.0071, 44.008, 44.009, 44.011, 44.0312, 44.032, 44.051, 44.052, 44.053, and 44.054;

(15) TEC, Chapter 45, §§45.003, 45.0031, 45.005, 45.105, 45.106, 45.202, 45.203; and

(16) TEC, Chapter 46.

(b) In addition to the prohibited exemptions specified in subsection (a) of this section, an innovation district may not be exempted from:

(1) a requirement of a grant or other voluntary benefit;

(2) duties that the statute applies to the execution of that power if a district chooses to implement an authorized power that is optional under the terms of the statute;

(3) any other requirement from which the district of innovation cannot be exempted, as determined by the commissioner of education; and

(4) requirements imposed by provisions outside the TEC, including requirements under the Texas Government Code, Chapter 822.

§102.1311. Term.

The term of a district's designation as a district of innovation may not exceed five calendar years and is effective upon district approval and notification of the plan to the Texas Education Agency. A district may only have one innovation plan at any given time.

§102.1313. Amendment, Rescission, or Renewal.

A district innovation plan may be amended, rescinded, or renewed if the action is approved by a majority vote of the district-level committee established under the Texas Education Code (TEC), §11.251, or a comparable committee if the district is exempt from that section, and a two-thirds majority vote of the board of trustees.

(1) Amendment. An amendment to an approved plan does not change the date of the term of designation as an innovation district. Exemptions that were already formally approved are not required to be reviewed.

(2) Rescission. A district must notify the Texas Education Agency within five business days of rescission and provide a date at which time it will be in compliance with all sections of the TEC, but no later than the start of the following school year.

(3) Renewal. A district may renew the district plan within six months of the expiration of the plan's term. During renewal, all sections of the plan and exemptions shall be reviewed and the district must follow all components outlined in §102.1307 of this title (relating to Adoption of Local Innovation Plan).

§102.1315. Termination.

(a) The commissioner of education may:

(1) terminate a district's designation as a district of innovation if, beginning with its ratings in the year of designation, the district is assigned for two consecutive school years:

(A) a final unacceptable academic performance rating under the Texas Education Code (TEC), §39.054;

(B) a final unacceptable financial accountability rating under the TEC, §39.082; or

(C) a final unacceptable academic performance rating under the TEC, §39.054, for one of the school years and a final unacceptable financial accountability rating under the TEC, §39.082, for the other school year; or

(2) permit the district to amend the district's local innovation plan to address concerns specified by the commissioner in lieu of terminating the designation as described in paragraph (1) of this subsection.

(b) The commissioner shall terminate a district's designation as a district of innovation if, beginning with its ratings in the year of designation, the district is assigned for three consecutive school years:

(1) a final unacceptable academic performance rating under the TEC, §39.054;

(2) a final unacceptable financial accountability rating under the TEC, §39.082; or

(3) any combination of one or more unacceptable ratings under paragraph (1) of this subsection and one or more unacceptable ratings under paragraph (2) of this subsection.

(c) Upon termination of an innovation plan, a district must return to compliance with all specified areas of the TEC by a date to be determined by the commissioner.

(d) A decision by the commissioner under this section is final and may not be appealed.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601304

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 185. PHYSICIAN ASSISTANTS

22 TAC §185.8

The Texas Medical Board (Board) proposes an amendment to §185.8, concerning Inactive License.

The amendment adds new language in subsection (d) providing that a licensee attempting to return from inactive to active status must complete a fingerprint card and return the card to the board as part of the application, as well as submitting, or having submitted on the applicant's behalf, a report from the National Practitioner Data Bank/Health Integrity and Protection Data Bank (NPDB-HIPDB).

Scott Freshour, General Counsel for the Board, has determined that for each year of the first five years the amendment as proposed is in effect the public benefit anticipated as a result of enforcing this proposal will be to protect the safety of the public by insuring that the Board is able to evaluate whether criminal arrests, convictions or disciplinary actions in other jurisdictions occurring during the licensee's period of inactive licensure impact the licensee's fitness to safely practice in Texas as a Physician Assistant.

Mr. Freshour has also determined that for the first five-year period the amendment is in effect there will be no fiscal implication to state or local government as a result of enforcing the amendment as proposed. There will be no effect to individuals required to comply with the rule as proposed. There will be no effect on small or micro-businesses.

Comments on the proposal may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018 or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §204.101, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§185.8. Inactive License.

(a) A license holder may have the license holder's license placed on inactive status by applying to the board. A physician assistant with an inactive license is excused from paying renewal fees on the license and may not practice as a physician assistant in Texas.

(b) In order for a license holder to be placed on inactive status, the license holder must have a current annual registration permit and have a license in good standing.

(c) A license holder who practices as a physician assistant in Texas while on inactive status is considered to be practicing without a license.

(d) A physician assistant may return to active status by:

(1) applying to the board, paying an application fee equal to an application fee for a physician assistant license;[;]

(2) complying with the requirements for license renewal under the Act;[-]

(3) providing current verifications from each state in which the physician assistant holds a license;[-]

(4) demonstrating current certification by NCCPA;[- and]

(5) completing a fingerprint card and returning the card to the board as part of the application;

(6) submitting a report from the National Practitioner Data Bank/Health Integrity and Protection Data Bank (NPDB-HIPDB) by contacting the NPDB-HIPDB and having a report of action submitted directly to the board on the applicant's behalf; and

(7) submitting professional evaluations from each employment held after the license was placed on inactive status, and complying with subsection (e) of this section.

(e) A physician assistant applicant applying to return to active status shall provide sufficient documentation to the board that the applicant has, on a full-time basis as defined in §185.4(d) of this title (relating to Procedural Rules for Licensure Applicants), actively practiced as a physician assistant or has been on the active teaching faculty of an acceptable approved physician assistant program, within either of the two years preceding receipt of an application for reactivation. Applicants who do not meet this requirement may, in the discretion of the board, be eligible for the reactivation of a license subject to one or more of the following conditions or restrictions as set forth in paragraphs (1) - (5) of this subsection:

(1) current certification by the National Commission on the Certification of Physician Assistants;

(2) completion of specified continuing medical education hours approved for Category 1 credits by a CME sponsor approved by the American Academy of Physician Assistants;

(3) limitation and/or exclusion of the practice of the applicant to specified activities of the practice as a physician assistant;

(4) remedial education; and/or

(5) such other remedial or restrictive conditions or requirements which, in the discretion of the board are necessary to ensure protection of the public and minimal competency of the applicant to safely practice as a physician assistant.

(f) After five years on inactive status, the license shall be canceled as if by request. The physician assistant may obtain a new license by complying with the requirements and procedures for obtaining an original license.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 17, 2016.

TRD-201601271

Mari Robinson, J.D.

Executive Director

Texas Medical Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 305-7016



CHAPTER 187. PROCEDURAL RULES

SUBCHAPTER B. INFORMAL BOARD PROCEEDINGS

22 TAC §187.16, §187.19

The Texas Medical Board (Board) proposes amendments to §187.16, concerning Informal Show Compliance Proceedings (ISCs), and §187.19, concerning Resolution by Agreed Order.

The amendment to §187.16 adds clarifying language to the notice provision in order to clearly state that the notice provided to complainants differs from the notice provided to licensees, in that the latter contains the ISC evidence, which is confidential by statute and cannot legally be disclosed to the complainant.

The amendment to §187.19 eliminates subsection (e) relating to post-ISC negotiations, via telephone or in person, between panel members, Respondents and board staff, as this provision does not comport with our current process relating to post-ISC negotiations between board members and Respondents. Additionally, such negotiation between board members (directly) and Respondents is specifically reserved and provided for during the mediation process.

Scott Freshour, General Counsel for the Board, has determined that for each year of the first five years the amendments as proposed are in effect the public benefit anticipated as a result of enforcing this proposal will be to have a clear, articulated process for providing ISC notice to complainants and licensees, which aligns with our current process and procedure; and to have a rule that aligns with our current procedures for post-ISC negotiations between panel members, Respondents and board staff, which are handled through mediation and addressed in Chapter 187.

Mr. Freshour has also determined that for the first five-year period the amendments are in effect there will be no fiscal implication to state or local government as a result of enforcing the amendments as proposed. There will be no effect to individuals required to comply with the rules as proposed. There will be no effect on small or micro-businesses.

Comments on the proposal may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018 or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§187.16. *Informal Show Compliance Proceedings (ISCs).*

(a) Notice of the time, date and place of the ISC shall be extended to the licensee and the complainant(s) in writing, by hand delivery, regular mail, certified mail - return receipt requested, overnight or express mail, courier service, or registered mail, to the address of record of the complainants and the address of record of the licensee or the licensee's authorized representative to be sent by the Board at least 30 days prior to the date of the ISC for complaints filed before September 1, 2011. For complaints filed on or after September 1, 2011, the notice shall be sent at least 45 days prior to the date of the ISC. The notice to the licensee or the licensee's authorized representative shall also include:

(1) a statement that the licensee has the opportunity to attend and participate in the informal meeting;

(2) a written statement of the nature of the allegations; and

(3) a copy of the information the board intends to use at the ISC. If the complaint includes an allegation that the licensee has violated the standard of care, the notice shall also include a copy of the Expert Physician Reviewers' Report, prepared in accordance with §154.0561, Texas Occupations Code. In addition, the board will also provide the licensee with the rules governing the proceeding and guidelines to assist the licensee to prepare for the ISC, including requirements regarding requests to reschedule the ISC. The information required by this section may be given in separate communications at different times, provided all of the information has been provided at least 30 days prior to the date of the ISC for complaints filed before September 1, 2011. For complaints filed with the board on or after September 1, 2011, the information to the licensee shall be sent at least 45 days prior to the date of the ISC.

(b) If the information that the board intends to use at the ISC includes only excerpts of any medical record, the licensee has a right to obtain the complete medical record within 14 days after a request is mailed.

(c) A licensee may be asked to respond in writing to questions from the board staff concerning the matter. If the licensee is asked to respond to written questions, the licensee shall respond within 14 days after the notice is mailed. The licensee's response may include any additional information the licensee wants the board representatives to consider.

(d) All information provided by the board staff and the licensee shall be provided to the board representatives for review prior to the board representatives making a determination of whether the licensee has violated the Act, board rules, remedial plan, or board order.

(e) All informal show compliance proceedings shall be scheduled not later than the 180th day after the date the board's official investigation of the complaint is commenced, unless good cause is shown by the board for scheduling the informal meeting after that date. For purposes of this subsection:

(1) "Scheduled" means the act of the agency to reserve a date for the ISC.

(2) "Good cause" shall have the meaning set forth in §179.6 of this title (relating to Time Limits).

§187.19. Resolution by Agreed Order.

(a) If the board representatives determine that the licensee has violated the Act, board rules, or board order, the board representatives may recommend board action and terms and conditions for informal resolution.

(b) The recommendation of the board representatives shall be reduced to writing in an agreed order or remedial plan prepared by board staff and presented to the licensee and the authorized representative.

(c) The licensee may accept the proposed settlement by signing and returning the agreed order or remedial plan within the time period prescribed. If the licensee rejects or fails to timely accept the proposed agreement, board staff may proceed with the filing of a Complaint at SOAH.

(d) Additional negotiations may be held between board staff and the licensee or the authorized representative. In consultation with the board representatives, as available, the recommendations of the

board representatives may be subsequently modified based on new information, a change of circumstances, or to expedite a resolution in the interest of protecting the public.

~~[(e) At the discretion of board staff, a licensee may be invited to participate in negotiations. One or both of the board representatives from the informal show compliance proceeding, or a board member if no such board representative is available, may participate in the negotiations, either in person or by telephone.]~~

~~(e) [(f)]~~ The board representative(s) shall be consulted and must concur with any subsequent substantive modifications before any recommendations are sent to the full board for approval.

~~(f) [(g)]~~ The recommendations may be adopted, modified, or rejected by the board.

~~(g) [(h)]~~ Board staff may communicate directly with the board representative(s) after the ISC for the purpose of discussing settlement of the case.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 18, 2016.

TRD-201601299

Mari Robinson, J.D.

Executive Director

Texas Medical Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 305-7016



CHAPTER 190. DISCIPLINARY GUIDELINES SUBCHAPTER B. VIOLATION GUIDELINES

22 TAC §190.8

The Texas Medical Board (Board) proposes an amendment to §190.8, concerning Violation Guidelines.

The amendment to §190.8 adds the phrase "post-exposure prophylaxis" to language related to the type of treatment that may be provided by physicians for infectious diseases located under paragraph (1)(L)(iii)(II), so as to improve consistency and mirror other language under paragraph (1)(L)(iii)(I), pertaining to sexually transmitted diseases. The added phrase "post-exposure prophylaxis" (PEP) is intended to further clarify that the purpose of the exception is to potentially prevent infection and the furtherance of an outbreak. The amendments propose changes to the definition of a patient's "close contacts" so that the definition better reflects guidance published by the Centers for Disease Control and Prevention and local Texas health authority, so that the specific circumstances of a local communicable disease outbreak and possible drug shortages might be better addressed by physicians. Language under paragraph (1)(L)(iii)(II)(-a-), relating to Chicken Pox, and paragraph (1)(L)(iii)(II)(-f-), stating shingles, is deleted, and replaced with the addition of the term *Varicella zoster*, for the purpose of reorganizing the list and using scientific names. New language is added to paragraph (1)(L)(iii)(II) and (1)(L)(iii)(II)(-g-) providing language that would allow PEP to be administered by physicians providing public health medical services pursuant to a memorandum of understanding between DSHS and the Texas Medical Board, and for any new or emergent communicable disease not specifically listed under

the rule that are determined to be a public health threat by state health authorities, thereby improving the state's ability to provide a quick public health response to communicable diseases affecting the health of Texans. The terms "infectious disease" and "communicable disease" are intended to be interchangeable.

Scott Freshour, General Counsel for the Board, has determined that for each year of the first five years the amendment as proposed is in effect the public benefit anticipated as a result of enforcing this proposal will be to allow physicians, both in the private sector and those employed by the state and providing public health medical services, to have greater flexibility to quickly and effectively treat infectious diseases affecting the lives of Texans, while maintaining appropriate limits so that the public health and welfare will not be jeopardized by the exception provided for under the rule.

Mr. Freshour has also determined that for the first five-year period the amendment is in effect there will be no fiscal implication to state or local government as a result of enforcing the amendment as proposed. There will be no effect to individuals required to comply with the rule as proposed. There will be no effect on small or micro-businesses.

Comments on the proposal may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018 or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§190.8. Violation Guidelines.

When substantiated by credible evidence, the following acts, practices, and conduct are considered to be violations of the Act. The following shall not be considered an exhaustive or exclusive listing.

(1) Practice Inconsistent with Public Health and Welfare. Failure to practice in an acceptable professional manner consistent with public health and welfare within the meaning of the Act includes, but is not limited to:

- (A) failure to treat a patient according to the generally accepted standard of care;
- (B) negligence in performing medical services;
- (C) failure to use proper diligence in one's professional practice;
- (D) failure to safeguard against potential complications;
- (E) improper utilization review;
- (F) failure to timely respond in person when on-call or when requested by emergency room or hospital staff;
- (G) failure to disclose reasonably foreseeable side effects of a procedure or treatment;
- (H) failure to disclose reasonable alternative treatments to a proposed procedure or treatment;
- (I) failure to obtain informed consent from the patient or other person authorized by law to consent to treatment on the patient's

behalf before performing tests, treatments, procedures, or autopsies as required under Chapter 49 of the Code of Criminal Procedure;

(J) termination of patient care without providing reasonable notice to the patient;

(K) prescription or administration of a drug in a manner that is not in compliance with Chapter 200 of this title (relating to Standards for Physicians Practicing Complementary and Alternative Medicine) or, that is either not approved by the Food and Drug Administration (FDA) for use in human beings or does not meet standards for off-label use, unless an exemption has otherwise been obtained from the FDA;

(L) prescription of any dangerous drug or controlled substance without first establishing a defined physician-patient relationship.

(i) A defined physician-patient relationship must include, at a minimum:

(I) establishing that the person requesting the medication is in fact who the person claims to be;

(II) establishing a diagnosis through the use of acceptable medical practices, which includes documenting and performing:

- (-a-) patient history;
- (-b-) mental status examination;
- (-c-) physical examination that must be performed by either a face-to-face visit or in-person evaluation as defined in §174.2(3) and (4) of this title (relating to Definitions). The requirement for a face-to-face or in-person evaluation does not apply to mental health services, except in cases of behavioral emergencies, as defined by 25 TAC §415.253 (relating to Definitions); and
- (-d-) appropriate diagnostic and laboratory testing.

(III) An online questionnaire or questions and answers exchanged through email, electronic text, or chat or telephonic evaluation of or consultation with a patient are inadequate to establish a defined physician-patient relationship;

(IV) discussing with the patient the diagnosis and the evidence for it, the risks and benefits of various treatment options; and

(V) ensuring the availability of the licensee or coverage of the patient for appropriate follow-up care.

(ii) A proper professional relationship is also considered to exist between a patient certified as having a terminal illness and who is enrolled in a hospice program, or another similar formal program which meets the requirements of subclauses (I) through (IV) of this clause, and the physician supporting the program. To have a terminal condition for the purposes of this rule, the patient must be certified as having a terminal illness under the requirements of 40 TAC §97.403 (relating to Standards Specific to Agencies Licensed to Provide Hospice Service) and 42 CFR 418.22.

(iii) Notwithstanding the provisions of this subparagraph, establishing a professional relationship is not required for:

(I) a physician to prescribe medications for sexually transmitted diseases for partners of the physician's established patient, if the physician determines that the patient may have been infected with a sexually transmitted disease; or

(II) a physician to prescribe dangerous drugs and/or vaccines for post-exposure prophylaxis of disease for close contacts of a patient [a patient's close contacts] if the physician diagnoses

the patient with one or more of the following infectious diseases listed in items (-a-) - (-g-) of this subclause, or is providing public health medical services pursuant to a memorandum of understanding entered into between the board and the Department of State Health Services. For the purpose of this clause, a "close contact" is defined as a member of the patient's household or any person with significant exposure to the patient for whom post-exposure prophylaxis is recommended by the Centers for Disease Control and Prevention, Texas Department of State Health Services, or local health department or authority ("local health authority or department" as defined under Chapter 81 of the Texas Health and Safety Code).[: any person who provided care for the patient while the patient was symptomatic; or a member of the patient's household.] The physician must document the treatment provided to the patient's close contact(s) in the patient's medical record. Such documentation at a minimum must include the close contact's name, drug prescribed, and the date that the prescription was provided.

- ~~{(-a-)} Chicken Pox;~~
- (-a-) ~~[(b)]~~ Influenza;
- (-b-) ~~[(e)]~~ Invasive Haemophilus influenzae

Type B;

- (-c-) ~~[(d)]~~ Meningococcal disease;
- (-d-) ~~[(e)]~~ Pertussis;
- (-e-) ~~[(f)]~~ Scabies; ~~[o]~~
- (-f-) ~~[(g)]~~ Varicella zoster; or ~~[Shingles.]~~
- (-g-) a communicable disease determined by

the Texas Department of State Health Services to:

~~(-1-) present an immediate threat of a high risk of death or serious long-term disability to a large number of people; and~~

~~(-2-) create a substantial risk of public exposure because of the disease's high level of contagion or the method by which the disease is transmitted.~~

(M) - (O) (No change.)

(2) - (8) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 18, 2016.

TRD-201601300

Mari Robinson, J.D.

Executive Director

Texas Medical Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 305-7016



TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES

SUBCHAPTER R. ADVISORY COMMITTEES

25 TAC §§37.401, 37.410, 37.420

The Executive Commissioner of the Health and Human Services Commission (HHSC), on behalf of the Department of

State Health Services (department), proposes new §37.401, concerning the Maternal Mortality and Morbidity Task Force, new §37.410 concerning the State Child Fatality Review Committee, and new §37.420 concerning the Sickle Cell Advisory Committee.

BACKGROUND AND PURPOSE

Senate Bill (SB) 200 and SB 277, 84th Legislature, Regular Session, 2015, directed the Executive Commissioner of HHSC to establish and maintain advisory committees to address major health and human services issues and to adopt rules to govern the advisory committee's purpose, tasks, reporting requirements, and date of abolition. As part of health and human services (HHS) system-wide inventory and analysis, the Maternal Mortality and Morbidity Task Force, the State Child Fatality Review Team Committee and the Sickle Cell Advisory Committee have been identified for rulemaking.

The Maternal Mortality and Morbidity Task Force is a statutorily-defined multidisciplinary task force within the department. Texas Health and Safety Code, §§34.001 - 34.018, directs this task force to study and review cases of pregnancy-related deaths and trends in severe maternal morbidity, determine the feasibility of the task force studying cases of severe maternal morbidity, and make recommendations to help reduce the incidence of pregnancy-related deaths and severe maternal morbidity in Texas. New §37.401 describes the operations of the task force including the purpose, tasks, reporting requirements, membership composition, and meeting schedules.

The State Child Fatality Review Team Committee is a statutorily-defined multidisciplinary committee within the department, whose mission is to reduce the number of preventable child deaths. Texas Family Code, §§264.501 - 264.515, directs the State Child Fatality Review Team Committee to meet quarterly to discuss issues related to child risks and safety, to develop strategies to improve child death data collection and analysis, to develop position statements on specific child safety issues, and to research and develop recommendations that will make Texas safer for children. New §37.410 describes the operations of the committee including the purpose, tasks, reporting requirements, membership composition, and meeting schedules. This team has been in existence with regular meetings since 1995.

Senate Bill 277, 84th Legislature, Regular Session, 2015, repealed Texas Health and Safety Code, §33.053, abolishing the Sickle Cell Advisory Committee. As a part of the HHS system-wide analysis, the HHSC Executive Commissioner recommended continuation of the Sickle Cell Advisory Committee in rule. Texas Health and Safety Code, §33.052, directs the department to identify efforts related to the expansion and coordination of education, treatment, and continuity of care programs for individuals with sickle cell trait and sickle cell disease. The purpose of this advisory committee is to raise public awareness of sickle cell disease and sickle cell trait. New §37.420 establishes the committee's purpose, tasks, reporting requirements, membership requirements, membership qualifications and meetings schedules.

SECTION-BY-SECTION SUMMARY

An amendment to the title of Subchapter R, "School Health Advisory Committee," revises the title to "Advisory Committees" to allow for additional advisory committees rules within this subchapter.

New §37.401 establishes the Maternal Mortality and Morbidity Task Force. The new rule (1) identifies the statutory authority for the task force; (2) outlines the task force's purpose; (3) describes tasks; (4) outlines the reporting requirements; (5) gives the date of abolition; (6) establishes membership composition and qualifications; and (7) establishes meeting schedules.

New §37.410 establishes the State Child Fatality Review Team Committee. The new rule (1) identifies the statutory authority for the committee; (2) outlines the committee's purpose; (3) describes tasks; (4) outlines the reporting requirements; (5) establishes membership composition and qualifications; and (6) establishes meeting schedules.

New §37.420 establishes the Sickle Cell Advisory Committee. The new rule (1) identifies the statutory authority for the committee; (2) outlines the committee's purpose; (3) describes tasks; (4) describes reporting requirements; (5) gives the date of abolition; (6) establishes membership composition and qualifications; and (7) establishes meeting schedules.

FISCAL NOTE

Evelyn Delgado, Assistant Commissioner of the Family and Community Health Services Division, has determined that for each year of the first five years that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Evelyn Delgado has also determined that there will not be an adverse economic impact on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices, beyond what is already required by statute, in order to comply with the sections.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL GOVERNMENT

There are no anticipated costs to persons who are required to comply with the sections as proposed. There is no fiscal impact to local employment.

PUBLIC BENEFIT

Mrs. Delgado has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefits anticipated as a result of enforcing or administering the sections are (1) a better understanding of the causes and incidences of child deaths in Texas; (2) strategies for reducing the number of preventable child deaths; (3) policy, law and/or practice recommendations for reducing the incidence of pregnancy-related deaths and severe maternal morbidity in Texas; and (4) improved strategies and methods for raising of public awareness related to preventable child deaths, pregnancy related deaths and severe maternal morbidity in Texas, and sickle cell disease and sickle cell trait.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure

and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Sandra Serna, Family and Community Health Services Division, Department of State Health Services, Mail Code 1920, P.O. Box 149347, Austin, Texas 78714-9347 or by email at sandra.serna@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The new rules are authorized by Texas Government Code, §531.012, which requires the department to adopt rules necessary to establish an Advisory Committee, and by Chapter 2110 in general; and Texas Government Code, §531.0055(e), and the Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Texas Health and Safety Code, Chapter 1001.

The new rules affect Texas Government Code, Chapters 531 and 2110; and Texas Health and Safety Code, Chapter 1001.

§37.401. Maternal Mortality and Morbidity Task Force.

(a) The committee. The Maternal Mortality and Morbidity Task Force (committee) is appointed under and governed by this section. The committee is established under Texas Health and Safety Code, §§34.001 - 34.018.

(b) Purpose. The purpose of the committee is to study cases of pregnancy-related deaths and trends in severe maternal morbidity and to make recommendations to reduce the incidence of pregnancy-related deaths and severe maternal morbidity in Texas.

(c) Tasks. The committee:

(1) studies and reviews:

(A) cases of pregnancy-related deaths; and

(B) trends in severe maternal morbidity.

(2) determines the feasibility of the committee studying cases of severe maternal morbidity; and

(3) makes recommendations to help reduce the incidence of pregnancy-related deaths and severe maternal morbidity in Texas.

(d) Reports. No later than September 1 of each even-numbered year, the committee must submit a biennial written report to the Governor, Lieutenant Governor, Speaker of the House of Representatives, and appropriate committees of the Texas Legislature.

(1) The report must include:

(A) the findings of the committee related to their study and review of cases and trends in pregnancy-related deaths and severe maternal morbidity in this state; and

(B) any policy recommendations made to the HHSC Executive Commissioner to help reduce the incidence of pregnancy-related deaths and severe maternal morbidity.

(2) DSHS must disseminate the report to the state professional associations and organizations listed in Texas Health and Safety Code, §34.006(b).

(e) Sunset Provision. The committee is subject to Texas Government Code, Chapter 325, (Texas Sunset Act). Unless continued in existence as provided by that chapter, the committee is abolished and this section expires September 1, 2019.

(f) Composition.

(1) The committee is composed of 15 members:

(A) thirteen members appointed by the DSHS Commissioner:

(i) four physicians specializing in obstetrics, at least one of whom is a maternal fetal medicine specialist;

(ii) one certified nurse-midwife;

(iii) one registered nurse;

(iv) one physician specializing in family practice;

(v) one physician specializing in psychiatry;

(vi) one physician specializing in pathology;

(vii) one epidemiologist, biostatistician, or researcher of pregnancy-related deaths;

(viii) one social worker or social service provider;

(ix) one community advocate in a relevant field; and

(x) one medical examiner or coroner responsible for recording deaths;

(B) a representative of DSHS's family and community health programs; and

(C) the state epidemiologist for DSHS or the epidemiologist's designee.

(2) In appointing members to the committee, the DSHS Commissioner:

(A) includes members working in and representing communities that are diverse with regard to race, ethnicity, immigration status, and English proficiency;

(B) includes members from differing geographic regions in the state, including both rural and urban areas;

(C) endeavors to include members who are working in and representing communities that are affected by pregnancy-related deaths and severe maternal morbidity and by a lack of access to relevant perinatal and intrapartum care services; and

(D) ensures that the composition of the committee reflects the racial, ethnic, and linguistic diversity of Texas.

(g) Terms of office.

(1) Members are appointed for staggered six-year terms, with the terms of four or five members, as appropriate, expiring February 1st of each odd-numbered year.

(2) A committee member may serve more than one term.

(3) If a vacancy occurs, a person is appointed to serve the unexpired portion of that term.

(h) Officers. The DSHS Commissioner appoints from among the committee members a presiding officer.

(1) The presiding officer presides at all committee meetings at which he or she is in attendance, calls meetings in accordance with this section, appoints subcommittees of the committee as necessary, and causes proper reports to be made to the HHSC Executive Commissioner. The presiding officer may serve as an ex officio member of any subcommittee of the committee.

(2) The committee may reference its presiding officer by another term, such as chairperson.

(i) Meetings. The committee meets at least quarterly to conduct business, or at the call of the DSHS Commissioner.

(1) The committee meets at the call of the presiding officer.

(2) Meeting arrangements are made by DSHS staff.

(3) The committee is not a "governmental body" as defined in the Open Meetings Act, Texas Government Code, Chapter 551. Meetings may be conducted in person, through teleconference call, or by means of other technology.

(4) A simple majority of the appointed committee members constitutes a quorum for the purpose of transacting official business.

(5) The committee is authorized to transact official business only when in a legally constituted meeting with a quorum present.

(6) The agenda for each committee meeting must include an opportunity for new business or for any member to address the committee on matters relating to committee business.

(j) Attendance. Members must attend committee meetings as scheduled.

(1) A member must notify the presiding officer or appropriate DSHS staff if he or she is unable to attend a scheduled meeting.

(2) It is grounds for removal from the committee if a member cannot discharge the member's duties for a substantial part of the term for which the member is appointed because of illness or disability, is absent from more than half of the committee meetings during a calendar year, or is absent from at least three consecutive committee meetings.

(3) The validity of an action of the committee is not affected by the fact that it is taken when grounds for removal of a member exists.

(k) Staff. Staff support for the committee is provided by DSHS staff.

(l) Procedures.

(1) Any action taken by the committee must be approved by a majority vote of the members present once quorum is established.

(2) Each member has one vote.

(3) A member may not authorize another individual to represent the member by proxy.

(4) The committee must make decisions in the discharge of its duties without discrimination based on any person's race, creed, gender, religion, national origin, age, physical condition, or economic status.

(5) Minutes of each committee meeting are taken by DSHS staff and approved by the committee at the next scheduled meeting.

(m) Confidentiality.

(1) Any information pertaining to a pregnancy-related death or severe maternal morbidity is confidential.

(2) Confidential information that is acquired by DSHS and that includes identifying information of an individual or health care provider is confidential and may not be disclosed to any person.

(3) Information is not confidential under this section if the information is general information that cannot be connected with any specific individual, case, or health care provider.

(4) The committee may publish statistical studies and research reports based on information that is confidential under this section, provided that the information:

(A) is published in the aggregate;

(B) does not identify a patient or the patient's family;

(C) does not include any information that could be used to identify a patient or the patient's family; and

(D) does not identify a health care provider.

(5) The department will adopt and implement practices and procedures to ensure that information that is confidential under this section is not disclosed in violation of this section.

(6) In accordance with Texas Health and Safety Code §34.009, information in the committee's possession is confidential and excepted from disclosure under the Public Information Act, Texas Government Code Chapter 552.

(7) The committee and DSHS must comply with all state and federal laws and rules relating to the transmission of health information, including the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191) and rules adopted under that Act.

(n) Statements by members.

(1) HHSC, DSHS, and the committee are not bound in any way by any statement, recommendation, or action on the part of any committee member, except when a statement or action is in pursuit of specific instructions from HHSC, DSHS, or the committee.

(2) The committee and its members may not participate in legislative activity in the name of HHSC, DSHS, or the committee except with approval through HHSC's legislative process. Committee members are not prohibited from representing themselves or other entities in the legislative process.

(3) A committee member must not accept or solicit any benefit that might reasonably tend to influence the member in the discharge of the member's official duties.

(4) A committee member must not disclose confidential information acquired through his or her committee membership.

(5) A committee member must not knowingly solicit, accept, or agree to accept any benefit for having exercised the member's official powers or duties in favor of another person.

(6) A committee member who has a personal or private interest in a matter pending before the committee must publicly disclose

the fact in a committee meeting and may not vote or otherwise participate in the matter. The phrase "personal or private interest" means the committee member has a direct pecuniary interest in the matter but does not include the committee member's engagement in a profession, trade, or occupation when the member's interest is the same as all others similarly engaged in the profession, trade, or occupation.

(o) Reimbursement for expenses.

(1) Members appointed to the committee are not entitled to compensation for service on the committee or reimbursement for travel or other expenses incurred by the member while conducting the business of the committee.

(2) In carrying out its duties, the committee may use technology, including teleconferencing or videoconferencing, to eliminate travel expenses.

§37.410. State Child Fatality Review Team Committee.

(a) The committee. The State Child Fatality Review Team Committee (committee) is appointed under and governed by this section. The committee is established under Texas Family Code, §§264.501 - 264.515.

(b) Purpose. The purpose of the committee is to reduce the number of preventable deaths to children in the State of Texas.

(c) Tasks.

(1) The committee develops an understanding of the causes and incidences of child death in Texas.

(2) The committee identifies procedures within agencies represented on the committee to reduce the number of preventable child deaths.

(3) The committee promotes public awareness and makes recommendations to the Governor and Texas Legislature for changes in law, policy, and practice to reduce the number of preventable child deaths.

(d) Reports.

(1) The committee files a biennial written report with the Governor, Lieutenant Governor, Speaker of the House of Representatives, Texas Department of State Health Services (DSHS), and Texas Department of Family and Protective Services (DFPS) and makes the report available to the public.

(2) The report contains aggregate child fatality data collected by local child fatality review teams, recommendations to prevent child fatalities and injuries, and recommendations to DFPS based on input from the child safety review subcommittee.

(3) The committee shall submit data reports to the Vital Statistics Unit not later than the 30th day after the day on which the review of child fatalities took place.

(e) Composition. The committee is composed of 22 members appointed by the Texas Health and Human Services Commission (HHSC) Executive Commissioner. The committee includes:

(1) a person appointed by and representing the State Registrar of Vital Statistics;

(2) a person appointed by and representing the DSHS Commissioner;

(3) a person appointed by and representing the DSHS Title V Director; and

(4) the following individuals:

(A) a criminal prosecutor involved in prosecuting crimes against children;

(B) a sheriff;

(C) a justice of the peace;

(D) a medical examiner;

(E) a police chief;

(F) a pediatrician experienced in diagnosing and treating child abuse and neglect;

(G) a child educator;

(H) a child mental health provider;

(I) a public health professional;

(J) a child protective services specialist;

(K) a sudden infant death syndrome family service provider;

(L) a neonatologist;

(M) a child advocate;

(N) a chief juvenile probation officer;

(O) a child abuse prevention specialist;

(P) a representative of the Texas Department of Public Safety;

(Q) a representative of the Texas Department of Transportation;

(R) an emergency medical services provider; and

(S) a provider of services to, or an advocate for, victims of family violence.

(f) Terms of office. Except as necessary to stagger terms, the term of office for each member is three years.

(1) At the expiration of their terms, members may renew their terms.

(2) The person appointed by and representing the State Registrar of Vital Statistics, the person appointed by and representing the DSHS Commissioner, and the person appointed by and representing the DSHS Title V Director are permanent members of the committee.

(3) An appointment to a vacancy on the committee is made in the same manner as the original appointment.

(g) Officers. The committee selects from its members a presiding officer and an assistant presiding officer.

(1) The presiding officer presides at all committee meetings at which he or she is in attendance and calls meetings of the committee.

(2) The assistant presiding officer presides at meetings if the presiding officer is unable to attend.

(h) Meetings.

(1) The committee meets quarterly.

(2) Meeting arrangements are made by DSHS staff.

(3) The committee is a "governmental body" as defined in the Open Meetings Act, Texas Government Code, Chapter 551. Meetings may be conducted in person, through teleconference call, or by means of other technology.

(4) A simple majority of the appointed committee members constitutes a quorum for the purpose of transacting official business.

(5) The committee is authorized to transact official business only when in a legally constituted meeting with quorum present.

(6) The agenda for each committee meeting includes an item entitled public comment under which any person is allowed to address the committee on matters relating to business. The presiding officer may establish procedures for public comment, including a time limit on each comment.

(i) Attendance. Members must attend committee meetings as scheduled.

(1) A member must notify the presiding officer or appropriate DSHS staff if he or she is unable to attend a scheduled meeting.

(2) It is grounds for removal from the committee if a member cannot discharge the member's duties for which the member is appointed because of illness or disability or is absent from more than one committee meeting per year.

(3) A member may give another member voting proxy upon his or her absence.

(j) Staff. Staff support for the committee is provided by DSHS.

(k) Procedures.

(1) Any action taken by the committee must be approved by a majority vote of the members present, once quorum is established.

(2) Each member has one vote unless given proxy by another member.

(3) The committee makes decisions in the discharge of its duties without discrimination based on any person's race, creed, gender, religion, national origin, age, physical condition, or economic status.

(4) Minutes of each committee meeting are taken by DSHS staff and approved by the committee at the next scheduled meeting.

(l) Statement by members.

(1) HHSC, DSHS, and the committee are not bound in any way by any statement, recommendation, or action on the part of any committee member, except when a statement or action is in pursuit of specific instructions from HHSC, DSHS, or the committee.

(2) The committee and its members may not participate in legislative activity in the name of the committee. Committee members are not prohibited from representing themselves or other entities in the legislative process.

(3) A committee member may not accept or solicit any benefit that might reasonably tend to influence the member in the discharge of the member's official duties.

(4) A committee member may not disclose confidential information acquired through his or her committee membership.

(5) A committee member may not knowingly solicit, accept, or agree to accept any benefit for having exercised the member's official powers or duties in favor of another person.

(6) A committee member who has a personal or private interest in a matter pending before the committee must publicly disclose the fact in a committee meeting and may not vote or otherwise participate in the matter. The phrase "personal or private interest" means the committee member has a direct pecuniary interest in the matter but does not include the committee member's engagement in a profession, trade, or occupation when the member's interest is the same as all others similarly engaged in the profession, trade, or occupation.

(m) Reimbursement for expenses. A member of the committee is not entitled to compensation for serving on the committee but is entitled to reimbursement for the member's travel expenses as provided for in the General Appropriations Act.

(1) Reimbursement for a person serving on the committee is paid from funds appropriated by DSHS.

(2) Reimbursement for other persons serving on the committee shall be paid from funds appropriated to DSHS.

§37.420. Sickle Cell Advisory Committee.

(a) The committee. The Sickle Cell Advisory Committee (committee) is appointed under and governed by this section. The committee is established under Texas Government Code, §531.012.

(b) Applicable law. The committee is subject to Texas Government Code, Chapter 2110, concerning state agency advisory committees.

(c) Purpose. The purpose of the committee is to raise awareness of sickle cell disease and sickle cell trait in Texas.

(d) Tasks.

(1) The committee reviews and suggests methods for raising public awareness of sickle cell disease and sickle cell trait.

(2) The committee recommends two specific strategies in the two-year term to raise public awareness.

(e) Reports.

(1) The committee files an annual written report with the Texas Health and Human Services Commission (HHSC) Executive Commissioner.

(A) The report lists:

(i) the meeting dates of the committee;

(ii) the attendance records of its members;

(iii) a brief description of actions taken by the committee;

(iv) a description of how the committee has accomplished the tasks given to the committee by the Texas Department of State Health Services (DSHS) and HHSC; and

(v) anticipated activities of the committee for the next year.

(B) The report identifies the costs related to the committee, including the cost of DSHS staff time spent in support of the committee's activities and the source of funds used to support the committee's activities.

(C) The report covers the meetings and activities in the immediate preceding fiscal year and is filed with the HHSC Executive Commissioner by the first day of December of the following fiscal year.

(2) The committee reports any recommendations to the HHSC Executive Commissioner at a meeting of the HHSC Executive Council established under Texas Government Code, §531.0051.

(3) The committee files an annual written report with the Texas Legislature of any policy recommendations made to the HHSC Executive Commissioner.

(f) Abolishment. The committee is abolished and this section expires September 1, 2018.

(g) Composition. The committee is composed of seven members appointed by the HHSC Executive Commissioner, including:

(1) two members from community based organizations with experience addressing the needs of individuals with sickle cell disease;

(2) two physicians specializing in hematology;

(3) two members of the public who are either an individual with sickle cell disease or a parent of a person with sickle cell disease or trait; and

(4) one representative from a health professions academic setting.

(h) Terms of office.

(1) The term of office for each member is two years.

(2) If a vacancy occurs, a person is appointed to serve the unexpired portion of that term.

(i) Officers. The committee selects from its members a presiding officer and an assistant presiding officer.

(1) The presiding officer serves until September 1, 2018. The assistant presiding officer serves until September 1, 2018. Both the presiding officer and the assistant presiding officer may holdover until his or her replacement is selected.

(2) The presiding officer presides at all committee meetings at which he or she is in attendance, calls meetings in accordance with this section, appoints subcommittees of the committee as necessary, and causes proper reports to be made to the HHSC Executive Commissioner. The presiding officer may serve as an ex officio member of any subcommittee of the committee.

(3) The assistant presiding officer performs the duties of the presiding officer in case of the absence or disability of the presiding officer. In case the office of presiding officer becomes vacant, the assistant presiding officer serves until the committee selects a new presiding officer.

(4) The committee may reference its officers by other terms, such as chairperson and vice-chairperson.

(j) Meetings. The committee meets three times a year to conduct business.

(1) The committee meets at the call of the presiding officer.

(2) Meeting arrangements are made by DSHS staff.

(3) The committee is a "governmental body" as defined in the Open Meetings Act, Texas Government Code, Chapter 551. Meetings may be conducted in person, through teleconference call, or by means of other technology.

(4) A simple majority of the appointed committee members constitutes a quorum for the purpose of transacting official business.

(5) The committee is authorized to transact official business only when in a legally constituted meeting with a quorum present.

(6) The agenda for each committee meeting includes an opportunity for new business or for any member to address the committee on matters relating to committee business.

(7) The agenda for each committee meeting also includes an item entitled public comment under which any person is allowed to address the committee on matters relating to business. The presiding officer may establish procedures for public comment, including a time limit on each comment.

(k) Attendance. Members must attend committee meetings as scheduled.

(1) A member must notify the presiding officer or appropriate DSHS staff if he or she is unable to attend a scheduled meeting.

(2) It is grounds for removal from the committee if a member:

(A) cannot discharge the member's duties for a substantial part of the term for which the member is appointed because of illness or disability;

(B) is absent from more than half of the committee meetings during a calendar year; or

(C) is absent from at least three consecutive committee meetings.

(3) The validity of an action of the committee is not affected by the fact that it is taken when grounds for removal of a member exists under paragraph (2) of this subsection.

(l) Staff. Staff support for the committee is provided by DSHS.

(m) Procedures. Roberts Rules of Order are the basis of parliamentary decisions, except where otherwise provided by law or rule.

(1) Any action taken by the committee must be approved by a majority vote of the members present, once quorum is established.

(2) Each member has one vote.

(3) A member may not authorize another individual to represent the member by proxy.

(4) The committee makes decisions in the discharge of its duties without discrimination based on any person's race, creed, gender, religion, national origin, age, physical condition, or economic status.

(5) Minutes of each committee meeting are taken by DSHS staff and approved by the committee at the next scheduled meeting.

(n) Statement by members.

(1) HHSC, DSHS, and the committee are not bound in any way by any statement, recommendation, or action on the part of any committee member, except when a statement or action is in pursuit of specific instructions from HHSC, DSHS, or the committee.

(2) The committee and its members may not participate in legislative activity in the name of HHSC, DSHS, or the committee except with approval through HHSC's legislative process. Committee members are not prohibited from representing themselves or other entities in the legislative process.

(3) A committee member may not accept or solicit any benefit that might reasonably tend to influence the member in the discharge of the member's official duties.

(4) A committee member may not disclose confidential information acquired through his or her committee membership.

(5) A committee member may not knowingly solicit, accept, or agree to accept any benefit for having exercised the member's official powers or duties in favor of another person.

(6) A committee member who has a personal or private interest in a matter pending before the committee must publicly disclose the fact in a committee meeting and may not vote or otherwise participate in the matter. The phrase "personal or private interest" means the committee member has a direct pecuniary interest in the matter but does not include the committee member's engagement in a profession, trade, or occupation when the member's interest is the same as all others similarly engaged in the profession, trade, or occupation.

(o) Reimbursement for expenses. In accordance with the requirements set forth in Texas Government Code Chapter 2110, a committee member may receive reimbursement for the member's expenses incurred for each day the member engages in official committee business if authorized by the General Appropriations Act or budget execution process.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 18, 2016.

TRD-201601301

Lisa Hernandez

General Counsel

Department of State Health Services

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 776-6972



CHAPTER 265. GENERAL SANITATION SUBCHAPTER B. TEXAS YOUTH CAMPS SAFETY AND HEALTH

25 TAC §265.29

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), proposes an amendment to §265.29, concerning the Youth Camp Training Advisory Committee.

BACKGROUND AND PURPOSE

The purpose of the amendment is to implement the repeal of Health and Safety Code, §141.0096, by Senate Bill (SB) 277, 84th Legislature, Regular Session, 2015, which abolished the Youth Camp Training Advisory Committee. Section 265.29 currently includes the Youth Camp Training Advisory Committee and the Youth Camp Advisory Committee. This amendment will remove the Youth Camp Training Advisory Committee from §265.29.

The Youth Camp Training Advisory Committee was created by the Legislature in 2005 to advise the department and the executive commissioner in the development of criteria and guidelines for the training and examination program on sexual abuse and child molestation for staff and volunteers of youth camps.

The Youth Camp Training Advisory Committee was one of several advisory committees recommended for abolishment by the Sunset Advisory Commission during the 2014 review of the department. Subsequent to the repeal of the statutory requirements for this and other committees, the commission conducted a comprehensive analysis and sought stakeholder input on the continuation of the advisory committees abolished in statute to determine if there was a need to recreate any of the committees in rule.

No comments were received regarding the discontinuation of the Youth Camp Training Advisory Committee. The department will continue to obtain input as needed on youth camp training through the Youth Camp Advisory Committee and ongoing interactions with youth camp representatives.

SECTION-BY-SECTION SUMMARY

Existing §265.29(b) is being deleted to remove references to the Youth Camp Training Advisory Committee, abolished by SB 277.

The amendment to §265.29(c) renumbers and renames subsection (b) to reflect section reorganization and the procedures for the Youth Camp Advisory Committee.

FISCAL NOTE

Jon Huss, Section Director, Environmental and Consumer Safety Section, has determined that for each year of the first five years that the section will be in effect, there will be no fiscal implications to the state or local governments as a result of enforcing or administering the section as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Huss has also determined that there will be no adverse impact on small businesses or micro-businesses required to comply with the section as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the section as proposed.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Huss has also determined that for each year of the first five years that the section will be in effect, the public will benefit from adoption of the section. The public benefit anticipated from enforcing or administering the section is to better ensure the health and safety of children attending youth camps.

REGULATORY ANALYSIS

The department has determined that this is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed amendment does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Carolyn Bivens, Department of State Health Services, P.O. Box 149347, Mail Code 1911, Austin, Texas 78714-9347, (512) 776-2370, or by email to Carolyn.Bivens@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rule has been reviewed

by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, §141.008, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules necessary to administer the youth camp program; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendment affects Government Code, Chapter 531, and Health and Safety Code, Chapters 141 and 1001.

§265.29. *Youth Camp Committee* [~~Committees~~].

(a) (No change.)

~~[(b) Training advisory committee.]~~

~~[(1) Training advisory committee appointment. The commissioner or his designee shall appoint a training advisory committee to advise the department and the executive commissioner in the development of criteria and guidelines for the training and examination.]~~

~~[(2) Training advisory committee membership. The training advisory committee consists of not more than nine members including at least two members who represent the general public; and other members, who include experienced camping professionals representing the camping communities of this state, representatives of youth camps selected by the department, and representatives of the Council on Sex Offender Treatment established under Occupations Code, Chapter 110.]~~

~~[(3) Filling a vacancy on the training advisory committee. Any vacancy on the training advisory committee will be filled by the department in the same manner as other appointments to the training advisory committee.]~~

~~[(4) Meetings. The advisory committee shall meet at the call of the commissioner.]~~

(b) ~~[(e) Procedures. [Both committees:]]~~

(1) Staggered terms of service. Committee members shall serve for staggered six-year terms, with the terms of three members expiring on August 31 of each odd-numbered year.

(2) Adoption of committee rules of conduct and election of officers. The committee may adopt rules for the conduct of its own activities and may elect from among its members a chairperson, a vice-chairperson, and a secretary.

(3) Committee quorum. A simple majority of the members of the committee who are statutorily required to be appointed shall constitute a quorum for the purpose of transacting official business.

(4) Committee meetings announced. The committee is not a "governmental body" as defined in the Open Meetings Act. However, in order to promote public participation, each meeting of the committee shall be announced and conducted in accordance with the Texas Government Code, Open Meetings Act, Chapter 551.

(5) Compensation or reimbursement of expenses. A committee member may not receive compensation or reimbursement of expenses for serving on a youth camp committee.

(6) Presiding officer. The [Each] committee shall annually select from among its members a chair who will serve as the presiding officer of the committee. The presiding officer of the committee shall preside over the committee.

(7) Reports. The presiding officer shall file an annual written report with the department.

(A) The report may list the meeting dates of the committee and any subcommittees, the attendance records of its members, a brief description of actions taken by the committee, a description of how the committee has accomplished any specific tasks officially given to the committee, the status of any rules that were recommended by the committee, and anticipated activities of the committee for the next year.

(B) The report shall cover the meetings and activities in the immediate preceding 12 months and shall be filed with the department. The report shall be signed by the presiding officer.

(8) Committee abolished. By October 1, 2021, the executive commissioner will initiate and complete a review of the committee [committees] to determine whether the committee [committees] should be continued, consolidated with another committee, or abolished. If the [a] committee is not continued or consolidated, the committee shall be abolished on that date.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 18, 2016.

TRD-201601296

Lisa Hernandez

General Counsel

Department of State Health Services

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 776-6972



TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 371. DRINKING WATER STATE REVOLVING FUND

The Texas Water Development Board ("TWDB" or "board") proposes amendments to 31 Texas Administrative Code ("TAC") §§371.1, 371.2, 371.10 - 371.18, 371.20 - 371.24, 371.30 - 371.35, 371.40 - 371.42, 371.60 - 371.62, 371.70 - 371.74, 371.80 - 371.82, and 371.85 - 371.88, relating to the TWDB's administration of the Drinking Water State Revolving Fund ("DWSRF"). TWDB also proposes new §§371.3, 371.4, 371.36, and 371.43 - 371.52 are proposed. Repeals of existing §§371.3, 371.4, and 371.43 - 371.51 are simultaneously proposed elsewhere in this issue of the *Texas Register*.

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

The TWDB proposes to amend numerous provisions in 31 TAC Chapter 371. Various amendments are proposed to provide greater clarity in this chapter of TWDB rules or to update rule provisions pursuant to TWDB practice. The specific provisions

being amended and the reasons for the amendments are discussed in more detail below.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS AND NEW RULES.

Subchapter A. General Program Requirements.

Section 371.1. Definitions.

The definition of "Acquisition" is added to discuss eligible project costs and to describe a phase of the project.

The definition of "Applicant" is revised for clarity to focus on the repayment of the debt rather than ownership of the project.

The definition of "Application" is revised to expand the focus from solely 'forms' to 'forms and other information' that is submitted to the Board.

The definition of "Authorized representative" is revised to provide greater clarity.

The definition of "Bypass" is revised to incorporate the specific reasoning for passing over a higher ranked project in favor of lower ranked project.

The definition of "Commitment" is revised for clarity to refer directly to the Board resolution that constitutes the commitment rather than to the applicant's fulfillment of the conditions.

The definition of "Commitment term" is deleted because it is no longer needed with the added definition of "Expiration date," which provides more clarity.

The definition of "Construction" is deleted because it is no longer necessary.

The definition of "Construction phase" is added to provide greater clarity.

The definition of "Corporation" is deleted because it is not necessary.

The definition of "Design" is revised for clarity.

The definition of "Disadvantaged community" is revised to incorporate unemployment rates and population trends into the affordability criteria that currently consider only the income level.

The definition of "Disaster" is revised to add extreme heat.

The definition of "Eligible applicant" is revised to include a privately-owned community water system, which is currently eligible, as one of the eligible entities listed in the rule.

The definition of "Environmental affirmation" is deleted because it is no longer needed.

The definition of "Expiration date" is added to provide greater clarity regarding the Board's offer of financial assistance and is used to clarify the timeframe allowed for the applicant to submit a request to extend the Board's commitment.

The definition of "Financial assistance" is revised to provide greater clarity.

The definition of "Invited Projects List" is retitled "Initial Invited Projects List" to be consistent with the terminology used in the Board's Intended Use Plan.

The definition of "Lending rate" is revised for greater clarity to distinguish between financial assistance, which must be repaid and accrues interest, and principal forgiveness, which is not repaid and does not accrue interest.

The definition of "Nonprofit noncommunity (NPNC water system)" is revised to focus on the operation of the system rather than ownership by a non-profit organization.

The definition of "Person" is revised to align more closely to the definition in Chapter 15, Subchapter J, of the Texas Water Code.

The definition of "Planning" is added to reference a particular phase or aspect of the project.

The definition of "Population" is revised to specify that the data used must be the latest data available from the U.S. Census Bureau, such as the American Community Survey data released annually, rather than the decennial census.

The definition of "Principal forgiveness" is added to specify the type of additional subsidization that is being offered for the program.

The definition of "Project" is revised to provide greater clarity.

The definition of "Project information form" is retitled as "Project Information Form (PIF)" and is revised to clarify that the information submitted must conform to the agency's requirements.

The definition of "Project Priority List" is revised for clarity to reference the specific list found in the Intended Use Plan that contains the projects eligible for funding ranked according to their rating criteria score.

The definition of "Ready to proceed" is revised for clarification purposes.

The definition of "Subsidy" is revised to reference only a reduction in the interest rate from the market interest rate rather than principal forgiveness.

The definition of "Utility Commission" is added to delineate between the Public Utility Commission of Texas and the Texas Commission on Environmental Quality because of new powers and duties of the Public Utility Commission.

Other non-substantive, grammatical changes are made for clarification and grammatical purposes. Subsections are renumbered to reflect added and removed definitions.

Section 371.2. Projects and Activities Eligible for Assistance.

Section 371.2 is revised to include a list of all eligible project categories, eligible project-related costs, and ineligible projects in accordance with the Federal Safe Drinking Water Act ("FSDWA") (42 U.S.C. §§300f *et seq.*). While all projects and activities eligible under federal law are listed, the specific projects and activities eligible for assistance under the Texas DWSRF program for a particular funding year would be established annually in the DWSRF's Intended Use Plan. This will allow greater flexibility to adjust the program based on needs and capacity.

Section 371.3. Other Authorized Activities: Source Water Protection and Technical Assistance.

New §371.3 is added. Language from previously numbered §371.3 and §371.4 is added and revised to align the language more closely to the federal regulations. The reference to limitations on the use of funds for these purposes includes the percentages specified in the federal regulations.

Section 371.4. Federal Requirements.

A new §371.4 is added to discuss the federal requirements currently applicable to DWSRF projects. The applicability of the American Iron and Steel requirement currently established an-

nually through the federal appropriations for the program will be specified in the Intended Use Plan.

Subchapter B. Financial Assistance.

Section 371.10. Type of Financial Assistance.

Section 371.10 is revised to state that the executive administrator shall determine the type of financial assistance in accordance with the types of financial assistance authorized by the Act.

Section 371.11. Financing of Planning, Acquisition, and Design Phases.

Section 371.11 is revised to reflect a change in terminology regarding the phases of projects. It is revised to state that applicants may request financial assistance for planning, acquisition, and design without a determination that the project is ready to proceed. It also deletes the reference to applicants who have completed the planning, acquisition, and design for a proposed project within three years of the closing date for financial assistance receiving priority for construction phase funding of the project in the next available IUP if the project is ready to proceed. This priority is retained elsewhere in §371.21(d). The title is revised from "Planning, Acquisition, and Design Funding" to "Financing of Planning, Acquisition, and Design Phases."

Section 371.12. Construction Phase Funding.

Section 371.12 is revised to reflect a change in terminology regarding the phases of projects. The title is revised from "Construction Funding" to "Construction Phase Funding."

Section 371.13. Pre-Design Funding Option.

Section 371.13 is revised to reflect a change in terminology regarding the phases of projects.

Section 371.14. Lending Rates.

Section 371.14 is revised to make private and taxable entities eligible for the interest rate reduction. As part of the revision to clarify eligibility for the reduction, TWDB is proposing to revise the method of establishing the fixed rate scale and determining the amount of adjustment from the market interest rate. TWDB is not proposing to alter the interest rate reduction a borrower would have received under the current program practices. For consistency, the point in time for determining the total fixed lending rate reduction will be set at 30 days from the proposed date the application will be presented to the Board for approval. Other wording changes were made to provide greater clarity. In addition, references to the maximum reduction level have been removed to allow greater flexibility in establishing a significant interest rate reduction consistent with projections of the long-term financial health of the DWSRF. The interest rate reduction will instead be established annually in DWSRF's Intended Use Plan.

Section 371.15. Fees for Financial Assistance.

Section 371.15 is revised to allow greater flexibility to make annual adjustment to the DWSRF program based on needs and projected financial conditions. To accomplish this, the amount of any administrative loan origination fee, up to the maximum specified amount, would be established in the DWSRF's Intended Use Plan. The title is revised from "Fees of Financial Assistance" to "Fees for Financial Assistance."

Section 371.16. Term of Financial Assistance.

Section 371.16 is revised to incorporate a reference to the Federal Safe Drinking Water Act with respect to the expected design life of extended term financing offered to a disadvantaged

community and extended financing through the purchase of debt obligations of a municipality.

Section 371.17. Principal Forgiveness.

Section 371.17 is revised to substitute "principal forgiveness" for "subsidies" in the title and text. As explained under Definitions, principal forgiveness is a type of additional subsidization offered in the program. The term "subsidy" now refers only to a reduction in the interest rate from the market interest rate rather than principal forgiveness.

Subchapter C. Intended Use Plan.

Section 371.20. Submission of Project Information Forms.

Section 371.20 is revised to clarify the requirements for submission of project information forms. It specifically references submission of Project Information Forms to be included on an amended Project Priority List within the Intended Use Plan. It also establishes that the required information that must be in a Project Information Form will be specified in Board guidance. It clarifies that a registered engineer must properly affix the engineer's seal, signature, and date of execution to the project information form if the amount requested from the program is equal to or greater than \$100,000.

Section 371.21. Rating Process.

Section 371.21 is revised to incorporate a consideration of effective management in the rating factors for the program. A new subsection (f) is added to discuss the selection process for urgent need financial assistance, including the ability to bypass higher rated projects to provide funding to urgent need projects.

371.22. Public Notice.

Section 371.22 is revised to better reflect TWDB processes whereby the executive administrator, not the Board members, hold public hearings. The rule would state that the executive administrator may make amendments to the Project Priority List after a 14-day public comment period without any public hearing.

Section 371.23. Criteria and Methods for Distribution of Funds.

Section 371.23 is revised to reflect a change in terminology and to provide greater clarity. It revises "Subsidy" or "subsidies" to "principal forgiveness" and "Invited Projects List" to "Project Priority List" to be consistent with other sections as well as the terminology in the Intended Use Plan. The reference to small communities is clarified to mean small water systems.

Section 371.24. Changes to Project.

Section 371.24 is revised to adjust permitted changes in a proposed project listed in the Intended Use Plan without requiring a re-ranking of the project. First, the applicant for a proposed project may change provided the project itself does not change. Second, the fundable amount of a proposed project may not increase by more than 10% of the amount listed in the approved IUP. The rule is revised to allow the executive administrator to waive the 10% limit to not only incorporate additional elements to the project, but also increased project costs. Further, the section is revised to specify that any principal forgiveness awarded may not exceed the amount in the original Intended Use Plan.

Subchapter D. Application for Assistance.

Section 371.30. Pre-Application Conferences.

Section 371.30 is revised to allow individuals to participate in the conference without being in attendance.

Section 371.31. Timeliness of Application and Required Application Information.

Section 371.31 is revised to base the due date for curing a deficiency on the date of the notice to the applicant rather than the date the applicant receives the notice. This will allow enhanced tracking for program administration. This section specifies that the application must include a copy of any actual or proposed contracts covering revenues for the project for a duration specified by the agency. To allow additional flexibility to the agency, the rule would permit an alternative method of establishing a reliable accounting of the financial records of the applicant if approved by the executive administrator. The rule would clarify the listing within the application of all the funds used for the project. This section is revised to require private applicants to submit an affidavit stating that the decision to apply for financial assistance was done so in accordance with the Applicant's bylaws or charter, instead of submitting an affidavit stating the Applicant sent written 72-hour notice to all customers, to allow Applicants to follow their established notice requirements. The provisions regarding required documentation from private applicants are revised to also cover sole proprietorships. Other non-substantive and grammatical changes were made for clarification purposes.

Section 371.32. Review of Applications for Financial Assistance.

Section 371.32(c) is deleted because it is no longer necessary. New subsection (c) is added to establish commitment timeframes for projects that qualify and have been designated to receive principal forgiveness. Due to the high demand and limited availability of subsidized funding, it is imperative that applicants offered principal forgiveness proceed in a timely manner.

Section 371.33. Refinancing.

Section 371.33 is revised to require the project to meet programmatic requirements.

Section 371.34. Required Water Conservation Plan and Water Loss Audit.

Section 371.34 is revised to incorporate new statutory requirements. According to §16.0121(g), Water Code, a retail public utility providing potable water that receives financial assistance from the TWDB is required to use a portion of that financial assistance, or any additional financial assistance provided by TWDB, to mitigate the utility's system water loss if, based on a water audit filed by the utility, the water loss meets or exceeds the threshold established by TWDB rule. In accordance with §16.0121(g), Water Code, as amended by H.B. 949, 84th Legislative Session, §371.34 is revised to allow the TWDB, at the request of the retail public utility, to waive this requirement. TWDB rules regarding this waiver are located in 31 TAC §358.6.

Section 371.35. Board Approval of Funding.

Section 371.35 is revised to remove the commitment expiration timeframes from the rules and establish the expiration timeframes through the annual Intended Use Plan applicable to the project in order to provide greater flexibility in administering the program. Section 371.35 will allow multiple extensions instead of one extension and the language is revised to better instruct applicants on the procedure for requesting an extension.

Section 371.36. Multi-year Commitments.

New §371.36 is added to implement multi-year commitments to provide a reliable source of capital based on a commitment structure that meets the annual capital requirements of the project. In order to provide a reliable source of capital based on a commitment structure that meets the annual capital requirements of the project, the TWDB is proposing to offer multi-year commitments. Multi-year commitments should assist entities that need to fund large projects over a period of time. Further, to assist in providing for long-term financial planning, the minimum interest rate reduction for the multi-year commitments will be established and locked for the five year period based on the interest rate reduction prescribed in the IUP for the first year's commitment.

Subchapter E. Environmental Reviews and Determinations.

Subchapter E is revised to provide greater clarity on the environmental review process through a reorganization of this subchapter. Repeals of existing §§371.43 - 371.51 are simultaneously proposed elsewhere in this issue of the *Texas Register*.

Section 371.40. Definitions.

The definition of "Affected community" is revised to clarify its meaning in the context of its use within the subchapter.

The definitions of "Categorical Exclusion," "Environmental Assessment," "Environmental Impact Statement," "Environmental Information Document," "Finding of No Significant Impact," "Record of Decision," and "Statement of Finding" are added to provide greater clarity on what is included in these various documents, which party prepares the documents, and their use.

The definitions of "Federal Environmental Cross-cutters" and "Human environment" are added to clarify terminology utilized within the subchapter.

The definition of "Mitigation" is revised to better reflect the federal definition by adding fuller explanations of the avoidance, minimization, and rectification aspects of mitigation. Therefore, because it is no longer necessary to retain separate definitions of "Avoidance" and "Minimization," they have been deleted.

The definition of "Emergency Relief Project" is revised to include natural disasters as an emergency condition or incident.

Section 371.41. Environmental Review Process.

Section 371.41 is revised to delete references to avoidance and minimization, which are both included in the definition of mitigation. In addition, disbursement of funds information was removed as this information is already provided in §371.72, relating to Disbursement of Funds. Section 371.41 is further revised to add more details on the timing and preparation of different environmental documents in order to provide greater clarity. Certain terminology is revised in order to avoid confusion between state and federal environmental documents. Other non-substantive and grammatical changes are made for clarification purposes.

Section 371.42. Board's Environmental Finding: Categorical Exclusions.

The title of §371.42 is revised from "Types of Environmental Determinations: Categorical Exclusion" to "Board's Environmental Finding: Categorical Exclusion" in order to provide greater clarity on which party is responsible for evaluating eligibility and issuing the Categorical Exclusion. It is further revised to clarify when a project can be categorically excluded from a full environmental review. Subsection (f) is deleted in order to move this information

to new §371.43 in order to further separate and clarify Applicant versus TWDB responsibilities.

Section 371.43. Applicant Requirements: Categorical Exclusions.

New §371.43 is added in order to delineate between the Applicant's and the TWDB's responsibilities regarding a Categorical Exclusion. New §371.43 contains the Applicant's responsibilities. This change was made to provide greater clarity.

Section 371.44. Board's Environmental Finding: Finding of No Significant Impact.

New §371.44 is added to reorganize and revise previous provisions on the Finding of No Significant Impact in order to provide greater clarity on each party's responsibilities regarding this document. Language from previous §371.43 is added here and is revised to remove the statement that an environmental assessment is required for proposed projects involving new construction. This is because some minor new construction elements are eligible for a CE, which does not require an environmental assessment. The previous language is further revised to reflect the fact that an environmental assessment is not required if the action is categorically excluded or if the executive administrator has decided that an environmental impact statement is required. It is revised to require that all contracts, plans, specifications, or other applicable documents used during the design and construction of the project include reference to or descriptions of the mitigation measures. References to avoidance and minimization were deleted because both are included in the definition of mitigation. Other minor revisions were made to provide greater clarity.

Section 371.45. Applicant Requirements: Environmental Information Document.

New §371.45 is added to reorganize and revise previous provisions on the Environmental Information Document in order to provide greater clarity on each party's responsibilities regarding this document. Language from previous §371.44 is added here and revised to provide greater clarity. An Applicant must prepare an Environmental Information Document for projects that have potential environmental impacts and the significance of those impacts is unknown. New §371.45 provides greater clarity on when an Environmental Information Document is needed, which party prepares the document, and what the document must include.

Section 371.46. Environmental Impact Statements.

New §371.46 is added here to reorganize Subchapter E for greater clarity. The language from previous §371.47 is added here and non-substantive changes to that language are made for clarity purposes.

Section 371.47. Decision to Prepare an Environmental Impact Statement: Notice of Intent.

New §371.47 is added here to reorganize Subchapter E for greater clarity. The language from previous §371.45 is added here and non-substantive changes to that language are made for clarity purposes.

Section 371.48. Board's Environmental Finding: Record of Decision.

New §371.48 is added here to reorganize Subchapter E for greater clarity. The language from previous §371.46 is added here and non-substantive changes to that language are made

for clarity purposes. That language is revised to delete references to avoidance and minimization because both are included in the definition of mitigation. The language is further revised to clarify that the TWDB may provide written notification regarding the outcome of the mitigation measures rather than issue a statement of findings.

Section 371.49. Applicant Requirements: Environmental Impact Statement.

New §371.49 is added here to reorganize Subchapter E for greater clarity. The language from previous §371.48 is added here and non-substantive changes to that language are made for clarity purposes.

Section 371.50. Proposed Project Alterations.

New §371.50 is added here to reorganize Subchapter E for greater clarity. The language from previous §371.49 is added here and revised to state that the executive administrator's review of proposed project alterations may result in a notation to the file when the alterations are minor. It is further revised for clarity to explain the process of confirming that project alterations are within the scope of the original environmental finding.

Section 371.51. Use of Previously Prepared Environmental Findings.

New §371.51 is added here to reorganize Subchapter E for greater clarity. The language from previous §371.50 is added here and revised to allow the executive administrator to adopt previous environmental findings issued by other agencies, not just federal agencies, provided that the finding is compliant with NEPA. It is also revised to clarify that only mitigation measures from the previous findings that are applicable to the proposed project components will be applied as conditions of the financial assistance. It is revised to state that the executive administrator may provide written notification of the outcome of the mitigation measure proposed in an environmental finding to interested agencies and public groups. References to avoidance and minimization were deleted because both are included in the definition of mitigation. Certain wording from previous language is revised in order to provide greater clarity.

Section 371.52. Emergency Relief Project Procedures.

New §371.52 is added here to reorganize Subchapter E for greater clarity. The language from previous §371.51 is added here and non-substantive changes to that language are made for clarity purposes. Certain references to the Board are removed to provide greater flexibility in the emergency relief project procedures.

Subchapter F. Engineering Review and Approval.

Section 371.60. Engineering Feasibility Report.

Section 371.60 is revised to require the engineering feasibility report to show how the project will remedy the drinking water issues and problems instead of simply that they will remedy the problems and issues. Other non-substantive changes are made for clarity purposes.

Section 371.61. Contract Documents: Review and Approval.

Section 371.61 is revised to provide greater clarity on what the term "contract documents" include for the purposes of this section and to reference the TWDB's authority to audit project files.

Section 371.62. Advertising and Awarding Construction Contracts.

Section 371.62 is revised to extend the required notification period for pre-construction conferences from five to ten days to ensure TWDB staff would be able to attend if desired.

Subchapter G. Loan Closings and Availability of Funds.

Section 371.70. Financial Assistance Secured by Bonds or Other Authorized Securities.

Section 371.70 is revised to require the ordinance or resolution adopted by the governing body authorizing the issuance of debt to be sold to the Board to include a statement that all payments, including the origination fee, are made to the Board via wire transfer at no cost to the Board. Further, §371.70(a)(5) is revised to still require assurances that the Applicant will comply with any special conditions specified by the Board's environmental finding, but to delete the requirement that this assurance last until all financial obligations to the state have been discharged. Subsection (d) is added to provide greater clarity on which documents are required and which are not in the case of 100 percent principal forgiveness. Other non-substantive and grammatical changes are made for clarification purposes.

Section 371.71. Financial Assistance Secured by Promissory Notes and Deeds of Trust.

Section 371.71 is revised to clarify that a deed of trust, security agreement, and title insurance policy is not required in the situation of 100 percent principal forgiveness. It is also revised to change "Commission" to "Utility Commission" because of new powers and duties of the Public Utility Commission.

Section 371.72. Disbursement of Funds.

Section 371.72 is revised to eliminate the environmental affirmation by the Board but still require the environmental review to be completed before release of funds for design.

Section 371.73. Remaining Unused Funds.

Section 371.73 is revised to use "unused funds" instead of "surplus funds" for consistency.

Section 371.74. Surcharge.

Section 371.74 is revised to remove "as those terms are defined" because those terms are not defined. It is also revised to reflect new powers and duties of the Public Utility Commission

Subchapter H. Construction and Post-Construction Requirements.

Section 371.80. Inspection During Construction.

Section 371.80 is revised to eliminate the reference to "sound engineering principles" for consistency with §17.185 of the Texas Water Code. Further, on-site observations were added to the scope of inspections as part of TWDB's actions to confirm ongoing compliance with all applicable requirements. Other minor revisions were made to provide greater clarity.

Section 371.81. Alterations During Construction.

Section 371.81 is revised to include the requirement in §17.186 of the Texas Water Code that the Texas Commission on Environmental Quality must give its approval before any substantial or material changes are made in any previously approved plans for facilities required to have commission approval of plans and specifications.

Section 371.85. Final Accounting.

Section 371.85 is revised to specify that remaining surplus funds may be used as specified in any applicable bond ordinance for certain purposes.

Section 371.87. Release of Retainage.

Section 371.87 is revised to clarify that the TWDB must issue a Certificate of Approval prior to approving the full release of retainage on a contract.

Non-substantive or grammatical changes are made to the following sections for clarification and grammatical purposes: §§371.18, 371.82, 371.86, and 371.88.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Cindy Demers, 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.

There is no change in costs because there are no direct costs associated with the proposed amendments and new rules. This proposal is not expected to have any impact on state or local revenues. The proposal does not require any increase in expenditures for state or local governments as a result of administering the rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from the proposal.

PUBLIC BENEFITS AND COSTS

Ms. Cindy Demers 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 provides clarity regarding the TWDB's Drinking Water State Revolving Fund program and is consistent with state and federal laws regarding the Drinking Water State Revolving Fund.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board has determined that a local employment impact statement is not required because the proposal does not adversely affect a local economy in a material way for the first five years that the proposal is in effect because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking. The board 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

The board 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 provide greater clarity regarding the Drinking Water State

Revolving Fund and to follow federal and state requirements for that fund.

Even if the proposal 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 the Federal Safe Drinking Water Act or any other 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 it is also proposed under authority of Texas Water Code §15.605. Therefore, this proposed rulemaking does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The board 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

The board evaluated this proposed rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to make clarifying changes that align with state statutes and federal requirements related to the Drinking Water State Revolving Fund. The proposed rulemaking would substantially advance this stated purpose by clarifying rules related to the Drinking Water State Revolving fund, incorporating applicable language from state and federal laws and rules, and reflecting the current state and federal requirements for the Drinking Water State Revolving Fund.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that administers the Drinking Water State Revolving Fund for the State of Texas.

Nevertheless, the board further evaluated these proposed rules and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of these proposed rules 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 nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, this rulemaking requires compliance with state and federal laws and rules regarding the Drinking Water State Revolv-

ing Fund. These requirements will not burden, restrict, or limit an owner's right to property. Therefore, the proposed rules do not constitute a taking under Texas Government Code, Chapter 2007.

SUBMISSION OF COMMENTS

Written comments on the proposed rulemaking may be submitted by mail to Mr. Les Trobman, 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*.

SUBCHAPTER A. GENERAL PROGRAM REQUIREMENTS

31 TAC §§371.1 - 371.4

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §15.605.

The proposed rulemaking affects Chapter 15 of the Texas Water Code.

§371.1. Definitions.

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

(1) Acquisition--The Applicant obtaining interests in land for the purposes of locating eligible project components.

(2) ~~[(4)]~~ Act--The Federal Safe Drinking Water Act, 42 U.S.C. §§300f et seq.

(3) ~~[(2)]~~ Applicant--The entity applying for financial assistance from the DWSRF including:

(A) the entity that receives the financial assistance; and

(B) the entity legally responsible to repay the debt [that owns the project funded under this chapter, or an entity authorized to act on behalf of the Applicant].

(4) ~~[(3)]~~ Application--The information and supporting documentation submitted by or on behalf of the Applicant that may be used for commitment for financial assistance from the DWSRF or that [The forms provided by] the executive administrator determines [that] must be completed for consideration for financial assistance from the DWSRF.

(5) ~~[(4)]~~ Authorized representative--The signatory agent [of the Applicant] authorized and directed by the Applicant's governing body to file the application and to sign documents relating to the project, on behalf of the Applicant.

(6) ~~[(5)]~~ Board--The Texas Water Development Board.

(7) ~~[(6)]~~ Bonds--All bonds, notes, certificates of obligation, and book-entry obligations authorized to be issued by any political subdivision.

(8) ~~[(7)]~~ Bypass--To pass over a higher ranked project in favor of a lower ranked project to ensure that funds available are utilized in a timely manner, to select an interrelated project, or to meet statutory and capitalization grant requirements as [The selection of a project for funding independent of ranking based on factors] delineated in the applicable IUP.

(9) ~~[(8)]~~ Capitalization grant--The federal grant funds awarded annually by the EPA to the State for capitalization of the DWSRF.

(10) ~~[(9)]~~ Certification of Trust--An instrument executed by a home-rule municipality pursuant to Chapter 104, Local Government Code, governing the management of the financial assistance proceeds in accordance with §114.086, Texas Property Code.

(11) ~~[(10)]~~ Closing--The exchange of the Applicant's approved debt instruments for DWSRF financial assistance.

(12) ~~[(11)]~~ Commission--The Texas Commission on Environmental Quality.

(13) ~~[(12)]~~ Commitment--An offer by the Board to provide financial assistance to an Applicant as evidenced by [who timely fulfills the conditions in] a Board resolution.

~~[(13)] Commitment term--The amount of time, after the Board commitment, within which the commitment for financial assistance must be closed.]~~

(14) Community water system--A public water system that:

(A) serves at least 15 service connections used by year-round residents of the area served by the system; or

(B) regularly serves at least 25 year-round residents.

(15) Consolidation--Any one of the following activities:

(A) a public water system acquiring another public water system;

(B) a public water system providing retail service to another public water system; or

(C) a public water system providing wholesale service, which may include operation of the system, to another public water system.

~~[(16)] Construction--The erection, acquisition, alteration, remodeling, rehabilitation, improvement, extension, or other man-made change necessary for an eligible project or activity.]~~

(16) ~~[(17)]~~ Construction account--A separate account created and maintained for the deposit of financial assistance and utilized by the Applicant to pay eligible expenses for the project.

(17) Construction phase--The erection, acquisition, alteration, remodeling, rehabilitation, improvement, extension, or other man-made change necessary for an eligible project or activity.

(18) Contaminant--Any physical, chemical, biological, or radiological substance present in water.

(19) Contract documents--The engineering documentation relating to the project including engineering drawings, maps, technical specifications, design reports, instructions, and other contract conditions and forms that are in sufficient detail to allow contractors to bid on the work.

~~[(20)] Corporation--A nonprofit water supply corporation created and operating under Chapter 67 of the Texas Water Code.]~~

(20) ~~[(21)]~~ Davis-Bacon Act--The federal statute at 40 U.S.C. §§141 et seq. and in conformance with the U.S. Department of Labor regulations at 29 CFR Part 5 (Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction) and 29 CFR Part 3 (Contractors and Subcontractors on Public Work Financed in Whole or in Part by Loans or Grants from the United States).

~~(21)~~ ~~[(22)]~~ Debt--All bonds or other documents issued or to be issued by any political subdivision or eligible Applicant pledging repayment of the Board's financial assistance.

~~(22)~~ ~~[(23)]~~ Design--The project phase during which [the Applicant prepares] the project design documents are prepared by the Applicant. Documents may include [including] design surveys, plans, working drawings, specifications, and any procedures and protocols to be used during the construction of the project.

~~(23)~~ ~~[(24)]~~ Disadvantaged community--A community that meets the affordability criteria based on income, unemployment rates, and population trends. Specifically, the service area of an eligible applicant, the service area of a community that is located outside the entity's service area, or a portion within the entity's service area if the proposed project is providing new service to existing residents in unserved areas; and meets the following affordability criteria: (a) has an annual median household income that is no more than 75 percent of the state median household income using an acceptable source of socioeconomic data, and (b) the household cost factor that considers income, unemployment rates, and population trends must be greater than or equal to one percent if only water or sewer service is provided or greater than or equal to two percent if both water and sewer service are provided. The required data and calculations of the household cost factor are specified in the IUP under which the project would receive funding. [The service area or portion of a service area that has an adjusted median household income that is no more than 75% of the State median household income for the most recent year for which statistics are available; and if the service area is only charged for one type of service, water or sewer with a household cost factor for water or sewer rates that is greater than or equal to one percent; or if the service area is charged for both water and sewer services with a combined household cost factor for water and sewer rates that is greater than or equal to two percent. The Board may provide financial assistance to an entity that cannot otherwise afford financial assistance under the DWSRF based on considerations other than household cost factors if such considerations clearly warrant financial assistance.]

~~(24)~~ ~~[(25)]~~ Disaster--The occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, extreme heat, other public calamity requiring emergency action, or energy emergency as defined in Texas Government Code §418.004.

~~(25)~~ ~~[(26)]~~ Drinking Water State Revolving Fund (DWSRF)--The financial assistance program authorized by Texas Water Code, Chapter 15, Subchapter J in accordance with the Act.

~~(26)~~ ~~[(27)]~~ Eligible Applicant--Any of the following entities:

- (A) a nonprofit noncommunity water system;
- (B) a nonprofit community water system;
- (C) a political subdivision that is a municipality, intermunicipal, interstate or state agency, or a nonprofit water supply corporation created and operating under Chapter 67 of the Texas Water Code; [or]
- (D) a privately-owned community water system; or
- (E) ~~[(D)]~~ any other entity eligible under federal law to receive funds from the DWSRF.

~~(27)~~ ~~[(28)]~~ Engineering feasibility report--Those necessary plans and studies that directly relate to the project and that are needed

in order to assure compliance with the enforceable requirements of the Act and state statutes.

~~[(29)~~ Environmental affirmation--The Board's acceptance of the environmental determination made prior to the release of funds for design or construction for a project receiving pre-design financial assistance.]

~~(28)~~ ~~[(30)]~~ EPA--The United States Environmental Protection Agency or a designated representative.

~~(29)~~ ~~[(31)]~~ Escrow account--A separate account maintained by an escrow agent until such funds are eligible for release to the construction account.

~~(30)~~ ~~[(32)]~~ Escrow agent--Any of the following:

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

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

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

~~(31)~~ ~~[(33)]~~ Executive administrator--The executive administrator of the Board or a designated representative.

~~(32)~~ Expiration date--The date on which the Board's offer of financial assistance is no longer open or valid and by which a Closing must occur.

~~(33)~~ ~~[(34)]~~ Financial assistance--Funding made available to eligible Applicants as authorized in 40 CFR §35.3525 [Loan funds], including principal forgiveness [and negative interest loans, provided to eligible Applicants].

~~(34)~~ ~~[(35)]~~ Force majeure--Acts of god, strikes, lockouts, or other industrial disturbances, acts of the public enemy, war, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, droughts, tornadoes, hurricanes, arrests and restraints of government and people, explosions, breakage or damage to machinery, pipelines or canals, and any other incapacities of either party, whether similar to those enumerated or otherwise, and not within the control of the party claiming such inability, which by the exercise of due diligence and care such party could not have avoided.

~~(35)~~ ~~[(36)]~~ Green project--A project or components of a project that, when implemented, will result in energy efficiency, water efficiency, green infrastructure, or environmental innovation that is [are] characterized as a green project [projects] either categorically or by utilizing a business case as approved by the executive administrator.

~~(36)~~ ~~[(37)]~~ Green project reserve--A federal directive requiring a specified portion of the capitalization grant to be used for green projects.

~~(37)~~ Initial Invited Projects List--That portion of the Project Priority List listing the eligible projects ranked according to their rating that will initially be invited to submit applications in accordance with procedures and deadlines as detailed in the applicable IUP.

~~(38)~~ Intended Use Plan [use plan] (IUP)--A document prepared annually by the Board, after public review and comment, which identifies the intended uses of all DWSRF program funds and describes how those uses support the overall goals of the DWSRF program.

~~(39)~~ Invited Projects List--That portion of the IUP listing eligible projects ranked according to their rating which will be invited to submit applications in accordance with procedures and deadlines as detailed in the applicable IUP.

~~(39)~~ [(40)] Lending rate--The rate of interest applicable to [a particular] financial assistance that must be repaid [under the DWSRF].

~~(40)~~ [(41)] Market interest rates--Interest rates comparable to those attained for [municipal] securities in an open market offering.

~~(41)~~ [(42)] Municipality--A city, town, or other public body created by or pursuant to state law.

~~(42)~~ [(43)] Nonprofit organization--Any legal entity that is recognized as a tax exempt organization by the Texas Comptroller of Public Accounts pursuant to 34 Texas Administrative Code, Part 1, Chapter 3, Subchapter O (relating to State and Local Sales and Use Taxes [Tax]).

~~(43)~~ [(44)] Nonprofit noncommunity (NPNC) water system--A public water system that is not operated for profit, [a community water system and that] is owned [and operated] by a political subdivision or nonprofit entity, and is not a community water system [organization].

~~(44)~~ [(45)] Outlay report--The Board's form used to report costs incurred on the project.

~~(45)~~ [(46)] Permit--Any permit, license, registration, or [and] other legal document required from any local, regional, state, or federal government for construction of the project.

~~(46)~~ [(47)] Person--An individual, corporation, partnership, association, State, municipality, commission, or political subdivision of the State, or any interstate body, as defined by 33 U.S.C. §1362, including a political subdivision as defined by Chapter 15, Subchapter J, of the Texas Water Code, if the person is eligible for financial assistance under the Act.

~~(47)~~ Planning--The project phase during which the Applicant identifies and evaluates potential alternatives to meet the needs of the proposed project. It includes the environmental review described in Subchapter E of this chapter and preparation of the engineering feasibility report as described in Subchapter F of this chapter.

~~(48)~~ Political subdivision--A municipality, intermunicipal, interstate, or state agency, any other public entity eligible for assistance, or a nonprofit water supply corporation created and operating under Texas Water Code Chapter 67.

~~(49)~~ Population--The number of people who reside within the territorial boundaries of or receive wholesale or retail water service from the Applicant based upon data that is acceptable to the executive administrator and which includes the following:

(A) acceptable demographic projections or other information in the engineering feasibility report or the latest official data available from the U.S. Census Bureau [census] for an incorporated city; or

(B) information on the population for which the project is designed, where the Applicant is not an incorporated city or town.

~~(50)~~ Primary drinking water regulation--Regulations promulgated by EPA which:

(A) apply to public and private water systems;

(B) specify contaminants which, in the judgment of the EPA [administrator], may have any adverse effect on the health of persons;

(C) specify for each such contaminant either:

(i) a maximum contaminant level if, in the judgment of the EPA [administrator], it is economically and technologically feasible to ascertain the level of such contaminant in water in public water systems; or

(ii) if, in the judgment of the EPA [administrator], it is not economically or technologically feasible to [so] ascertain the level of such contaminant, each treatment technique known to the EPA [administrator] which leads to a reduction in the level of such contaminant sufficient to satisfy the requirements of the Act; and

(D) contain criteria and procedures to assure a supply of drinking water which dependably complies with such maximum contaminant levels including quality control and testing procedures to insure compliance with such levels and to ensure the proper operation and maintenance of the system, and requirements as to:

(i) the minimum quality of water which may be taken into the system; and

(ii) the siting of new facilities for public water systems.

~~(51)~~ Principal forgiveness--A type of additional subsidization authorized by 42 U.S.C. §300j-12(d) or federal appropriations acts, as detailed in the Intended Use Plan and principal forgiveness agreement or bond transcript applicable to the project.

~~(52)~~ [(51)] Private Placement Memorandum (PPM)--A document functionally similar to an "official statement" used in connection with an offering of municipal securities in a private placement.

~~(53)~~ [(52)] Project--The planning, acquisition [of land, water rights and permits], environmental review, design, construction, and other activities designed to accomplish the objectives, goals, and policies of [eligible for funding under] the Act.

~~(54)~~ [(53)] Project engineer--The engineer retained by the Applicant to provide professional engineering services during any phase of a project.

~~(55)~~ [(54)] Project Information Form (PIF) [information form]--The form that the executive administrator determines must be submitted by Applicants for rating and ranking on an IUP.

~~(56)~~ [(55)] Project Priority List--A [That portion of the IUP] listing found in the IUP of projects eligible for funding, [projects] ranked according to their rating criteria score and that may be further prioritized as described in the applicable IUP.

~~(57)~~ [(56)] Public water system--

(A) In General. A system that provides water to the public for human consumption through pipes or other constructed conveyances, if such system has at least 15 service connections or regularly serves at least 25 individuals. Such term includes:

(i) any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system; and

(ii) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.

(B) Connections. A connection to a system that delivers water by a constructed conveyance other than a pipe shall not be considered a connection, if:

(i) the water is used exclusively for purposes other than residential use (consisting of drinking, bathing, cooking, or other similar uses);

(ii) the EPA [administrator] or the Commission determines that alternative water to achieve the equivalent level of public health protection provided by the applicable national primary drinking water regulation is provided for residential or similar uses for drinking and cooking; or

(iii) the EPA [administrator] or the Commission determines that the water provided for residential or similar uses for drinking, cooking, and bathing is centrally treated or treated at the point of entry by the provider, a pass-through entity, or the user to achieve the equivalent level of protection provided by the applicable national primary drinking water regulations.

(C) Irrigation districts. An irrigation district in existence prior to May 18, 1994, that provides primarily agricultural service through a piped water system with only incidental residential or similar uses shall not be considered to be a public water system if the system or the residential or similar users of the system comply with subparagraph (B)(ii) and (iii) of this paragraph.

(D) Transition period. A water supplier that would be a public water system only as a result of modifications made shall not be considered a public water system until two years after August 6, 1996. If a water supplier does not serve 15 service connections or 25 people at any time after the conclusion of the two-year period, the water supplier shall not be considered a public water system.

(58) [(57)] Ready to proceed--A project for which available information indicates that there are no significant permitting, land acquisition, social, contractual, environmental, engineering, or financial issues that would keep the project from proceeding in a timely manner to the construction phase of the project.

(59) [(58)] Release of funds--The sequence and timing for Applicant's release of financial assistance funds from the escrow account to the construction account.

(60) [(59)] Secondary drinking water regulation--Regulations promulgated by EPA which apply to public water systems and which specify the maximum contaminant levels which, in the judgment of the EPA [administrator], are necessary to protect the public welfare. Such regulations may vary according to geographic and other circumstances and may apply to any contaminant in drinking water:

(A) which may adversely affect the odor or appearance of such water and consequently may cause a substantial number of the persons served by the public water system providing such water to discontinue its use; or

(B) which may otherwise adversely affect the public welfare.

(61) [(60)] Small water system--A system that serves ten thousand persons or fewer.

(62) [(61)] State--The State of Texas.

(63) [(62)] Subsidy--A reduction in the interest rate from the market interest rate. [Any special financial terms and conditions available including loan forgiveness, negative interest rates, or other financial incentives as detailed in an IUP.]

(64) Utility Commission--The Public Utility Commission of Texas.

(65) [(63)] Water conservation plan--A report outlining the methods and means by which water conservation may be achieved within a particular facilities planning area.

(66) [(64)] Water conservation program--A comprehensive description and schedule of the methods and means to implement and enforce a water conservation plan.

§371.2. *Projects and Activities Eligible for Assistance.*

(a) Eligible projects. Projects that address or prevent violations of health-based drinking water standards. These include projects needed to maintain compliance with existing national primary drinking water regulations for contaminants with acute and chronic health effects. Projects to replace aging infrastructure are eligible for assistance if they are needed to maintain compliance [facilitate compliance with the primary or secondary drinking water regulations applicable to the public water systems] or [otherwise significantly] further the public health protection objectives of the Act. The specific projects and activities eligible for assistance for a particular funding year will be established annually in the IUP based on the eligible project categories and eligible project-related costs in (b) and (c) of this section, as authorized by the Act. [Eligible projects include:]

[(1) upgrade or replacement of infrastructure in order to continue providing the public with safe drinking water, including projects to replace aging infrastructure;]

[(2) correction of exceedances of the health standards established by the Act;]

[(3) consolidation of water supplies where the water supply is contaminated or the system is unable to maintain compliance with the national primary drinking water regulations for financial or managerial reasons and the consolidation will achieve compliance;]

[(4) purchase of capacity in another system if the purchase is part of a consolidation plan and is cost-effective considering buy-in fees and user fees;]

[(5) ensuring that the system has the technical, managerial, and financial capacity to comply with the national primary drinking water regulations and applicable state drinking water regulations over the long term or, where the owner or operator of the system to be funded agrees to undertake all feasible and appropriate changes in operations (including ownership, management, accounting, rates, maintenance, consolidation, alternative water supply, or other procedures) to ensure compliance; and]

(b) Eligible Project Categories.

(1) Treatment. Examples of projects include, but are not limited to, installation or upgrade of facilities to improve the quality of drinking water to comply with primary or secondary standards and point of entry or central treatment under 42 U.S.C. §300f(4)(B)(i)(III).

(2) Transmission and distribution. Examples of projects include, but are not limited to, installation or replacement of transmission and distribution pipes to improve water pressure to safe levels or to prevent contamination caused by leaks or breaks in the pipes.

(3) Source. Examples of projects include, but are not limited to, rehabilitation of wells or development of eligible sources to replace contaminated sources.

(4) Storage. Examples of projects include, but are not limited to, installation or upgrade of eligible storage facilities, including finished water reservoirs, to prevent microbiological contaminants from entering a public water system.

(5) Consolidation. Eligible projects are those needed to consolidate water supplies where, for example, a supply has become contaminated or a system is unable to maintain compliance for technical, financial, or managerial reasons.

(6) Creation of new systems. Eligible projects are those that, upon completion, will create a community water system to address existing public health problems with serious risks caused by unsafe drinking water provided by individual wells or surface water sources. Eligible projects are also those that create a new regional community water system by consolidating existing systems that have technical, financial, or managerial difficulties. Projects to address existing public health problems associated with individual wells or surface water sources must be limited in scope to the specific geographic area affected by contamination. Projects that create new regional community water systems by consolidating existing systems must be limited in scope to the service area of the systems being consolidated. A project must be a cost-effective solution to addressing the problem. The applicant must have given sufficient public notice to potentially affected parties and must have considered alternative solutions to addressing the problem. Capacity to serve future population growth cannot be a substantial portion of a project.

(7) ~~(6)~~ Green Projects. Projects that ~~[projects which]~~ qualify as green projects, in accordance with EPA definitions, based upon information provided within the submitted project information form, the application, and if necessary, the business case.

(c) Eligible project-related costs. In addition to costs needed for the project itself, the following project-related costs are eligible for assistance:

(1) Pre-project costs for planning and design.

(2) Costs for the acquisition of land only if needed for the purposes of locating eligible project components. The land must be acquired from a willing seller.

(3) Costs for restructuring systems that are in significant noncompliance with any national primary drinking water regulation or variance or that lack the technical, financial, and managerial capability to ensure compliance with the requirements of the Act, unless the systems are ineligible under paragraph (d)(2) or (d)(3) of this section.

(d) Ineligible projects. Assistance from the Fund may not be provided to:

(1) Federally-owned public water systems or for-profit noncommunity water systems.

(2) Systems that lack the technical, financial, and managerial capability to ensure compliance with the requirements of the Act, unless the assistance will ensure compliance and the owners or operators of the systems agree to undertake feasible and appropriate changes in operations to ensure compliance over the long term.

(3) Systems that are in significant noncompliance with any national primary drinking water regulation or variance, unless:

(A) The purpose of the assistance is to address the cause of the significant noncompliance and will ensure that the systems return to compliance; or

(B) The purpose of the assistance is unrelated to the cause of the significant noncompliance and the systems are on enforcement schedules (for maximum contaminant level and treatment technique violations) or have compliance plans (for monitoring and reporting violations) to return to compliance.

(e) Ineligible projects. The following projects are ineligible for assistance:

(1) Dams or rehabilitation of dams.

(2) Water rights, except if the water rights are owned by a system that is being purchased through consolidation as part of a capacity development strategy.

(3) Reservoirs or rehabilitation of reservoirs, except for finished water reservoirs and those reservoirs that are part of the treatment process and are on the property where the treatment facility is located.

(4) Projects needed primarily for fire protection.

(5) Projects needed primarily to serve future population growth. Projects must be sized only to accommodate a reasonable amount of population growth expected to occur over the useful life of the facility.

(6) Projects that have received assistance from the national set-aside for Indian Tribes and Alaska Native Villages under 42 U.S.C. §300j-12(i).

(f) Ineligible project-related costs. The following project-related costs are ineligible for assistance from the Fund:

(1) Laboratory fees for routine compliance monitoring.

(2) Operation and maintenance expenses.

~~{(b) Ineligible projects. Projects are not eligible to receive DWSRF funds if the primary purpose of the project is to supply or attract growth. If the primary purpose is to solve a compliance or public health problem, the entire project, including the portion necessary to accommodate a reasonable amount of growth over its useful life, is eligible.}~~

§371.3. Other Authorized Activities: Source Water Protection and Technical Assistance.

(a) DWSRF financial assistance is available to eligible Applicants for:

(1) implementation of local, voluntary source water protection measures to protect source water of the system from contamination and to ensure compliance with national primary drinking water regulations applicable to the community water system;

(2) assistance in the development of voluntary local incentive-based partnerships to reduce the presence of contaminants, to provide financial, managerial, or technical assistance, and to develop recommendations for voluntary, long-term source water protection strategies;

(3) a capacity development strategy to assist public water systems in developing and maintaining adequate technical, financial, and management capacity; and

(4) establishment and implementation of wellhead protection programs.

(b) Limitation. For each fiscal year, the total amount of financial assistance provided for activities under this section may not exceed 15 percent of the amount of the capitalization grant received for that year and may not exceed 10 percent of the amount of the capitalization grant for that year for any one of the following activities:

(1) acquisition of land or conservation easements;

(2) implementation of voluntary, incentive-based source water quality protection measures;

(3) creation of a capacity development strategy;

(4) delineation or assessment of source water protection areas; and

(5) establishment and implementation of wellhead protection programs.

(c) Acquisition of land or of conservation easements from a willing seller or grantor is eligible for financial assistance for source water protection only if the purpose of the acquisition is to protect the source water of a public water system from contamination to maintain or achieve compliance with national primary drinking water regulations.

§371.4. Federal Requirements.

(a) Davis-Bacon Act Prevailing Wage Provision. The Applicant must comply with the requirements of section 1450(e) of the Act (42 U.S.C. §300j-9(e)) in all procurement contracts and sub-grants, and require that loan recipients, procurement contractors, and sub-grantees include such a term and condition in subcontracts and other lower tiered transactions. The Davis Bacon prevailing wage requirements, as provided in 40 U.S.C. §§3141 et seq. and the Department of Labor's implementing regulations, apply to any construction project funded by the DWSRF.

(b) National Environmental Policy Act-like environmental review. The National Environmental Policy Act provisions apply to projects receiving DWSRF assistance. The requirements are specified in Subchapter E of this chapter.

(c) Signage. Projects must comply with the EPA signage requirements implemented to enhance public awareness of DWSRF projects.

(d) American Iron and Steel requirements. As delineated in the applicable IUP, assistance recipients may be required to use only iron and steel products that are produced in the United States for projects for the construction, alteration, maintenance, or repair of a public water system.

(e) Other Federal Requirements. Other federal statutory, regulatory, executive order, and/or guidance and policy authority may apply. Federal requirements are further detailed in the IUP under which a project was funded.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601309

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Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



SUBCHAPTER B. FINANCIAL ASSISTANCE

31 TAC §§371.10 - 371.18

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §15.605.

The proposed rulemaking affects Chapter 15 of the Texas Water Code.

§371.10. Type of Financial Assistance.

The executive administrator shall determine the type of financial assistance available to the Applicant based on the evaluation of the project

information forms, the application, and the availability of funds in accordance with the types of assistance authorized in the Act.

§371.11. Financing of Planning, Acquisition, and Design Phases [Funding].

~~[(a)] Applicants may request [This type of] financial assistance [is available] for the planning, acquisition [of land or water], and [the] design for a proposed project without a readiness to proceed determination.~~

~~[(b) Applicants who have completed the planning, acquisition, and design for a proposed project within three years of the closing for financial assistance will receive a priority for construction funding of the project in the next available IUP if the project is ready to proceed.]~~

§371.12. Construction Phase Funding.

This type of financial assistance is available for the construction phase of an eligible project that is ready to proceed.

§371.13. Pre-Design Funding Option.

This type of financial assistance is available for the planning, design, acquisition, and construction phase of a project. This option allows the commitment of construction funding where planning and design are not yet completed. This option is available only when the executive administrator recommends it to the Board based on a finding that the project is ready to proceed.

§371.14. Lending Rates.

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

(1) Average life--The number determined by dividing the sum of all [the] payment periods [of all maturities of a loan] by the total principal amount [number of maturities].

(2) Borrower--Each eligible Applicant that has received a commitment [receiving a loan] from the Board.

(3) Interest [~~Loan interest~~] rate--The individual interest rate for each maturity in an amortized debt schedule [of a loan] as identified by the executive administrator under this chapter.

(4) Market rate--The individual interest rate for each maturity in an amortized debt schedule [of a loan] payment that is the borrower's market cost of funds based on the MMD scale for the borrower as identified under subsection (c)(1) of this section.

(5) MMD--Thomson Reuters Municipal Market Data Range of Yield Curve Scales.

(6) Payment period--The number determined by multiplying the total principal amount due for an individual maturity as set forth in the debt instrument [loan] by the standard period for the debt instrument [loan].

(7) Standard period--The number identified by determining the number of days between the date of delivery of the funds to a borrower and the date of the maturity of a bond or loan payment pursuant to which the funds were provided calculated on the basis of a 360-day year composed of twelve 30-day periods and dividing that number by 360.

(8) Term--For bonds, the length of time between when the bond is issued and the final maturity in the debt instrument; for loans, the period of time any principal is outstanding.

(b) Procedure for setting fixed interest rates. [The interest rates will be determined by this section and as described in an IUP.]

(1) The executive administrator will set fixed interest rates as described in the IUP and further determined in this section, [rates for loans] on a date that is:

(A) no earlier than five business days prior to the adoption of the political subdivision's bond ordinance or resolution or the execution of a loan agreement; and

(B) not more than 45 days before the anticipated closing of a commitment [the loan] from the Board.

(2) After 45 days from the assignment of the interest rate [on the loan], rates may be extended only with the executive administrator's approval.

(c) Fixed rates. The fixed interest rates for financial assistance under this chapter will be determined as provided in this subsection. The executive administrator will identify the market rate for the borrower, determine the amount of adjustment from the market interest rate scale appropriate for the borrower pursuant to paragraph (2) of this subsection, apply the identified interest rate adjustment to the market rate for each year of the borrower's scale [the borrower] to determine the [loan] interest rate, and apply the [loan] interest rate to the proposed principal schedule, as more fully set forth in this subsection.

(1) Identifying [To identify] the market rate for eligible borrowers.[:]

(A) for borrowers that have a rating by a recognized bond rating entity and will not have bond insurance, the executive administrator will rely on the higher of the appropriate MMD scale for the current bond rating of the borrower or the appropriate MMD BAA scale; or

(B) for borrowers with no rating by a recognized bond rating entity or for borrowers with a rating that is less than investment grade as determined by the executive administrator, the executive administrator will rely on the appropriate MMD BAA scale.[: or]

[(C) for borrowers that are rated by a recognized rating entity with bond insurance or for borrowers with no rating by a recognized bond rating entity with insurance, the executive administrator will rely on the higher of the borrower's uninsured fixed rate scale or the insurer's fixed rate scale.]

(2) The fixed rate scale shall be established for each borrower using individual coupon rates for each maturity of the proposed debt based on the appropriate scale.

(3) [(2)] The program is designed to provide borrowers with an interest rate [a +25 basis point] reduction from the fixed rate scale applicable to the borrower [market rate] based on a level debt service schedule, or if applicable, the reduction is set at the total basis points below the fixed rate scale for borrowers as derived under paragraph (3) of this subsection. Notwithstanding the foregoing, in no event shall the [loan] interest rate as determined under this section be less than zero.

(4) For loans and bond commitments with an average life in excess of 16 years for a term of up to 20 annual maturities or years or an average life in excess of 20 years for a term of up to 30 annual maturities or years (or a pro-rata calculation for terms between 20 and 30 annual maturities or years), and at the discretion of the Board for loans and bond commitments that have debt schedules that produce a total fixed lending rate reduction in excess of a standard loan or bond commitment structure (defined as a debt service schedule in which the first year of the maturity schedule is interest-only followed by principal maturing on the basis of level debt service), the following procedures will be used to determine the total fixed lending rate reduction:

(A) The interest rate component of level debt service will be determined by using the 15th year (19th year for 30-year terms) coupon rate of the appropriate scale of the MMD scales that corresponds to the 15th year (19th year for 30-year terms) of principal of the standard loan or bond commitment structure and that is measured 30 days from the date that application is proposed to be presented to the Board for approval.

(B) Level debt service will be calculated using the 15th year (19th year for 30-year terms) MMD Scale coupon rate as described in subparagraph (A) of this paragraph and the par amount of the loan or bond commitment according to a standard loan or bond commitment structure. For a loan or bond commitment that has been proposed for a term of years equal to a standard loan or bond commitment structure, the dates specified in the application shall be used for interest and principal calculation. For a loan or bond commitment that has been proposed for a term of years less than a standard loan or bond commitment structure or longer than a standard loan or bond commitment structure, level debt service will be calculated beginning with the dated date, will be based upon the principal and interest dates specified in the application, and will continue for the term of a standard loan or bond commitment structure.

(C) A calculation will be made to determine how much a borrower's interest would be reduced if the loan or bond commitment had been made according to the total fixed lending rate reduction provided in paragraph (3) of this subsection and based upon the principal payments calculated in subparagraph (B) of this paragraph.

(D) The Board will establish a total fixed lending rate reduction for the loan or bond commitment that will achieve the interest savings in subparagraph (C) of this paragraph based upon the principal schedule proposed by the borrower.

(5) [(3)] To determine the [loan] interest rate, the following procedures will apply:

(A) Unless otherwise requested by the borrower under subparagraph (B) of this paragraph, the [loan] interest rate will be determined based on a debt service schedule that provides interest only to be paid in the first year of the debt service schedule and in which the remaining annual debt service payments are level, as determined by the executive administrator. The executive administrator will identify the appropriate MMD scale for the borrower and identify the market rate for the maturity due each year [in the year preceding the year in which the average life is reached]. The executive administrator will reduce that market rate of each year by the number of basis points applicable according to paragraph (2) of this subsection and thereby identify a proposed [loan] interest rate scale. The proposed [loan] interest rate scale will be applied to the proposed principal repayment schedule. If the resulting debt service schedule is level to the satisfaction of the executive administrator, then the proposed [loan] interest rate will be the [loan] interest rate for the commitment [loan]. If the resulting debt service schedule is not level to the satisfaction of the executive administrator, then the executive administrator may adjust the interest rate for any or all of the maturities to identify the [loan] interest rate that as closely as possible achieves the interest savings applicable according to paragraph (2) of this subsection while maintaining the principal schedule proposed by the borrower.

(B) A borrower may request a debt service schedule in which the annual debt service payments are not level through the term of the amortized debt schedule [loan], as determined by the executive administrator. [In this event, the executive administrator will approximate a level debt service schedule for the loan amount and identify a proposed loan interest rate that provides for annual debt service payments that are level for the term of the loan following the procedures set

forth in paragraph (1)(A) of this subsection.] From the level debt service schedule, the executive administrator will determine the amount of the subsidy applicable to [that would have been provided if] the [annual] debt service schedule provided [payments had been level]. The executive administrator will then identify the [loan] interest rate that as closely as possible provides the borrower the identified subsidy amount for the principal schedule requested by the borrower.

(d) Variable rates. The interest rate for DWSRF variable rate debt [loans] under this chapter will be set at a rate equal to the actual interest cost paid by the Board on its outstanding variable rate debt plus the cost of maintaining the variable rate debt in the DWSRF. Variable rate debt is [loans are] required to be converted to long-term fixed rate financing [loans] within 90 days of project completion unless an extension is approved in writing by the executive administrator. Within the time limits set forward in this subdivision, borrowers may request to convert to a long-term fixed rate at any time, upon notification to the executive administrator and submittal of a resolution requesting such conversion. The fixed lending rate will be calculated under the procedures and requirements of subsections (b) and (c) of this section.

[(e) Private and taxable borrowers. The interest rate for loan agreements for those borrowers receiving financial assistance who are determined to be private or taxable issuers will be:]

[(1) for borrowers that have a rating by a recognized bond rating entity and will not have bond insurance, the executive administrator will rely on the higher of the MMD taxable scale for the current bond rating of the borrower or the MMD BAA taxable scale;]

[(2) for borrowers with no rating by a recognized bond rating entity or for borrowers with a rating that is less than investment grade as determined by the executive administrator, the executive administrator will rely on the MMD BAA taxable scale; or]

[(3) for borrowers that are rated by a recognized bond rating entity with bond insurance or for borrowers with no rating by a recognized bond rating entity with bond insurance, the executive administrator will rely on the higher of the borrower's uninsured fixed rate taxable scale or the insurer's fixed rate taxable scale.]

(e) [(f)] NPNC borrowers. NPNC borrowers that issue tax-exempt obligations and that operate community/non-community water systems will receive interest rates pursuant to subsections (b) - (d) of this section.

(f) [(g)] Adjustments. The executive administrator may adjust a borrower's interest rate at any time prior to closing as a result of a change in the borrower's credit rating.

§371.15. Fees for [eff] Financial Assistance.

(a) General. The Applicant will be assessed charges for the purpose of recovering administrative costs of all projects receiving DWSRF financial assistance. However, no fees or costs shall be assessed on the portion of the project that receives principal [subsidization through loan] forgiveness [or other subsidies] as detailed in the IUP.

(b) Origination [Loan origination] fee. An administrative fee not to exceed [A loan origination fee equal to] 2.25[%] percent of the project costs will be assessed, as a one-time non-refundable charge. Project costs upon which the fee will be assessed do not include the origination fee or those project costs that are funded through principal [loan] forgiveness. The fee is due and payable at the time of closing and may be financed as a part of the financial assistance.

§371.16. Term of Financial Assistance.

(a) The Board may offer financial assistance up to 20 [30] years for the planning, acquisition, design and/or construction of a

project, in accordance with the Act and the IUP under which the project received funding.

(b) In accordance with the Act and notwithstanding [Notwithstanding] the terms in subsection (a) of this section, the Board may offer [the term of] financial assistance in excess of 20 years, up to 30 years for:

(1) a disadvantaged community, provided that the financial assistance does [offered may] not exceed the expected design life of an eligible project; or[-]

(2) the purchase of bonds issued by a municipality, provided the financial assistance does not exceed the useful life of the underlying asset.

§371.17. Principal Forgiveness [Subsidies].

(a) The Board may provide principal forgiveness [subsidies] for financial assistance for:

(1) an entity that meets the affordability criteria established in this chapter and in the IUP for a Disadvantaged Community; or

(2) an entity that meets the criteria established in the IUP for other subsidies allowed under the federal appropriations law or the capitalization grant.

(b) Total amount of principal forgiveness [subsidies]. The total amount of principal forgiveness [subsidies] may not exceed the percentages established by federal law or by the capitalization grant.

§371.18. Financial Guarantees for Political Subdivision Bonds.

(a) Financial guarantees. The Board will consider accepting surety bonds in lieu of required cash reserve deposits and insurance policies for political subdivision bonds. At the time of commitment and at closing, only those financial guarantors that have been approved by the Board are authorized to underwrite financial guarantee policies on political subdivision bonds approved by the Board.

(b) Criteria for authorized list. The Board will maintain a list of authorized financial guarantors. In order to be considered for placement on the list, a guarantor must meet the following minimum criteria:

(1) the financial guarantor must be a nationally-recognized [nationally recognized] provider of municipal bond insurance and must have a triple-A stable insurer financial strength rating with Standard & Poor's, Moody's Investors Service, Inc. and Fitch, Inc.; and

(2) the financial guarantor must have a triple-A insurer financial enhancement rating with Standard & Poor's.

(c) Review of policies. The executive administrator shall review all policies of insurance submitted by authorized financial guarantors and may reject any policy of insurance or surety bond that [which] does not protect the interests of the Board's financial program or that [which] subrogates the Board's rights.

(d) Removal from authorized list. The executive administrator may remove a financial guarantor from the authorized list at any time that a change in status would cause the financial guarantor to fail to meet the minimum criteria.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.
TRD-201601310



SUBCHAPTER C. INTENDED USE PLAN

31 TAC §§371.20 - 371.24

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §15.605.

The proposed rulemaking affects Chapter 15 of the Texas Water Code.

§371.20. *Submission of Project Information Forms.*

(a) Eligible [~~The executive administrator will request eligible~~] Applicants may [to] submit a project information form for rating and ranking on the applicable IUP. To be included in the IUP and on the initial Project Priority List, Applicants must [Applicants shall] submit a complete and accurate project information form by the date included in the notice. As further detailed in the applicable IUP, applicants may also submit a project information form after the date included on the notice for a project to be considered for inclusion on an amended Project Priority List published after the initial IUP has been approved. The required information will be specified in Board guidance and will include, but will not be [is not] limited, to the following:

- (1) a detailed description of the proposed project;
- (2) a county map(s) showing the location of the service area;
- (3) an estimated total project cost which:

(A) for an estimated financial assistance amount greater than \$100,000, the project information form shall be sealed [certified] by a registered professional engineer; or

(B) for an estimated financial assistance amount less than \$100,000, the project information form shall be accompanied by a statement signed by the system operator establishing the basis for the estimate;

- (4) an estimated project schedule;
- (5) the population currently served by the Applicant;
- (6) the status of the Applicant's water conservation plan;
- (7) signature of the Applicant's authorized representative;

and

(8) additional information, as detailed within the solicitation for project information forms, needed to establish the priority rating score.

(b) The Applicant's failure to submit all of the information requested may result in a failure to include the project in the IUP.

§371.21. *Rating Process.*

(a) Projects in an IUP will be rated based upon the information, and any accompanying supporting documentation, [detailed within the] submitted by the Applicant on the project information form.

(b) Projects will be rated based on the following factors:

(1) Health and compliance. Factors regarding public health concerns/issues or violations of maximum contaminant levels pursuant to 40 CFR [~~C.F.R.~~] Part 141.

(2) Effective management. Whether an entity has adopted or plans to prepare an Asset Management Plan and provide training to the Applicant's governing body and employees, whether the project addresses water conservation and energy efficiency, and whether the project implements a state or regional water plan.

(3) Eligibility as Disadvantaged Community. Projects located in disadvantaged communities, as defined in Subchapter A of this Chapter.

~~[(2) Affordability. A project located in a disadvantaged community shall have an affordability rating factor as defined within the applicable IUP.]~~

~~[(3) Emergency relief. Projects which are affected by events of natural disaster.]~~

~~[(A) The Applicant must demonstrate that a need for emergency relief from an imminent threat to public health, safety, environment, or welfare exists. The applicant must describe the nature of the threat and provide a complete description of the proposed emergency relief project as defined in §371.40 of this title (relating to Definitions).]~~

~~[(B) The Board may authorize funding for the emergency relief project as detailed in §371.51 of this title (relating to Emergency Relief Project Procedures) or as described in an IUP.]~~

(4) Additional factors as designated within the applicable IUP and determined by the executive administrator.

(c) Source Water Protection projects are rated and ranked according to the criteria and procedures within the applicable IUP.

(d) Previously funded projects. Planning, acquisition, or design projects, completed within three years from the closing of the financial assistance will receive a priority for construction phase funding if there are no significant changes that affect the original project rating and the project is ready to proceed.

(e) If any changes are proposed to the nature of the improvements of a proposed project, or in the number of participants in a consolidation project which would result in a change to the combined rating factor as determined in the IUP, the projects must be re-ranked. In this case, the project's ranking will be determined based on the revised combined rating factor.

(f) Urgent Need. The Board may offer urgent need financial assistance to address situations that require immediate attention to protect public health and safety as prescribed in the IUP. The executive administrator may bypass projects to provide funding to urgent need projects.

§371.22. *Public Notice.*

(a) In accordance with the Act, the executive administrator [Board] shall hold public hearings and allow a period for public review and comment before the Board considers [eonsidering] the adoption and approval of the IUP and the Project Priority List.

(b) For any substantive amendments thereto, the executive administrator [Board] shall hold a public hearing and allow a period of public review and comment in accordance with the Act. The executive administrator may make amendments to the Project Priority List after a 14-day public comment period without any public hearing.

§371.23. *Criteria and Methods for Distribution of Funds.*

(a) Amount of available funds. Annually, the executive administrator will determine the amount of funds available for water system improvements and other projects for the fiscal year.

(b) Principal forgiveness [Subsidy] limits. The total amount of principal forgiveness [subsidies] in any fiscal year may not exceed the percentages established by federal law or by the capitalization grant.

(c) Project Priority List. Available program funds will be applied to the list of projects designated to receive funding. The methods used for ranking include:

(1) Project costs. Project costs will be determined by cost estimates contained in the project information form if the executive administrator deems those costs reasonable and acceptable; the costs will also be reflected in the applicable IUP.

(2) Tie-breakers. If two or more projects receive the same rating, then the executive administrator will use the tie-breaker procedures listed in the applicable IUP.

(3) Bypass procedure. The executive administrator may bypass higher rated and ranked projects if:

(A) an incomplete application is submitted as described in §371.31 of this title (relating to Timeliness of Application and Required Application Information); or

(B) a bypass is necessary to fund certain types of projects as detailed in the applicable IUP or as required by capitalization grant conditions.

(d) Small water systems. Projects with identical combined rating scores, including rating scores of zero, will be listed in order of population. Projects serving smaller populations will be listed above those projects serving larger populations.

(1) To the extent eligible Applicants are available, a minimum of 15[%] percent of the funds will be made available to small water systems [communities].

(2) If small community projects listed in priority order on the Invited Projects List are less than 15[%] percent, then the executive administrator may bypass projects for systems serving larger populations to ensure inclusion of small water systems [community] projects for at least 15[%] percent of available funds.

(e) Projects submitted for financing will be screened for eligibility, scored, ranked, and listed on a Project Priority List. Applicants with projects on the Initial Invited Projects List will be invited to submit applications in accordance with the procedures and deadlines as detailed in the applicable IUP. The project selection is subject to subsections (a) - (d) of this section. The Project Priority [Invited Projects] List will be reviewed periodically and additional invitations will be extended until all of the annual DWSRF funding amount is committed.

(f) Utilization of remaining funds. If there are insufficient applications for financial assistance to obligate available funds for the funding year, then the executive administrator shall utilize the remaining funds during the next funding year or at any time in combination with other Board financial assistance programs.

(g) Fund shortages. When the amount of funds required to fund all complete applications for financial assistance exceeds the amount of funds available in the funding year, a shortage of funds exists. In such an instance, the Board will fund Applicants until all funds have been utilized. The Board shall fund projects prioritized by the date and time of receipt of a complete application and the project's ability to proceed to commitment.

§371.24. *Changes to Project.*

Subsequent to adoption of an IUP, the Applicant for a proposed project listed within the Project Priority [Invited Projects] List may be allowed certain changes without requiring a re-ranking in the following circumstances:

(1) the Applicant for a proposed project changes but the project does not change;

(2) [(+) the number of participants in a consolidation project changes and [may change provided that] the change does not result in a change [modification] to the combined rating factor; and

(3) [(2) the fundable amount of a proposed project does not increase by [depending on the availability of funds, the total cost of the project may not increase in an amount of] more than 10[%] percent of the amount listed in the approved [adopted] IUP. The executive administrator may waive the 10[%] percent limit to incorporate additional elements or increased project costs; however, any principal forgiveness awarded may not exceed the original IUP amounts allocation [to the project].

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601311

Les Trobman

General Counsel

Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



SUBCHAPTER D. APPLICATION FOR ASSISTANCE

31 TAC §§371.30 - 371.36

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §15.605.

The proposed rulemaking affects Chapter 15 of the Texas Water Code.

§371.30. *Pre-Application Conferences.*

The Applicant must schedule an appointment and participate in a pre-application conference to be held in person or by teleconference to discuss the eligibility of the project and of the Applicant for financial assistance; the general, engineering, environmental, fiscal, and legal requirements of an application; and to assist the Applicant in completing an application. The following individuals should participate in [attend] the conference: a member of the governing body of the Applicant; the consulting engineer; and the financial advisor.

§371.31. *Timeliness of Application and Required Application Information.*

(a) Time to submit applications. Applications and required additional data or information must be submitted in a timely basis. The failure to timely submit the application, the information necessary to complete the application or additional requested information will result in the bypass of the project [on the Invited Projects List].

(1) Deadline to submit application. Applicants shall submit a complete application by the deadlines established by the Board as

detailed in the applicable IUP or the project will be bypassed [~~ineligible for funding~~]. The Applicant will be notified when an application is administratively complete.

(2) Incomplete applications. An Applicant shall cure any deficiency in an application upon request from the executive administrator and shall submit all requested information within fourteen days from the date [~~receipt~~] of the notice of a deficiency.

(3) Additional information. The Applicant shall submit any additional or modified information or data required by the executive administrator within fourteen days of the request for same, regardless of the expiration of other applicable deadlines in this section.

(4) Extension of time. The executive administrator may grant an extension of time to complete the application or to receive additional information and data if the Applicant can show good cause for the delay or if the delay is caused by an event of force majeure. The executive administrator exercises sole discretion in determining whether and to what extent to grant a time extension.

(b) Required application information. For eligible public Applicants and eligible NPNC Applicants that are also eligible public Applicants, an application shall be in the form and number of copies [~~numbers~~] prescribed by the executive administrator and, in addition to any other information that may be required by the executive administrator or the Board, the Applicant shall provide [~~at a minimum~~] the following documentation:

(1) a resolution from its governing body that shall:

(A) request financial assistance, identifying the amount of requested assistance;

(B) designate the authorized representative to act on behalf of the governing body; and

(C) authorize the representative to execute the application, appear before the Board on behalf of the Applicant, and submit such other documentation as may be required by the executive administrator;

(2) a notarized affidavit from the authorized representative stating that:

(A) the decision to request financial assistance from the Board was made in a public meeting held in accordance with the Open Meetings Act (Government Code, Chapter 551) and after providing all such notice as is required by the Open Meetings Act or, for a corporation, that the decision to request financial assistance from the Board was made in a meeting open to all customers after providing all customers written notice at least 72 hours prior to such meeting;

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

(C) the Applicant has no outstanding judgments, orders, fines, penalties, taxes, assessment_s, or other enforcement or compliance issues of any kind or nature by EPA, the Commission, Texas Comptroller of Public Accounts, Utility Commission, Texas Office of the Secretary of State, or any other federal, state, or local government, that would materially affect the Applicant's ability to repay its debt, or identifying such judgments, orders, fines, penalties, taxes, assessment_s, or other enforcement or compliance issue as may be outstanding for the Applicant;

(D) the Applicant warrants compliance with the representations made in the application in the event that the Board provides the financial assistance; and

(E) the Applicant will comply with all applicable federal laws, rules, and regulations as well as the laws of this State and the rules and regulations of the Board;

(3) copies of the following project documents:

(A) any draft or executed contracts for consulting services to be used by the Applicant in applying for financial assistance or constructing the proposed project, including but not limited to, financial advisor, engineer, and bond counsel; and

(B) contracts for engineering services should include the scope of services, level of effort, costs, project schedules, and other information necessary for adequate review by the executive administrator. A project schedule shall be provided with the contract; the schedule must provide firm timelines for the completion of each phase of a project and note the milestones within the phase of the project;

(4) a citation to the specific legal authority in the Texas Constitution and statutes under which the Applicant is authorized to provide the service for which the Applicant is receiving financial assistance as well as the legal documentation identifying and establishing the legal existence of the Applicant;

(5) if the Applicant provides or will provide water supply or treatment service to another service provider, or receives such service from another service provider, the proposed agreement, contract, or other documentation which legally establishes such service relationship, with the final and binding agreements provided prior to closing;

(6) documentation of the ownership interest, with supporting legal documentation, for the property on which the proposed project shall be located, or if the property is to be acquired, certification that the Applicant has the necessary legal power and authority to acquire the property;

(7) if financing of the project will require a contractual loan agreement or the sale of bonds to the Board payable either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts, for a duration specified by the executive administrator, under which the Applicant's gross income is expected to accrue. Before financial assistance is closed, an Applicant shall submit executed copies of such contracts to the executive administrator;

(8) if the bonds to be sold to the Board are revenue bonds secured by a subordinate lien, a copy of the authorizing instrument of the governing body for all prior and outstanding bonds shall be furnished;

(9) if a bond election is required by law to authorize the issuance of bonds to finance the project, the executive administrator may require the Applicant to provide the election date and election results necessary for the issuance of the bonds as part of the application or prior to closing;

(10) an audit of the Applicant for the preceding year prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant, unless an alternative method of establishing a reliable accounting of the financial records of the Applicant is approved by the executive administrator; and

(11) a listing of all the funds used for the project, including funds already expended from sources other than financial assistance offered from the Board, such as from participating local government entities or prior-issued debt. [if additional funds are necessary to complete the project, or if the applicant has applied for and/or received a commitment from any other source for the project or any aspect of the project, a listing of those sources, including total project costs, financing terms, and current status of the funding requests.]

(c) For eligible private Applicants and eligible NPNC Applicants that are not also eligible public Applicants, an application shall be in the form and number of copies [numbers] prescribed by the executive administrator, and, in addition to any other information that may be required by the executive administrator or the Board, such Applicant shall provide:

(1) the legal documentation identifying and establishing the legal existence of the Applicant, including articles of incorporation with certificate of account status [good standing] or partnership agreements;

(2) the documentation identifying and establishing full legal and equitable ownership interests of the real and personal property that constitute the water system held by the Applicant;

(3) [if the documentation of ownership indicates that the Applicant is a legal entity other than a sole proprietorship,] the Applicant shall provide:

(A) identification of any affiliated interests or affiliates; and

(B) a notarized statement from the sole proprietor or each entity holding an ownership interest:

(i) identifying an individual whom may act as the representative on behalf of the sole proprietor or each legal entity which has been identified as maintaining an ownership interest in the Applicant;

(ii) authorizing such representative to submit an application and such other documentation as may be required by the executive administrator;

(4) identification of the authority to provide the service for which the assistance is requested which shall include:

(A) a map of the area served acceptable to the executive administrator;

(B) if the Applicant provides or will provide water supply or treatment service to another service provider, or receives such service from another service provider, the proposed agreement, contract, or other documentation which legally establishes such service relationship, with the final and binding agreements provided prior to closing; and

(C) for utilities, as defined pursuant to Utility Commission rules, the Certificate of [Public] Convenience and Necessity number and a service area map;

(5) a notarized affidavit by the designated representative of the Applicant:

~~[(A) for eligible private Applicants, stating that the decision to request financial assistance from the Board was made in a meeting open to all customers and after providing all customers written notice at least 72 hours prior to the meeting that a decision to request public assistance would be made during such meeting;]~~

~~(A) [(B)] requesting financial assistance and identifying the amount of requested assistance;~~

~~(B) [(C)] stating that the information submitted in the application is true and correct according to belief and knowledge of the representative;~~

~~(C) [(D)] stating that the Applicant or any of its affiliates or affiliated interests has no outstanding judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issue of any kind or nature by EPA, the Commission, Texas Comptroller of~~

Public Accounts, Utility Commission, Texas Office of the Secretary of State, or any other federal, state, or local government, that would materially affect the Applicant's ability to repay its debt, or identifying such judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issue as may be outstanding against the Applicant or any of its affiliates or affiliated interests;

~~(D) [(E)] stating that each entity with an ownership interest warrants compliance with representations made in the application in the event that the Board provides the financial assistance; [and]~~

~~(E) for eligible private Applicants, stating that the decision to request financial assistance from the Board was made in accordance with any applicable bylaws or charter of the Applicant; and~~

~~(F) assuring compliance with all applicable federal laws, rules, and regulations as well as the laws of this State and the rules and regulations of the Board;~~

(6) copies of the following project documents:

(A) any draft or executed contracts for consulting services to be used by the Applicant in applying for financial assistance or constructing the proposed project, to include, but not limited to, financial advisor, engineer, and bond counsel; and

(B) contracts for engineering services should include the scope of services, level of effort, costs, project schedules, and other information necessary for adequate review by the executive administrator. A project schedule shall be provided with the contract; the schedule must provide firm timelines for the completion of each phase of a project and note the milestones within the phase of the project;

(7) a business plan that:

(A) identifies by month for the next 18 months, or for the time period of project construction, whichever is longer, anticipated revenues, including any anticipated rate increases, and anticipated expenditures; and

(B) provides five year historical data on system revenue and expenditures;

(8) copies of the federal income tax returns for the Applicant for the two previous tax years;

(9) documentation of any bankruptcy proceedings for the Applicant or any affiliated interests or affiliates for the preceding five years or a sworn statement that the Applicant or any affiliated interests or affiliates has not been a party to a bankruptcy proceeding for the preceding five years;

(10) if any part of the community water system has been pledged or otherwise used as security for any other indebtedness of the Applicant or an affiliate or affiliated interest, a copy of the outstanding indebtedness;

(11) if financing of the project will require a contractual loan agreement or the sale of bonds to the Board payable either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts, for a duration specified by the executive administrator, under which Applicant's gross income is expected to accrue. Before the financial assistance is closed, an Applicant shall submit executed copies of such contracts to the executive administrator;

(12) if the Applicant is required to utilize a surcharge or otherwise intends to rely on an increase in the rate that it is charging in order to repay the requested financial assistance, a copy of the acknowledgment from the Utility Commission that the proposed rate change filing has been received;

(13) an audit of the Applicant for the preceding year prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant, unless an alternative method of establishing a reliable accounting of the financial records of the Applicant is approved by the executive administrator; and

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

§371.32. *Review of Applications for Financial Assistance.*

(a) Review of applications. The executive administrator will review the application to ensure that sufficient information has been provided to support the eligibility of the Applicant and the project. The executive administrator may request that the information or data for any portion of the application be modified or supplemented.

(b) Submittal of requested information. If the Applicant fails to submit information or data requested within the established time period, then the executive administrator may notify the Applicant that the application is incomplete and will be bypassed.

(c) If an applicant does not proceed through the application process and obtain a commitment within the application timeframes established within the applicable IUP, the principal forgiveness may be re-allocated to another eligible project. An extension of time for obtaining a commitment may be granted at the discretion of the executive administrator.

~~[(e) If the applicant has received an obligation of federal funds by the United States Department of Agriculture-Rural Development that would duplicate funding from the board for the same project, as evidenced in writing from the United States Department of Agriculture-Rural Development, or if the applicant has canceled such an obligation, the executive administrator shall not submit the application to the board and shall notify the applicant that its application will no longer be considered for this reason, unless good cause is shown that the application should be submitted to the board.]~~

§371.33. *Refinancing.*

(a) An application to refinance existing debt for eligible projects may be accepted by the executive administrator when sufficient funds are available to provide refinancing. If refinancing funds are available in an IUP, then the eligible Applicant shall describe the need for the eligible project and provide other specific information detailed in the project information form or otherwise requested by the executive administrator.

(b) An application for refinancing of existing debt shall be the same as an application for financial assistance under this chapter. The executive administrator may consider an application for refinancing when:

(1) the project meets all of the requirements under this chapter, including information evidencing that the environmental review, programmatic requirements, and engineering criteria meets the criteria required under law and this chapter for the same or similar projects; and

(2) the federal tax regulations allow such refinancing.

§371.34. *Required Water Conservation Plan and Water Loss Audit.*

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

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

(c) If a retail public utility's total water loss meets or exceeds the threshold for that utility in accordance with §358.6 of this title, the retail public utility must use a portion of any financial assistance received from the DWSRF, or any additional financial assistance provided by the Board, to mitigate the utility's water loss. However, at the request of a retail public utility, the Board may waive this requirement in accordance with §358.6 of this title.

§371.35. *Board Approval of Funding.*

(a) Presentation to Board. The Board must consider each application at a public meeting. The executive administrator will notify the Applicant when the Board's consideration of the application is scheduled for a public meeting.

(b) Action by Board. After considering the executive administrator's recommendation and comments from the Applicant and other interested persons, the Board may:

(1) resolve to approve an application only when it finds that the revenue or taxes or both revenue and taxes pledged by the Applicant will be sufficient to meet all obligations that will be assumed by the Applicant;

(2) resolve to disapprove or amend the proposed conditions for the financial assistance;

(3) request additional information related to the eligibility of the Applicant or the project or withdraw the application for consideration at another time; and

(4) approve an application for pre-design funding despite a negative recommendation from the executive administrator.

(c) Board's resolution. The Board's approval of an application and award of a commitment is recorded through the issuance of a resolution.

(d) Expiration of Board commitment. The Board's commitment for financial assistance expires on the date noted in the commitment as delineated in the IUP applicable to the project. ~~[or if no date is noted then the commitment expires after:]~~

~~[(1) 12 months for a commitment for financial assistance that includes construction, including financial assistance under the pre-design funding option; or]~~

~~[(2) six months for a commitment for financial assistance for planning, acquisition and design.]~~

(e) Extension of expiration date. Upon ~~[commitment. The Board is not required to approve the request for an extension of time to close the commitment for financial assistance. The Board is released from its offer to provide financial assistance for the project when the commitment expires. However, upon]~~ good cause shown or upon a showing that an event of [a] force majeure, as defined in this Chapter, ~~[event] caused the Applicant's failure to [close the commitment] timely~~ close the commitment, then an extension of the expiration date may be granted at the discretion of the Board. ~~[the Applicant may receive one extension of time by:]~~

(1) The Applicant must submit [submitting] a written request, at least 45 [30] days prior to the expiration date, except in the event of force majeure, as defined in this Chapter, that contains [containing] an explanation of the need for the extension and a request for a specific date for closing.; and]

(2) The [the] Board may, but is not required to, approve a request for an [approves the] extension of time [by minute order or resolution] and may allow a longer extension as appropriate to the circumstances in the event of force majeure.

§371.36. *Multi-year Commitments.*

(a) Commitment periods may be set for a period of up to five years. The minimum interest rate reduction for the multi-year commitments will be established for the five year period based on the interest rate reduction prescribed in the IUP for the first year's commitment.

(b) This option is only available for projects that do not receive principal forgiveness based on the affordability criteria. However, the entity receiving a multi-year commitment may receive principal forgiveness for the other eligible options, such as principal forgiveness for green projects, for the amount of funds committed for the initial year.

(c) Any entity receiving a multi-year commitment must annually re-confirm its anticipated funding commitments established with the initial commitment.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601312

Les Trobman

General Counsel

Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



SUBCHAPTER E. ENVIRONMENTAL REVIEWS AND DETERMINATIONS

31 TAC §§371.40 - 371.52

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §15.605.

The proposed rulemaking affects Chapter 15 of the Texas Water Code.

§371.40. *Definitions.*

Unless specifically defined differently within this subchapter, the following terms and acronyms, used in this subchapter, mean:

(1) Affected community--A community potentially impacted by the proposed project [where the proposed project is expected to result in environmental impacts or potential human health or environmental effects including minority communities, low-income communities or federally-recognized Indian tribal communities].

(2) Categorical Exclusion (CE)--An environmental finding issued by the Board for projects that would not individually or cumulatively have a significant adverse effect on the human environment and for which, therefore, the Applicant is not required to prepare an Environmental Information Document or an Environmental Impact Statement.

(3) Emergency Relief Project--An infrastructure construction project that provides relief to an entity experiencing an emergency

condition or incident that causes an imminent peril to public health, safety, environment, or welfare, including natural disasters, such as:

(A) the failure or destruction of public water supply pipelines, transmission, or distribution systems;

(B) the threat of or actual contamination of a public water supply;

(C) sustained or permanent service disruption of a source water or water treatment system;

(D) the reduction of public water supplies to critical levels by drought or other natural cause(s); or

(E) any other emergency condition as described in an IUP.

(4) Environmental Assessment--A public document prepared by the executive administrator for projects that may result in adverse environmental impacts and the significance of those impacts is not known. The Environmental Assessment, based primarily on the Environmental Information Document, must provide sufficient evidence and analysis to determine whether to prepare a Finding of No Significant Impact or an Environmental Impact Statement.

(5) Environmental Impact Statement (EIS)--A detailed written statement prepared by a third-party contractor, in close coordination with the executive administrator, that analyzes environmental impacts of project alternatives for projects with significant adverse impacts on the quality of the human environment. An EIS is required for projects that do not qualify for a Finding of No Significant Impact. An EIS provides the most comprehensive and detailed information about potential environmental impacts and mitigation required to comply with the NEPA. It is the basis for the Record of Decision issued by the Board.

(6) Environmental Information Document (EID)--A written analysis prepared by the Applicant that provides sufficient information, including appropriate regulatory agency correspondence and public participation documentation, for the executive administrator to undertake an environmental review and determine if the project qualifies for a Finding of No Significant Impact or if an Environmental Impact Statement will be required. An EID is not always necessary to determine if the project will require preparation of an EIS.

(7) Federal Environmental Cross-cutters--Federal environmental statutes, laws and Executive Orders that apply to projects and activities with a federal nexus, including the receipt of federal financial assistance.

(8) Finding of No Significant Impact (FONSI)--An environmental finding issued by the Board when the environmental assessment prepared for the project supports the determination that the project will not have a significant adverse effect on the human environment and therefore, does not require the preparation of an environmental impact statement.

(9) Human environment--The natural and physical environment and the relationship of people with that environment.

(10) Indian tribes--Federally recognized Indian tribes.

[(2) Avoidance--Avoiding the impact altogether by not taking a certain action or parts of an action during project implementation.]

[(3) NEPA--The Federal National Environmental Policy Act, 42 U.S.C. 4321 et seq.]

[(4) Indian tribes--Federally recognized Indian tribes.]

~~[(5) Minimization--Minimizing impacts by limiting the degree or magnitude of the action during project implementation.]~~

~~(11) [(6)] Mitigation--~~

~~(A) avoiding the impact altogether by not taking a certain action or parts of an action;~~

~~(B) minimizing impacts by limiting the degree or magnitude of the action and its implementation;~~

~~(C) rectifying the [an] impact by repairing, rehabilitating, or restoring the affected environment;~~

~~(D) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the project; and~~

~~(E) compensating for the impact by replacing or providing substitute resources or environments.~~

~~(12) NEPA--The Federal National Environmental Policy Act, 42 U.S.C. §§4321 et seq.~~

~~(13) Record of Decision (ROD)--An environmental finding issued by the Board that identifies the selected project alternative, presents the basis for the decision, identifies all the alternatives considered, specifies the environmentally preferable alternative, and provides information on the adopted means to mitigate for environmental impacts. The ROD is based on the conclusions of the EIS.~~

~~(14) Statement of Finding (SOF)--An environmental finding issued by the Board to correct, clarify, modify, or adopt a previous environmental finding, issued by the Board or other agency.~~

~~[(7) Emergency Relief Project--Infrastructure construction project which provides relief to an entity experiencing an emergency condition or incident that causes an imminent peril to public health, safety, environment, or welfare, including natural disasters, such as:]~~

~~[(A) the failure or destruction of public water supply pipelines, transmission, or distribution systems;]~~

~~[(B) the threat of or actual contamination of a public water supply;]~~

~~[(C) sustained or permanent service disruption of a source water or water treatment system;]~~

~~[(D) the reduction of public water supplies to critical levels by drought or other natural cause(s); or]~~

~~[(E) any other emergency condition as described in an EUP.]~~

§371.41. Environmental Review Process.

(a) Policy and purpose. This subchapter governs the environmental review of projects funded in whole or in part by the DWSRF. Environmental review of all proposed infrastructure projects is a condition of the use of DWSRF financial assistance and is subject to annual audits by the EPA. This subchapter follows the procedures established by the EPA for implementing the National Environmental Policy Act [NEPA] set forth at 40 CFR Part 6. The environmental review process described in this subchapter applies to the maximum extent legally and practicably feasible. However, the environmental review process may be modified due to an emergency condition as described in §371.40(3) [§371.40(7)] of this title (relating to Definitions). The environmental review [must be completed prior to the release of financial assistance for design and construction and the review] is subject to public comment. The Applicant, at all times throughout the design, construction, and operation of the project, shall comply with the findings [determinations] resulting from the environmental review.

(b) Timing. The environmental review process is a component of the planning phase and must be completed prior to the executive administrator's approval of the Applicant's engineering feasibility report.

(c) [(b)] Types of environmental findings. At [determinations. An environmental determination is issued by the executive administrator at] the culmination of the environmental review process described in this subchapter[- After gathering and reviewing relevant information and data, soliciting comments from state and federal agencies and receiving and analyzing public comments], the Board [executive administrator] will issue one of the following findings [determinations]:

(1) a Categorical Exclusion[.];

(A) based on review [submission] of information submitted by [from] the Applicant; and

(B) the eligibility criteria described in §371.42 of this subchapter.

(2) a Finding of No Significant Impact[.];

(A) based on review of the Applicant's Environmental Information Document; and

(B) the executive administrator's [Board's] Environmental Assessment; [or]

(3) a Record of Decision[.] based on review of the [an] Environmental Impact Statement prepared by the Applicant's third party contractor; or[.]

(4) a Statement of Findings:

(A) based on review of a previous environmental finding for the proposed project;

(B) based on review of proposed project modifications for consistency with a previous environmental finding; and/or

(C) to correct, clarify, or modify an environmental finding.

(d) [(e)] General review by the executive administrator.

(1) The executive administrator shall ensure that [conduct] an inter-disciplinary, inter-agency, and public review is conducted consistent with the NEPA. The purpose of this review is to ensure that the proposed project will comply with the applicable local, state, and federal laws and regulations relating to the identification of potential [the] environmental impacts of a proposed project and the necessary steps required to [avoid, minimize and, if necessary,] mitigate such impacts. The scope of the environmental review will depend upon the type of proposed action, the reasonable alternatives, and the type of environmental impacts.

(2) For all environmental findings [determinations] that are five years old or older, and for which the proposed infrastructure project has not yet been implemented, the executive administrator must re-evaluate the proposed financial assistance application as well as the environmental conditions and public comment to determine whether to conduct a supplemental environmental review in compliance with the NEPA, or to reaffirm the original finding [determination]. If there has been substantial change in the proposed infrastructure project that is relevant to environmental concerns, or if there are significant new circumstances, changes in federal environmental cross-cutter requirements that affect the environmental finding, or information relevant to environmental concerns, the executive administrator must conduct a supplemental environmental review and complete an appropriate finding [determination] in compliance with the NEPA. The executive administrator may consider environmental findings [determinations] issued by other entities.

§371.42. *Board's Environmental Finding [Types of Environmental Determinations]: Categorical Exclusions.*

(a) A proposed project can be categorically excluded from a full environmental review if the proposed project:

(1) fits within the category of action that is eligible for exclusion, as listed in subsection (b) of this section;

(2) [~~Categorical Exclusions may be available for projects that~~] will not result in significant impacts on the quality of the human environment; and

(3) ~~does [that do]~~ not involve extraordinary circumstances, as listed in subsection (d)(1) - (9) of this section.

(b) Projects that may be eligible for a categorical exclusion (CE) include the following actions on existing systems:

(1) those that involve upgrades that are minor;

(2) minor expansion of system capacity;

(3) the rehabilitation, including functional replacement of the existing system and system components; and

(4) the construction of new minor ancillary facilities located adjacent to or on the same property as existing facilities.

(c) Projects not eligible for a CE include:

(1) projects that would otherwise be eligible for a CE but due to extraordinary circumstances, as listed in subsection (d)(1) - (9) of this section, are not eligible for a CE;

(2) projects that involve new or relocated discharges to surface or ground water;

(3) projects that will likely result in the substantial increase in the volume or the loading of a pollutant to the receiving water;

(4) projects that will provide capacity to serve a population 30[%] percent greater than the existing population;

(5) projects that are not supported by the state, or other regional growth plan or strategy; and

(6) projects that directly or indirectly involve or relate to upgrading or extending infrastructure systems primarily for the purposes of future development.

(d) Extraordinary circumstances may become known at any time during the planning, design, or construction of a project and may cause the project to be ineligible for a CE. Extraordinary circumstances include, but are not limited to, the following known or expected impacts:

(1) potentially significant environmental impacts on the quality of the human environment either individually or cumulatively over time;

(2) disproportionately high and adverse human health or environmental effects on any community, including minority communities, low-income communities, or federally-recognized Indian tribal communities;

(3) a significant effect on federal or state-listed threatened or endangered species or their critical habitat;

(4) a significant effect on national or state natural landmarks or property with nationally significant or state historic, architectural, prehistoric, archeological, or cultural value;

(5) a significant effect on environmentally important natural resource areas such as wetlands, floodplains, significant agricultural

lands, aquifer recharge zones, coastal zones, barrier islands, wild and scenic rivers, and significant fish or wildlife habitat;

(6) a significant adverse air quality effect;

(7) a significant effect on the pattern and type of land use or growth and distribution of population including altering the character of existing residential areas, or may not be consistent with state or local government, or federally-recognized Indian tribe approved land use plans or federal land management plans;

(8) significant public controversy about a potential environmental impact of the proposed project; and

(9) conflict with federal, state, or local government, or federally-recognized Indian tribe environmental, resource protection, or land-use laws or regulations.

(e) Upon the discovery of extraordinary circumstances, the executive administrator may deny a CE or rescind an existing CE.

~~[(f) An Applicant shall submit sufficient information to demonstrate why the project is eligible for a CE including, but not limited to the following documentation:]~~

~~[(1) a brief but complete description of the project;]~~

~~[(2) plan maps or maps of the project depicting the location of all construction areas, the planning area boundaries, and any known environmentally important natural areas;]~~

~~[(3) information regarding the eligibility of the project for a CE under the criteria listed in subsection (b) of this section; and]~~

~~[(4) any information that may be helpful to determine whether any extraordinary circumstances, as listed in subsection (d)(1) - (9) of this section, apply to the project.]~~

(f) ~~[(g)]~~ The executive administrator shall review the information submitted by the Applicant and may request additional information as needed to complete the finding [determination] regarding the eligibility of a proposed project for a categorical exclusion.

(g) ~~[(h)]~~ The Board's finding [executive administrator's determination] relating to a CE shall be subject to public notice, which shall be published either in a newspaper of general circulation in the county or counties of the affected community or on the agency's website and referenced in a public notice in a newspaper of general circulation in the county or counties of the affected community.

§371.43. *Applicant Requirements: Categorical Exclusions.*

(a) Projects that qualify to be categorically excluded from a full environmental review fit into a category of actions, identified by the EPA, that do not individually or cumulatively have a significant effect on the human environment and do not involve extraordinary circumstances. This determination is based upon the criteria established in §371.42 of this subchapter (relating to Board's Environmental Finding: Categorical Exclusions).

(b) An Applicant shall submit sufficient information to demonstrate why the project is eligible for a CE including, but not limited to, the following documentation:

(1) a brief but complete description of the project;

(2) plan maps or maps of the project depicting the location of all construction areas, the planning area boundaries, and any known environmentally important natural areas;

(3) information regarding the eligibility of the project for a CE under the criteria listed in §371.42 of this subchapter;

(4) any information that may be helpful to determine whether any extraordinary circumstances, as listed in §371.42 of this subchapter, apply to the project; and

(5) any information that may be helpful to determine if mitigation measures are required to ensure the project will not individually or cumulatively have a significant adverse impact on the human environment. This includes, but is not limited to, coordination with applicable regulatory agencies regarding resources within their jurisdiction that may be adversely impacted by the project.

§371.44. Board's Environmental Finding: Finding of No Significant Impact.

(a) Purpose and applicability. A Finding of No Significant Impact (FONSI) may be issued if the proposed action will not have a significant effect on the human environment. A FONSI shall be based upon the information submitted by the Applicant and upon the environmental assessment (EA) prepared by the executive administrator.

(b) Environmental Assessment. An Environmental Assessment is required when the proposed project is expected to result in environmental impacts and the significance of those impacts is not known. When the executive administrator preliminarily determines that the impacts will not be significant and may be addressed by ordinary mitigation measures, then an Environmental Assessment will be prepared. An Environmental Assessment is not required if the proposed action is categorically excluded or if an Environmental Impact Statement is required.

(c) Contents of an Environmental Assessment.

(1) An Environmental Assessment shall include a brief discussion of the following:

(A) the purpose and need for the proposed project and an estimate of cost of the project;

(B) the alternatives considered, including the no action alternative, and the reasons for the rejection or acceptance of the alternatives;

(C) the affected environment, including baseline conditions that may be impacted by the proposed actions and the alternatives;

(D) the environmental impacts of the proposed project and the alternatives, including any unresolved conflicts concerning alternative use of available resources; and

(E) applicable environmental laws and executive orders.

(2) The form of the Environmental Assessment generally shall include:

(A) a listing or summary of coordination and consultation undertaken with any federal, state, local, or Indian tribe government regarding compliance with applicable environmental laws and executive orders;

(B) identification and description of the mitigation measures considered, including mitigation measures that must be adopted to ensure the proposed project will not have significant impacts; and

(C) incorporation of documents by reference, including the Environmental Information Document submitted by the Applicant.

(d) Contents of a FONSI. When the Environmental Assessment supports a finding that the proposed project will not have a significant effect on the human environment, then the Board may issue a FONSI. The FONSI must include the following components:

(1) an Environmental Assessment;

(2) a brief description of the reasons why there are no significant impacts;

(3) any commitments to mitigation measures that are essential to render the impacts of the proposed project insignificant;

(4) the date of issuance and signature of the executive administrator; and

(5) the executive administrator's statement that the Applicant has committed to the mitigation measures and that the Applicant has the ability and the authority to fulfill the commitment to mitigation;

(e) Public comments and the issuance of a FONSI.

(1) The executive administrator shall make the Environmental Assessment and preliminary FONSI available on the Board's website for review and public comment for a period of at least thirty (30) days.

(2) If no substantive comments are received, the executive administrator may proceed with the proposed project subject to the mitigation measures identified in the FONSI. If substantive comments are received, then the executive administrator shall respond to the comments and revise the FONSI accordingly, if necessary.

(3) The executive administrator shall ensure that the mitigation measures necessary to the FONSI determination are enforceable and shall conduct appropriate monitoring of these measures. All contracts, plans, specifications, and other applicable documents used during the design and construction of the project shall contain reference to or descriptions of the mitigation measures included in the FONSI, as required by this subchapter.

(f) Dissemination of information about mitigation measures. The executive administrator may provide written notification describing the outcome of the mitigation measure proposed in an environmental finding to interested agencies and public groups.

§371.45. Applicant Requirements: Environmental Information Document.

(a) An Applicant shall prepare an Environmental Information Document (EID) in consultation with the executive administrator for projects that have potential adverse environmental impacts and the significance of those impacts is not known. The executive administrator will provide guidance on the format and contents of the EID prior to the initiation of planning for the proposed project or as soon as practicable upon receipt of an application. An EID is not required when:

(1) the project is eligible for a CE or requires the preparation of an EIS;

(2) the Applicant submits a previous environmental finding that meets DWSRF program requirements, including compliance with the NEPA; or

(3) the Applicant prepares and submits a draft EIS and supporting documents that meet DWSRF program requirements, including compliance with the NEPA.

(b) Coordination. The Applicant shall prepare the EID in coordination with the appropriate federal agencies, state, and local governments, Indian tribes, and other potentially affected parties. The Applicant must also notify the executive administrator regarding any private entities or organizations affected by the proposed project.

(c) Contents of EID. The EID shall include, but is not limited to:

(1) a description of the project;

(2) the need for the proposed project;

(3) the alternatives to the project, including the no action alternative;

(4) the affected environment, including baseline conditions that may be impacted by the proposed project and the alternatives;

(5) the environmental impacts of the proposed action and alternatives, including unresolved conflicts concerning alternative uses of available resources;

(6) potential impacts on resources protected by the federal environmental cross-cutters;

(7) documentation showing that requisite regulatory agencies have been consulted;

(8) proposed mitigation measures supporting the issuance of a FONSI;

(9) documentation showing that the requisite public participation requirements have been satisfied; and

(10) any other information required by the executive administrator.

§371.46. Environmental Impact Statements.

(a) Purpose and applicability. An EIS examines impacts from the proposed project that are significantly affecting the human environment, requires close coordination with the Board and other agencies, and is the primary basis for the Board's issuance of a Record of Decision.

(b) Required EIS. An EIS shall be prepared for:

(1) new regional water supply systems for a community with a population greater than 100,000;

(2) actions likely to have a significant adverse effect on:

(A) local ambient air quality;

(B) local ambient noise levels;

(C) surface water reservoirs or navigation projects;

(D) the environment due to the releases of radioactive, hazardous, or toxic substances or biota;

(E) federal or state natural landmarks or any property eligible for the national or state register of historic places; or

(F) environmentally important natural resources such as wetland, floodplains, significant agricultural lands, aquifer recharge zones, coastal zones, barrier islands, wild and scenic rivers, and significant fish or wildlife habitat;

(3) actions inconsistent with federal, state, local, or Indian tribe environmental, resources protection, or land use laws or approved land use plans or regulations;

(4) actions likely to significantly affect the pattern and type of land use or growth and distribution of population, including altering the character of residential areas;

(5) actions that in conjunction with federal, state, local, or Indian tribe projects are likely to produce significant cumulative impacts; and

(6) actions with uncertain environmental effects or highly unique environmental risks that are likely to be significant.

§371.47. Decision to Prepare an Environmental Impact Statement: Notice of Intent.

(a) Notice of Intent (NOI) to prepare an EIS. When the executive administrator recommends the issuance of an EIS, a NOI will be

published in the Texas Register in order to provide the public with the opportunity to participate in a scoping meeting.

(b) Contents of NOI. The NOI shall contain information about a scoping meeting which shall be held no sooner than fifteen days after the publication of the notice of intent. The public comment period for the proposed scope of the EIS shall be at least forty-five days.

§371.48. Board's Environmental Finding: Record of Decision.

(a) General. A Record of Decision (ROD) results from an extensive environmental review of a proposed project's potential environmental impacts as detailed in an EIS.

(b) Contents of ROD. A ROD must include the following components:

(1) a brief description of the proposed project and the alternatives considered in the EIS as well as the environmental factors considered and the project's impacts;

(2) commitments to implement mitigation measures;

(3) an explanation if the environmentally preferred alternative was not selected;

(4) responses to substantive comments on the final EIS;

(5) the executive administrator's statement that the Applicant has committed to the mitigation measures and that the Applicant has the ability and the authority to fulfill the commitment to the measures; and

(6) the date of issuance and the signature of the executive administrator.

(c) Issuance of the ROD. The issuance of a ROD allows the Applicant to proceed with the proposed action subject to mitigation measures described in the ROD. The ROD shall be made available to the public.

(d) Monitoring of mitigation measures. The executive administrator shall ensure that adequate monitoring of the mitigation measures occurs throughout the construction of the project. Additionally all contracts, plans, specifications, and other applicable documents used during the planning, design, and construction of the project shall contain reference to or descriptions of the mitigation measures.

(e) Dissemination of information about mitigation measures. The executive administrator may provide written notification describing the outcome of the mitigation measures proposed in an environmental finding to interested agencies and public groups.

§371.49. Applicant Requirements: Environmental Impact Statement.

(a) Third party contractor. The Applicant shall contract with a third-party contractor at its own expense to prepare an EIS and any associated documents required for consideration by the executive administrator.

(b) Executive administrator approval. The executive administrator must approve of and participate in the Applicant's selection of the third-party contractor. The third party contractor shall be selected on the basis of its qualifications to prepare the EIS, including experience with data collection and analyses as well as with the clear presentation of information and data. The third-party contractor shall be responsible for providing technical advice to the Applicant and for receiving and incorporating technical advice from the executive administrator.

(c) The third-party contractor shall not have any financial or other interest in the proposed project and must submit a disclosure statement to the executive administrator documenting the fact that it has no financial or other interest in the project.

(d) Contract with third party. The Applicant and the executive administrator must agree to the creation and terms of a contract with the third party jointly selected by them to prepare the EIS. The contract terms must ensure that the third party does not have recourse to the Board or the EPA for financial or other claims arising under the contract.

(e) The third-party contractor shall cooperate with the executive administrator and shall provide draft documents, analyses, and conclusions that adequately assess the relevant environmental issues for review, comment, and direction from the executive administrator. The executive administrator shall have sole responsibility to ensure that the EIS and any associated documents adequately address the relevant environmental issues.

§371.50. Proposed Project Alterations.

(a) Proposed project changes during review. The Applicant must notify the executive administrator if during the environmental review process, the Applicant:

- or
- (1) changes its plans for the project as originally submitted;
 - (2) changes its schedule for the project from the originally submitted schedule.

(b) Alterations of proposed project. Any alteration to a project after the issuance of an environmental finding requires the Applicant to notify the executive administrator in writing in a timely manner. The Applicant shall briefly describe the reasons for the alterations in the proposed project.

(c) The executive administrator shall examine the contract documents, application, and other related documents to evaluate the proposed alterations to ensure consistency with the environmental finding. The executive administrator's review of proposed project alterations may result in:

- (1) a notation to the file that the proposed alterations are minor in nature as described in subsection (d) of this section;
- (2) the issuance of a SOF to confirm that project alterations are within the scope of the original environmental finding and do not require preparation of a new EID;
- (3) the issuance of a FONSI when a CE has been revoked, or the issuance of a public notice that the preparation of an EIS will be required;
- (4) the issuance of an amendment to a FONSI, or the revocation of a FONSI and the issuance of a public notice that the preparation of an EIS will be required; or
- (5) the issuance of a supplement to a ROD, or the revocation of the ROD and issuance a public notice that financial assistance for the proposed project will not be provided.

(d) Minor changes to the proposed or reviewed project that do not create previously unconsidered adverse environmental impacts usually will not affect the ability of the proposed project alterations to proceed without additional formal environmental review.

(e) Major changes to the proposed or reviewed project that are previously unexamined and that have the potential to create adverse environmental impacts may result in a decision to revoke a CE or a FONSI and to proceed with a more detailed level of environmental review consistent with this subchapter.

§371.51. Use of Previously Prepared Environmental Findings.

(a) Adoption of a previous environmental finding. Previous environmental findings issued by the EPA and other agencies may be

adopted in accordance with this section, provided that the finding was produced through procedures in compliance with the NEPA. The executive administrator must re-evaluate the proposed financial assistance application as well as environmental conditions and public comment to determine whether to conduct a supplemental environmental review of the action and complete an appropriate document in compliance with the NEPA, or to reaffirm the original finding.

(b) Previously required mitigation measures. Any and all mitigation measures specified in the previous finding for the applicable project components shall be applied as conditions of the commitment and closing for financial assistance documents and shall be consistent with the requirements of this subchapter.

(c) Method of adoption of a previous environmental finding. The previous finding will be adopted through the issuance of a Statement of Findings when the proposed project and its previous finding will be adopted without substantial modifications. The previous finding may also be adopted in a FONSI.

(d) Validity of previous environmental findings and re-evaluation. An environmental finding shall be re-evaluated if it was issued five years or more prior to the executive administrator's environmental review and if:

- (1) the proposed project has not yet been implemented;
- (2) there has been substantial change in the proposed infrastructure project that is relevant to environmental concerns; and
- (3) there are significant new circumstances or information relevant to environmental impacts of the proposed action.

(e) Dissemination of information about mitigation measures. The executive administrator may provide written notification describing the outcome of the mitigation measures proposed in an environmental finding to interested agencies and public groups.

§371.52. Emergency Relief Project Procedures.

(a) If an Applicant requests funding for an emergency relief project, the executive administrator shall review all information relevant to the emergency, proposed project, status of environmental review of the proposed project, known issues with the natural or cultural environment of the project area, and availability of funding.

(b) If an emergency condition described in §371.40(3) of this title (relating to Definitions) is present, the Board may authorize funding for the emergency relief project, subject to availability of funds, without full preparation or public review of NEPA review documentation (including a CE finding, EA, or EIS) if the executive administrator determines that:

- (1) delaying commencement of project construction during the period it would take to prepare, review, and circulate NEPA documentation, would increase the imminent peril to public health, safety, environment, or welfare; and
- (2) consultations required by the Endangered Species Act and National Historic Preservation Act have been completed.

(c) Special conditions appropriate to minimize any potential for adverse impact due to abbreviated or expedited review may be required.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.
TRD-201601313

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**SUBCHAPTER F. ENGINEERING REVIEW
AND APPROVAL**

31 TAC §§371.60 - 371.62

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §15.605.

The proposed rulemaking affects Chapter 15 of the Texas Water Code.

§371.60. Engineering Feasibility Report.

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

- (1) a description and purpose of the project;
- (2) the names of the entities to be served, along with the current and future population;
- (3) the cost of the project;
- (4) a description of the alternatives considered and reasons for selection of the project proposed;
- (5) sufficient information to evaluate the engineering feasibility;
- (6) maps and drawings as necessary to locate and describe the project area;
- (7) sufficient detail to document how ~~that~~ the project will remedy the drinking water issues and problems that were evaluated for rating on the IUP;
- (8) information showing that the project is cost effective; and for projects that implement new systems or significantly alter current systems, a detailed cost-effective analysis, including detailed operation and maintenance costs, may be requested to document program eligibility;
- (9) a detailed project schedule with timelines for each phase of the project and the milestones within each phase of the project; and
- (10) any other information or data necessary to evaluate the proposed project. The Applicant must submit any additional information requested by the executive administrator to document the project's eligibility for funding by the program.

(b) Approval of engineering feasibility report. The executive administrator will approve the engineering feasibility report when:

- (1) the items listed in subsection (a) of this section have been completed, including requests for additional information or data;
- (2) the appropriate environmental findings ~~[determinations]~~ have been completed in accordance with this chapter and the Applicant has agreed to incorporate into project documents, including contracts, all mitigation measures as a result of the environmental review; and

(3) the project and alternatives to the project have been analyzed and the proposed project is cost effective.

(c) Request for project amendment. A request for an amendment, after the approval of the engineering feasibility report, to a project shall be granted only if implementation of the amendment does not affect the original purpose of the project. The implementation of a project amendment must remedy the problems and issues identified in the Applicant's original project information form. Significant amendments to a project require previous approval by the executive administrator. The Applicant shall:

- (1) provide a description of and the need for an amendment;
- (2) submit additional engineering or environmental information as requested by the executive administrator;
- (3) provide an estimate of any increase or decrease in total project costs resulting from the proposed amendment; and
- (4) certify that the proposed amendment will not significantly alter the purpose of the project.

(d) Alternative methods of project delivery. Design build, construction manager at-risk, and other alternative methods of project delivery are eligible for available financial assistance, including combinations of planning, design and construction funding, in accordance with programmatic requirements. The executive administrator will provide written guidance regarding modifications of the type of financial assistance, and the review, approval, and release of funds processes for alternative delivery projects. The Board may specify special conditions in the commitment as appropriate to accommodate an alternative method of project delivery.

§371.61. Contract Documents: Review and Approval.

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

(b) An Applicant shall submit three copies of proposed contract documents, including the engineering plans and specifications, which shall be as detailed as would be required for submission to contractors bidding on the work. The Applicant shall provide the executive administrator with all contract documents proposed for bid advertising. The executive administrator shall review contract documents:

- (1) to ensure consistency with the approved engineering feasibility report and with approved environmental planning documents;
- (2) to ensure the proposed construction drawings and specifications provide adequate information so that a contractor can bid and construct the project without additional details or directions;
- (3) to ensure compliance with Commission rules at Title 30, Texas Administrative Code, Chapter 290, relating to Public Drinking Water and other applicable state and federal laws and rules;
- (4) to ensure the contract documents notify the contractor about the Board's authority to audit project files and inspect during construction; and
- (5) to ensure compliance with other requirements as provided in guidance forms and documents, including any additional documentation required by EPA.

(c) Other approvals. The Applicant shall obtain the approval of the plans and specifications from any other local, state, and federal

agencies having jurisdiction over the project. The executive administrator's approval is not an assumption of the Applicants' liability or responsibility to conform to all requirements of applicable laws relating to design, construction, operation, or performance of the project.

§371.62. *Advertising and Awarding Construction Contracts.*

(a) Applicable laws and rules. The Applicant shall comply with State procurement laws and rules and with applicable federal procurement rules.

(b) Executive administrator approval required. The Applicant shall not proceed to advertising for bids on the project without express written approval of the solicitation documents by the executive administrator. If the applicant proceeds to advertising without approval, it may affect eligibility for funding.

(c) Changes prior to award. If the Applicant needs to alter the plans, [and] specifications, or [and] contract documents after the executive administrator's approval, then the Applicant shall:

(1) provide the information and reasons relating to the changes therefore, if changes are required prior to bidding. The executive administrator must affirmatively approve any changes prior to advertising.

(2) changes that occur after advertising must be incorporated into an addendum and provided to the executive administrator for approval as part of the bidding process.

(d) Contract award. The text of a construction contract or a contract containing construction phase work submitted for approval prior to advertising shall contain the same language and provisions as the contingently executed contract.

(e) Pre-construction conference. The Applicant shall conduct a preconstruction conference on significant construction contracts to address the contents of the executed contract documents with the project owner, the project engineer, the prime contractor, and other appropriate parties in attendance. The Applicant shall provide the executive administrator with at least 10 [five] days advance notice of the date, time, and location of the conference.

(f) Notice to proceed. The executive administrator shall review the executed contract documents, including any additional documentation required by EPA and upon acceptance of same shall advise the Applicant that a notice to proceed may be issued to the contractor.

(g) No liability. The executive administrator and the Board shall have no liability for any event arising out of or in any way related to the contracts for or construction of the project.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601314

Les Trobman

General Counsel

Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



SUBCHAPTER G. LOAN CLOSINGS AND AVAILABILITY OF FUNDS

31 TAC §§371.70 - 371.74

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §15.605.

The proposed rulemaking affects Chapter 15 of the Texas Water Code.

§371.70. *Financial Assistance Secured by Bonds or Other Authorized Securities.*

(a) Applicability and required documents. This section applies to closings for financial assistance with entities issuing bonds or other authorized securities. The following documents are required for closing financial assistance secured by bonds or other authorized securities:

(1) evidence that applicable requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) a certified copy of the ordinance or resolution adopted by the governing body authorizing the issuance of debt to be sold to the Board that is acceptable to the executive administrator. The ordinance or resolution shall have sections providing as follows:

(A) if financial assistance proceeds are to be deposited into an escrow account at the time of closing then an escrow account shall be created that shall be separate from all other accounts and funds, as follows:

(i) the account shall be maintained by an escrow agent as defined in §371.1 of this title (relating to Definitions);

(ii) funds shall not be released from the escrow account without prior written approval from the executive administrator who shall issue written authorization for the release of funds;

(iii) upon request of the executive administrator, escrow account statements shall be provided to the executive administrator;

(iv) the investment of any financial assistance proceeds deposited into an approved escrow account shall be handled in a manner that complies with the Public Funds Investment Act, Government Code, Chapter 2256; and

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

(B) that the Applicant shall fix and maintain rates, in accordance with state law, and collect charges to provide adequate operation and maintenance of the project;

(C) that a construction account shall be created which shall be kept separate from all other accounts and funds of the Applicant;

(D) that bonds shall be closed in book-entry-only form;

(E) the use of a paying agent/registrar that is a Depository Trust Company (DTC) participant;

(F) that the payment of all DTC closing fees assessed by the Board's custodian bank be directed to the Board's custodian bank by the Applicant;

(G) evidence that one fully registered bond has been sent to the DTC or to the Applicant's paying agent/registrar prior to closing;

(H) that all payments, including the origination fee, are made to the Board via wire transfer at no cost to the Board;

(I) that the partial redemption of bonds or other authorized securities be made in inverse order of maturity;

(J) that insurance coverage be obtained and maintained in an amount sufficient to protect the Board's interest in the project;

(K) that the Applicant, or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the Applicant's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis as required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the Board were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the Board and the beneficial owner of the political subdivision's obligations, if the Board sells or otherwise transfers such obligations, and the beneficial owners of the Board's bonds if the political subdivision is an obligated person with respect to such bonds under rule 15c2-12. The ordinance or resolution shall also contain any other requirements of the SEC or the IRS relating to arbitrage, private activity bonds, or other relevant requirements regarding the securities held by the Board;

(L) the maintenance of current, accurate, and complete records and accounts in accordance with generally accepted accounting principles to demonstrate compliance with requirements in the financial assistance documents;

(M) that the Applicant shall annually submit an audit, prepared by a certified public accountant in accordance with generally accepted auditing standards;

(N) that the Applicant shall submit a final accounting within 60 days of the completion of the project;

(O) that the Applicant shall document the adoption and implementation of an approved water conservation program for the duration of the financial assistance;

(P) ~~that~~ the Applicant's agreement to comply with special environmental conditions specified in the Board's environmental finding ~~[determination]~~ as well as with any applicable Board laws or rules relating to use of the financial assistance;

(Q) that the Applicant shall establish a dedicated source of revenue for repayment of the financial assistance;

(R) that interest payments shall commence no later than one year after the date of closing; ~~and~~

(S) that annual principal payments will commence no later than one year after completion of project construction; and

(T) ~~[(S)]~~ any other recitals mandated by the executive administrator;

(3) unqualified approving opinions of the attorney general of Texas and, if bonds or other authorized securities are issued, a certification from the comptroller of public accounts that such debt has been registered in that office;

(4) an unqualified approving opinion by a recognized bond attorney;

(5) assurances that the Applicant will comply with any special conditions specified by the Board's environmental finding ~~[determination until all financial obligations to the State have been discharged]~~;

(6) if the project will result in the development of surface water or groundwater resources, the Applicant shall provide information showing that it has the legal right to use the water that the project

will provide. Upon receipt of the information, the executive administrator shall prepare a finding that the Applicant has a reasonable expectation of obtaining the water rights to the water that the project will provide prior to any release of funds for planning, land acquisition, and design activities. Prior to the release of funds for construction, a written water rights certification shall be prepared by the executive administrator. The certification shall be based upon the Applicant's information showing the necessary water rights have been acquired;

(7) evidence that the Applicant has the technical, managerial, and financial capacity to maintain the system unless the use of the funds will be to ensure that the system has the technical, managerial, and financial capacity to comply with the national primary or applicable state drinking water regulations over the long term;

(8) a Private Placement Memorandum containing a detailed description of the issuance of the debt to be sold to the Board. The Applicant shall submit a draft Private Placement Memorandum at least 30 days prior to the closing of the financial assistance; a final electronic version of the Memorandum shall be submitted no later than seven days before closing;

(9) when any portion of the financial assistance is to be held in an escrow account, the Applicant shall execute an escrow agreement, approved as to form and substance by the executive administrator;

(10) if applicable, a home rule municipality pursuant to Chapter 104, Local Government Code, shall execute a Certification of Trust as defined in §371.1 of this title (relating to Definitions); and

(11) any additional information specified in writing by the executive administrator.

(b) Certified bond transcript. Within 60 days of closing the financial assistance, the Applicant shall submit a transcript of proceedings relating to the debt purchased by the Board which shall contain those instruments normally furnished by a purchaser of debt.

(c) Phased closing. The executive administrator may determine that closing the financial assistance in phases is appropriate when:

(1) the project has distinct phases for planning, design, acquisition, and ~~for~~ construction or if any one of the phases can be logically and practically divided into discrete sections;

(2) the project utilizes the design-build or construction manager-at-risk process or any process wherein there is simultaneous design and construction;

(3) there are limitations on the availability of funds;

(4) additional oversight is required due to the financial condition of the Applicant or the complexity of the project; or

(5) due to any unique facts arising from the particular transaction.

(d) Financial assistance consisting of 100 percent principal forgiveness. Notwithstanding subsection (a) of this section, the following documents are required for closing financial assistance consisting of 100 percent principal forgiveness:

(1) evidence that applicable requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) an executed principal forgiveness agreement adopted by the governing body that is acceptable to the executive administrator. The agreement shall have the following sections:

(A) if financial assistance proceeds are to be deposited into an escrow account at the time of closing then an escrow account

shall be created that shall be separate from all other accounts and funds, as follows:

(i) the account shall be maintained by an escrow agent as defined in §371.1 of this title (relating to Definitions);

(ii) funds shall not be released from the escrow account without prior written approval from the executive administrator, who shall issue written authorization for the release of funds;

(iii) upon request of the executive administrator, escrow account statements shall be provided to the executive administrator;

(iv) the investment of any financial assistance proceeds deposited into an approved escrow account shall be handled in a manner that complies with the Public Funds Investment Act, Government Code, Chapter 2256; and

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

(B) that the Applicant shall fix and maintain rates, in accordance with state law, and collect charges to provide adequate operation and maintenance of the project;

(C) that a construction account shall be created which shall be kept separate from all other accounts and funds of the Applicant;

(D) that insurance coverage be obtained and maintained in an amount sufficient to protect the Board's interest in the project;

(E) that the Applicant, or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the Applicant's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis as required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the Board were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the Board and the beneficial owner of the political subdivision's obligations, if the Board sells or otherwise transfers such obligations, and the beneficial owners of the Board's bonds if the political subdivision is an obligated person with respect to such bonds under rule 15c2-12. The ordinance or resolution shall also contain any other requirements of the SEC or the IRS relating to arbitrage, private activity bonds, or other relevant requirements regarding the securities held by the Board;

(F) the maintenance of current, accurate, and complete records and accounts in accordance with generally accepted accounting principles to demonstrate compliance with requirements in the financial assistance documents;

(G) that the Applicant shall annually submit an audit, prepared by a certified public accountant in accordance with generally accepted auditing standards;

(H) that the Applicant shall submit a final accounting within 60 days of the completion of the project;

(I) that the Applicant shall document the adoption and implementation of an approved water conservation program for the duration of the financial assistance;

(J) the Applicant's agreement to comply with special environmental conditions specified in the Board's environmental find-

ing as well as with any applicable Board laws or rules relating to use of the financial assistance;

(3) assurances that the Applicant will comply with any special conditions specified by the Board's environmental finding;

(4) if the project will result in the development of surface water or groundwater resources, the Applicant shall provide information showing that it has the legal right to use the water that the project will provide. Upon receipt of the information, the executive administrator shall prepare a finding that the Applicant has a reasonable expectation of obtaining the water rights to the water that the project will provide prior to any release of funds for planning, land acquisition, and design activities. Prior to the release of funds for construction, a written water rights certification shall be prepared by the executive administrator. The certification shall be based upon the Applicant's information showing the necessary water rights have been acquired;

(5) evidence that the Applicant has the technical, managerial, and financial capacity to maintain the system unless the use of the funds will be to ensure that the system has the technical, managerial, and financial capacity to comply with the national primary or applicable state drinking water regulations over the long term;

(6) when any portion of the financial assistance is to be held in an escrow account, the Applicant shall execute an escrow agreement, approved as to form and substance by the executive administrator;

(7) if applicable, a home rule municipality pursuant to Chapter 104, Local Government Code, shall execute a Certification of Trust as defined in §371.1 of this title (relating to Definitions); and

(8) any additional information specified in writing by the executive administrator.

§371.71. Financial Assistance Secured by Promissory Notes and Deeds of Trust.

(a) Applicability. This section contains closing requirements for a water supply corporation, an eligible NPNC, or an eligible private Applicant or other Applicant that [who] is not authorized to issue bonds or other securities. This section applies to financial assistance for either pre-design or construction funding.

(b) Use of consultants. The executive administrator may recommend, but not require, that the entity engage the services of a financial advisor [adviser] or other consultant to ensure the appropriateness of the proposed debt and to provide advice to the entity.

(c) Documents required for closing. The executive administrator shall ensure that the following documents have been submitted prior to closing financial assistance secured by promissory notes and deeds of trust:

(1) evidence that applicable requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) an executed promissory note and loan agreement in a form approved by the executive administrator;

(3) a Deed of Trust and Security Agreement that shall contain a first mortgage lien evidenced by a deed of trust on all the real and personal property of the water system; provided, however, these are not needed if the financial assistance consists of 100 percent principal forgiveness;

(4) an owner's title insurance policy for the benefit of the Board covering all the real property identified in the deed of trust; provided, however, these are not needed if the financial assistance consists of 100 percent principal forgiveness;

(5) evidence that the rates on which the Applicant intends to rely for repayment of the financial assistance have received final and binding approval from the Utility Commission and, for Applicants required to utilize a surcharge account, evidence that the approval of the Utility Commission was conditioned on the creation of a surcharge account;

(6) a certified copy of the resolution adopted by the governing body authorizing the indebtedness and a certificate from the secretary of the governing body attesting to adoption of the resolution in accordance with the by-laws or rules of the governing body and in compliance with the Open Meetings Act, if applicable;

(7) a legal opinion from Applicant's counsel that provides:

(A) that the entity has the legal authority to enter into the loan agreement and to execute a promissory note;

(B) that the entity is not in breach or default of any state or federal order, judgment, decree, or other instrument which would have a material effect on the loan transaction;

(C) that there is no pending suit, action, proceeding, or investigation by a public entity that would materially adversely affect the enforceability or validity of the required financial assistance documents;

(D) evidence that the entity is in good standing with the Texas Office of the Secretary of State; and

(E) a statement relating to any other issues deemed relevant by the executive administrator.

(8) evidence that an approved water conservation plan has been adopted and will be implemented through the life of the project;

(9) evidence of the Applicant's agreement to comply with special environmental conditions contained in the Board's environmental finding [determination];

(10) evidence that the Applicant has adopted final water rates and charges that are not subject to appeal to the Utility Commission;

(11) copies of executed service and revenue contracts;

(12) evidence that the Applicant has the technical, managerial, and financial capacity to maintain the system unless the use of the funds will be to ensure that the system has the technical, managerial, and financial capacity to comply with the national primary or applicable state drinking water regulations over the long term;

(13) if the project will result in the development of surface or groundwater resources, the Applicant shall demonstrate that it has the right to use the quantity of water necessary for project effectiveness and efficiency. Upon receipt of the information, the executive administrator shall prepare a finding that the Applicant has a reasonable expectation of obtaining the water rights necessary for project implementation prior to any release of funds for planning, land acquisition, and design activities. A written water rights certification must be prepared by the executive administrator before funds can be released for construction activities based upon a showing by the Applicant that the necessary water rights have been acquired;

(14) when any portion of the financial assistance is to be held in an escrow account, the Applicant shall execute an escrow agreement, approved as to form and substance by the executive administrator; and

(15) any other documents relevant to the particular transaction.

(d) if in the event that financial assistance proceeds are to be deposited into an escrow account at the time of closing the financial assistance, then an escrow account shall be created that shall be separate from all other accounts and funds, as follows:

(1) the account shall be maintained by an escrow agent as defined in §371.1 of this title (relating to Definitions);

(2) funds shall not be released from the escrow account without prior written approval of the executive administrator who shall issue written authorization for the release of funds;

(3) upon request of the executive administrator, escrow account statements shall be provided on a monthly basis to the executive administrator;

(4) the investment of any financial assistance proceeds deposited into an approved escrow account, shall be handled in a manner that complies with the Public Funds Investment Act, Government Code, Chapter 2256; and

(5) the escrow account shall be adequately collateralized in a manner sufficient to protect the Board's interest in the project and that complies with the Public Funds Collateral Act, Government Code, Chapter 2257.

(e) Construction account. A construction account shall be created which shall be kept separate from all other accounts and funds of the Applicant.

(f) Phased closing. The executive administrator may determine that closing the financial assistance in phases is appropriate when:

(1) the project has distinct phases for planning, design, acquisition, and for construction or if any one of the phases can be logically and practically divided into discrete sections;

(2) the project utilizes the design-build or construction manager-at-risk process or any process wherein there is simultaneous design and construction;

(3) there are limitations on the availability of funds;

(4) additional oversight is required due to the financial condition of the Applicant or the complexity of the project; or

(5) due to any unique facts arising from the particular transaction.

§371.72. *Disbursement of Funds.*

(a) Escrow of funds. The executive administrator may deposit funds into an escrow account at the time of closing of the financial assistance. Releases from an escrow account shall occur sequentially as described in subsection (c) of this section or in accordance with phasing required for the applicable project. The Applicant shall submit outlays for all expenses incurred.

(b) Reimbursement method of accessing funds. DWSRF financial assistance is available for disbursement under a reimbursement method unless the executive administrator approves the deposit of funds into an escrow account at the closing of the financial assistance, as appropriate. The executive administrator shall reimburse the Applicants' expenditures upon the receipt of an outlay report supported by detailed invoices of expenditures or the executive administrator may issue a written authorization for the release of funds from an escrow account based on the receipt of outlay reports supported by detailed invoices of expenditures. The outlays and the releases from an escrow account shall be consistent with the approved project schedule.

(c) Sequence of availability of funds. Financial assistance shall be available for disbursement in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase, and after approval of a water conservation plan;

(2) for design costs, after receipt of executed contracts for design, after approval of an engineering feasibility report, and after completion [the Board's approval] of the environmental review; and

(3) for construction costs, after issuance of any applicable permits, after acquisition documents and contract documents~~[-]~~ (including plans and specifications) are approved and executed, and after the executive administrator has approved the issuance of a Notice to Proceed ~~[construction documents are contingently awarded]~~.

(d) Outlay reports. Applicants shall submit outlay reports supported by detailed invoices for incurred costs as the project progresses in accordance with the project schedule. Applicants shall submit outlay reports, in a form determined by the executive administrator, as follows:

(1) for financial assistance for planning, acquisition, and design, quarterly; and

(2) for financial assistance for construction, monthly.

~~[(e) Environmental affirmation. Prior to the executive administrator's approval of the release of financial assistance for design, acquisition, and construction or for a pre-design funding option project, the executive administrator shall summarize the project's environmental review and inform the Board of any environmentally related mitigation measures recommended for the project. The Board may elect to affirm or alter the conditions of the original commitment or withdraw the commitment to the Applicant based upon the environmental review and mitigation measures. The executive administrator may withhold or limit the release of financial assistance pending satisfactory completion of the project's environmental review.]~~

~~(e) [(f)] Consistency for project schedules and outlays. The executive administrator shall require that projects proceed in accordance with approved project schedules as closely as possible, and that outlays are submitted as required in subsection (d) of this section.~~

§371.73. *Remaining Unused Funds.*

(a) Remaining unused funds are those funds unspent after the original approved project is completed. Remaining unused funds may be spent for enhancements to the original project that are explicitly approved by the executive administrator, including green components.

(b) If there are no enhancements authorized, the Applicant shall be required to submit a final accounting and disposition of unused [surplus] funds.

§371.74. *Surcharge.*

For eligible private Applicants and eligible NPNC Applicants that are not also eligible public Applicants, the establishment of a surcharge and creation of a surcharge account~~[-]~~ as those terms are defined by the ~~commission~~ is required. If the executive administrator determines that the use of a surcharge and surcharge account is not available to an Applicant through the Utility Commission ~~[commission]~~, the executive administrator may recommend that the Board consider other sources of revenue available to an Applicant for repayment of financial assistance from the Board.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.
TRD-201601315

Les Trobman

General Counsel

Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061

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SUBCHAPTER H. CONSTRUCTION AND POST-CONSTRUCTION REQUIREMENTS

31 TAC §§371.80 - 371.82, 371.85 - 371.88

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §15.605.

The proposed rulemaking affects Chapter 15 of the Texas Water Code.

§371.80. *Inspection During Construction.*

(a) Applicant's inspection. The Applicant shall provide for the adequate qualified inspection of the project under the supervision of a registered engineer and shall require the engineer's assurance that the work is being performed in a satisfactory manner in accordance with the approved plans, ~~[and]~~ specifications, and other engineering design or permit documents, approved alterations or changes, and in accordance with the requirements in the environmental ~~finding~~ ~~[determination]~~ applicable to the project, and to the sound engineering principles and construction practices.

(b) Board's inspection. The executive administrator may, at his discretion, inspect the construction and materials of any project at any time. The purpose of the inspection is to determine whether the contractor is substantially complying with the approved engineering plans of the project and is constructing the project in accordance with ~~[sound engineering principles and]~~ the approved project schedule. The inspection by the Board does not subject the state to any civil liability.

(c) Scope of inspections. Inspections may include, but are not limited to:

(1) ~~on-site observations~~, review of the ~~[physical]~~ conditions at the construction sites, including compliance with environmental mitigation measures;

(2) review of documents related to the construction projects, including but not limited to:

(A) payroll, daily attendance, and any other records relating to person employed during the construction, and records relating to the Davis Bacon Act and related federal laws and regulations relating to prevailing wage rates;

(B) invoice, receipts for materials, accounting ledgers, and any other documents related to expenditure of funds to facilitate tracking project's progress;

(C) evidence of testing of installed materials and equipment;

(D) deviations from approved plans and specifications;

(E) change orders and supporting documents; and

(F) review of any other documents to ensure compliance with the terms of the approved contract documents and the Board's rules.

(d) ~~The executive administrator~~ ~~[Inspectors]~~ may document issues to ensure compliance with applicable laws, rules, and contract

documents, and may recommend to the owner that certain corrective actions occur to ensure compliance with laws, rules, and approved plans and specifications.

(e) The Applicant shall provide the executive administrator [~~inspectors~~] with a response to the issues relating to compliance.

§371.81. *Alterations During Construction.*

(a) Changes after approval of engineering feasibility report. Applicant shall notify the executive administrator of any changes to the project that occur after the approval of the report but prior to the start of construction. The executive administrator shall review the proposed changes and notify the Applicant if additional engineering or other information is required. For facilities required to have Commission approval, the Commission must give its approval before any substantial or material changes are made in the plans. No changes may be implemented without the express written approval of the executive administrator.

(b) Changes during construction. Any proposed change to the construction contract must be submitted to the executive administrator in the form of a formal change order; the change will be reviewed for compliance with program requirements and applicable Commission rules. Depending upon the scope and complexity of the proposed change, approval by the executive administrator also may require amendments to other engineering and environmental documents and coordination with the Commission for issues involving variances to Commission rules.

§371.82. *Force Account.*

The executive administrator expects that all significant elements of a project shall be constructed with skilled laborers and mechanics obtained through the competitive bidding process. Notwithstanding that expectation, the Applicant, with the prior approval of the executive administrator, may utilize its own employees and equipment for inspection or minor construction upon [a] showing that it possesses the necessary competence required to accomplish such work and that the work can be accomplished more economically by the use of the force account method.

§371.85. *Final Accounting.*

(a) Within 60 [~~sixty~~] days of Applicant's receipt of the certificate of approval for the final prime construction contract and the final inspection report, the Applicant shall submit a final accounting and a final funds requisition form.

(b) After the final accounting, the executive administrator shall notify the Applicant if remaining surplus funds exist and advise the Applicant that the remaining surplus funds may be used, as specified in any applicable bond ordinance, for:

- (1) payment of bonds in inverse order of maturity;
- (2) deposit into the interest and sinking fund; or
- (3) deposit to a reserve fund.

§371.86. *Records Retention.*

The Applicant shall retain all documents, records, and invoices [~~invoice, and records~~] whether in electronic form or otherwise relating to the expenditure of all financial assistance from the DWSRF for a period of three full state fiscal years after the completion of the project and the final certificate of approval.

§371.87. *Release of Retainage.*

(a) Retainage. The Applicant will withhold a minimum of five percent [~~5%~~] of each progress payment throughout the course of the construction contract.

(b) Full release of retainage. The executive administrator will approve the full release of retainage on a contract when:

- (1) the Applicant's engineer approves the contractor's request for release of retainage; and
- (2) the Applicant's governing body approves the release of retainage; and[-]
- (3) the executive administrator issues the Certificate of Approval.

(c) Partial release of retainage. If a project is substantially complete, the executive administrator may approve a partial release of retainage.

§371.88. *Responsibilities of Applicant.*

After the satisfactory completion of the project, the Applicant remains responsible for compliance with applicable laws and rules relating to the project and to the financial assistance documents including, but not limited to, submission of an annual audit, implementation and enforcement of the approved water conservation program and other assurances made to the Board. The Board has a continuing interest in the State's investment and therefore, the Applicant shall be subject to the continuing authority of the Board and the executive administrator through final payment of the financial assistance.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601316

Les Trobman

General Counsel

Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



CHAPTER 371. DRINKING WATER STATE REVOLVING FUND

The Texas Water Development Board ("TWDB" or "board") proposes to repeal 31 Texas Administrative Code (TAC) §§371.3, 371.4, and 371.43 - 371.51.

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

The TWDB proposes to repeal provisions of 31 TAC Chapter 371 in order to reorganize certain information to provide greater clarity and to streamline TWDB processes for implementation of the Drinking Water State Revolving Fund (DWSRF). The specific provisions being repealed and the reasons for the repeals are discussed in more detail below.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Section 371.3 and §371.4 are repealed in order to combine relevant language and delete language that is no longer necessary. These changes are made to provide greater clarity and to ensure consistency with state and federal DWSRF requirements.

Sections 371.43 - 371.51 are repealed in order to provide greater clarity regarding the environmental requirements for the DWSRF. These changes will provide greater clarity on which

documents are prepared by the Applicant, which documents are prepared by the TWDB, and which documents are prepared by a third party. These changes will also provide greater clarity on the timing of required environmental documentation. The repeal of these sections is proposed in order to reorganize and renumber this subchapter for greater clarity.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS.

Ms. Cindy Demers, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed repeal. For the first five years the repeal is in effect, there is no expected additional cost to state or local governments resulting from their administration.

There is no change in costs because there are no direct costs associated with the proposed repeal. This repeal is not expected to have any impact on state or local revenues. The repeal does not require any increase in expenditures for state or local governments as a result of administering the repeal. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from the repeal.

PUBLIC BENEFITS AND COSTS.

Ms. Demers also has determined that for each year of the first five years the proposed repeal is in effect, the public will benefit from the repeal as it provides clarity regarding the TWDB's Drinking Water State Revolving Fund program.

LOCAL EMPLOYMENT IMPACT STATEMENT.

The board has determined that a local employment impact statement is not required because the proposed repeal does not adversely affect a local economy in a material way for the first five years that the proposed repeal is in effect because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this repeal. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the repeal as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION.

The board reviewed the proposed repeal in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the repeal 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 this repeal is to provide greater clarity regarding the Drinking Water State Revolving Fund and ensure consistency with state and federal requirements for that fund.

Even if the proposed repeal were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this repeal 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 repeal does not meet any of these four applicability criteria because it: 1) does not exceed the Federal Safe Drinking Water Act or any other 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 it is also proposed under authority of Texas Water Code §15.605. Therefore, this proposed repeal does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The board 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.

The board evaluated this proposed repeal and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this repeal is to more closely align the TWDB's rules related to the Drinking Water State Revolving fund to state statutes and federal requirements and to provide greater clarity. The proposed repeal would substantially advance this stated purpose by reflecting the current state and federal requirements for the Drinking Water State Revolving Fund.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed repeal because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that administers the Drinking Water State Revolving Fund for the State of Texas.

Nevertheless, the board further evaluated this proposed repeal and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this proposed repeal 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 repeal does not burden nor 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 repeal requires compliance with state and federal laws and rules regarding the Drinking Water State Revolving Fund. These requirements will not burden, restrict, or limit an owner's right to property. Therefore, the proposed repeal does not constitute a taking under Texas Government Code, Chapter 2007.

SUBMISSION OF COMMENTS.

Written comments on the proposed repeal may be submitted by mail to Mr. Les Trobman, 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*.

SUBCHAPTER A. GENERAL PROGRAM REQUIREMENTS

31 TAC §§371.3, §371.4

STATUTORY AUTHORITY.

This repeal is proposed under the authority of Texas Water Code §15.605.

The proposed repeal affects Chapter 15 of the Texas Water Code.

§371.3. *Land Costs.*

§371.4. *Other Authorized Securities: Source Water Protection and Technical Assistance.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601307

Les Trobman

General Counsel

Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



SUBCHAPTER E. ENVIRONMENTAL REVIEWS AND DETERMINATIONS

31 TAC §§371.43 - 371.51

STATUTORY AUTHORITY.

This repeal is proposed under the authority of Texas Water Code §15.605.

The proposed repeal affects Chapter 15 of the Texas Water Code.

§371.43. *Types of Environmental Determinations: Finding of No Significant Impact.*

§371.44. *Environmental Information Document: Applicant Requirements.*

§371.45. *Decision to Prepare an Environmental Impact Statement: Notice of Intent.*

§371.46. *Types of Environmental Determinations: Record of Decision.*

§371.47. *Environmental Impact Statements.*

§371.48. *Environmental Impact Statement: Applicant Requirements.*

§371.49. *Proposed Project Alterations.*

§371.50. *Use of Environmental Determinations Prepared by Other Entities.*

§371.51. *Emergency Relief Project Procedures.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601308

Les Trobman

General Counsel

Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



CHAPTER 375. CLEAN WATER STATE REVOLVING FUND

The Texas Water Development Board ("TWDB" or "board") proposes amendments to 31 Texas Administrative Code (TAC) §§375.1, 375.2, 375.10 - 375.19, 375.30 - 375.34, 375.40 - 375.44, 375.60 - 375.62, 375.81 - 375.83, 375.90, 375.91, 375.101 - 375.104, 375.106 - 375.109, 375.201, 375.203, and 375.206 relating to the TWDB's administration of the Clean Water State Revolving Fund (CWSRF). TWDB also proposes new §§375.3, 375.45, 375.63 - 375.71, and 375.92 - 375.94. Repeals of existing §§375.50 - 375.56, 375.63 - 375.70, 375.92, and 375.93 are simultaneously proposed elsewhere in this issue of the *Texas Register*.

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

Pursuant to the Water Resources Reform and Development Act of 2014 (WRRDA), the TWDB proposes to amend numerous provisions in 31 TAC Chapter 375. Various amendments are proposed to implement changes to the federal requirements for the CWSRF. Various other amendments are proposed to provide greater clarity in this chapter of TWDB rules or to update rule provisions pursuant to TWDB practice. The specific provisions being amended and the reasons for the amendments are discussed in more detail below.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS AND NEW RULES.

Subchapter A. General Program Requirements.

Section 375.1. Definitions.

The definition of "Acquisition" is added to discuss eligible project costs, federal requirements regarding acquisition of land. It is also used to describe a phase of the project.

The definition of "Applicant" is revised for clarity to focus on the repayment of the debt rather than ownership of the project.

The definition of "Application" is revised to expand the focus from solely forms to forms and other information that is submitted to the TWDB.

The definition of "Authorized representative" is revised to provide greater clarity.

The definition of "Bypass" is revised to incorporate the specific reasoning for passing over a higher ranked project in favor of a lower ranked project.

The definition of "Commitment" is revised for clarity to refer directly to the Board resolution that constitutes the commitment rather than to the applicant's fulfillment of the conditions.

The definition of "Commitment term" is deleted because it is no longer needed with the added definition of "Expiration date," which provides more clarity.

The definition of "Construction" is revised to match the definition found in 33 U.S.C. §1292(1).

The definition of "Construction phase" is added to provide greater clarity.

The definition of "Cost and Effectiveness Analysis" is added to implement provisions of WRRDA. The term "analysis" includes both the study and evaluation of the cost and effectiveness of the processes, materials, techniques, and technologies for carrying out the proposed project or activity and the final selection, to the maximum extent practicable, of a project or activity that maximizes the potential for efficient water use, reuse, recapture, and conservation, and energy conservation.

The definition of "Design" is revised for clarity.

The definition of "Disadvantaged Community" is revised to incorporate the affordability criteria required in WRRDA.

The definition of "Disaster" is revised to add extreme heat.

The definition of "Eligible Applicant" is revised to implement provisions of WRRDA, explicitly mention eligibility of a special purpose district that finances on behalf of its members' waste disposal projects, and provide greater clarity.

The definition of "Environmental affirmation" is deleted because it is no longer needed.

The definition of "Expiration date" is added to provide greater clarity regarding the TWDB's offer of financial assistance and is used to clarify the timeframe allowed for the applicant to submit a request to extend the Board's commitment.

The definition of "Financial assistance" is revised to provide greater clarity.

The definition of "Fiscal Sustainability Plan" is added to implement provisions of WRRDA.

The definition of "Invited Projects List" is retitled "Initial Invited Projects List" to be consistent with the terminology used in the TWDB's Intended Use Plan.

The definition of "Lending rate" is revised for greater clarity to distinguish between financial assistance, which must be repaid and accrues interest, and principal forgiveness, which is not repaid and does not accrue interest.

The definition of "Municipality" is revised to better reflect the definition in federal law.

The definition of "Non-equivalency project" is revised to provide clarity through a reference to equivalency projects.

The definition of "Planning" is added to implement provisions of WRRDA.

The definition of "Political subdivision" is revised to conform to the Texas Water Code.

The definition of "Population" is revised to specify that the data used must be the latest data available from the U.S. Census Bureau, such as the American Community Survey data released annually, rather than the decennial census.

The definition of "Principal forgiveness" is added to specify the type of additional subsidization that is being offered for the program.

The definition of "Project" is revised to reference the language in the Federal Water Pollution Control Act and provide greater clarity.

The definition of "Project information form" is retitled as "Project Information Form (PIF)" and is revised to clarify that the information submitted must conform to the agency's requirements.

The definition of "Project Priority List" is revised for clarity to reference the specific list found in the Intended Use Plan that contains the projects eligible for funding ranked according to their rating criteria score.

The definition of "Ready to proceed" is revised for clarification purposes.

The definition of "Small and Medium-sized Publicly Owned Treatment Works" is added to implement provisions of WRRDA.

The definition of "Subsidy" is revised to reference only a reduction in the interest rate from the market interest rate rather than principal forgiveness.

The definition of "Treatment works" is added to implement provisions of WRRDA.

The definition of "Utility Commission" is added to delineate between the Public Utility Commission of Texas and the Texas Commission on Environmental Quality because of new powers and duties of the Public Utility Commission.

Other non-substantive, grammatical changes are made for clarification and grammatical purposes. Subsections are renumbered to reflect added and removed definitions.

Section 375.2. Projects and Activities Eligible for Assistance.

Section 375.2 is revised to add new projects and activities that are eligible under the Federal Water Pollution Control Act in accordance with WRRDA. While all projects and activities eligible under federal law are listed, the specific projects and activities eligible for assistance under the Texas CWSRF program for a particular funding year would be established annually in the CWSRF's Intended Use Plan. This will allow greater flexibility to adjust the CWSRF program based on needs and capacity.

Section 375.3. Federal Requirements.

Section 375.3 is added to list the new federal requirements for the CWSRF instituted or made permanent through WRRDA. Also, TWDB is proposing to include EPA's new policy on providing "signage" options to enhance public awareness for equivalency projects.

Subchapter B. Financial Assistance.

Section 375.10. Types of Financial Assistance.

Section 375.10 is revised to state that the executive administrator shall determine the type of financial assistance in accordance with the types of financial assistance authorized by the Federal Water Pollution Control Act ("the Act").

Section 375.11. Refinancing.

Section 375.11 is revised to require the project to meet programmatic requirements.

Section 375.12. Financing of Planning, Acquisition, and Design Phase.

Section 375.12 is revised to reflect a change in terminology regarding the phases of projects. It is revised to state that applicants may request financial assistance for planning, acquisition, and design without a readiness to proceed determination. It also deletes the reference to applicants who have completed the planning, acquisition, and design for a proposed project within

three years of the closing date for financial assistance receiving priority for construction phase funding of the project in the next available IUP if the project is ready to proceed. This priority is retained elsewhere in §375.31(c).

Section 375.13. Construction Phase Funding and Section 375.14. Pre-Design Funding Option.

Section 375.13 and §375.14 are revised to reflect a change in terminology regarding the phases of projects.

Section 375.15. Lending Rates.

Section 375.15 is revised to make private and taxable entities eligible for the interest rate reduction. As part of the revision on eligibility for the reduction, TWDB is proposing to consolidate and revise the method of establishing the fixed rate scale and determining the amount of adjustment from the market interest rate for both the equivalency and non-equivalency borrowers. TWDB is not proposing to alter the interest rate reduction a borrower would have received under the current program practices. For consistency, the point in time for determining the total fixed lending rate reduction will be set at 30 days from the proposed date the application will be presented to the Board for approval. Other wording changes were made to provide greater clarity. In addition, references to the maximum reduction level have been removed to allow greater flexibility in establishing a significant interest rate reduction consistent with projections of the long-term financial health of the CWSRF. The interest rate reduction will instead be established annually in CWSRF's Intended Use Plan.

Section 375.16. Fees for Financial Assistance.

Section 375.16 is revised to allow greater flexibility to make annual adjustment to the CWSRF program based on needs and projected financial conditions. To accomplish this, the amount of any administrative loan origination fee, up to the maximum specified amount, would be established in the CWSRF's Intended Use Plan. The title is revised from "Fees of Financial Assistance" to "Fees for Financial Assistance." Other non-substantive changes are made.

Section 375.17. Term of Financial Assistance.

Section 375.17 is revised to be consistent with the requirement of WRRDA. The TWDB is proposing to revise the requirement that the term offered may not exceed the "expected design" life of an eligible project to the "projected useful" life.

Section 375.18. Principal Forgiveness.

Section 375.18 is revised based on new requirements established through WRRDA.

Subchapter C. Intended Use Plan.

Section 375.30. Submission of Project Information Forms.

Section 375.30 is revised to clarify the requirements for submission of project information forms. It specifically references submission of Project Information Forms to be included on an amended Project Priority List within the Intended Use Plan. It also establishes that the required information that must be in a Project Information Form will be specified in TWDB guidance. It clarifies that a registered engineer must properly affix the engineer's seal, signature, and date of execution to the project information form if the amount requested from the program is equal to or greater than \$100,000.

Section 375.31. Rating Process.

Section 375.31 is revised to amend the rating criteria to incorporate additional projects and activities that are eligible based on WRRDA. In addition, consistent with the overall goals of the Federal Water Pollution Control Act, TWDB is proposing to consider enforcement action, innovative or alternative technology or approaches, and effective management as rating criteria. It is further revised for greater clarity.

Section 375.32. Public Notice.

Section 375.32 is revised to better reflect TWDB processes whereby the executive administrator, not the Board members, hold public hearings. The rule would state that the executive administrator may make amendments to the Project Priority List after a 14-day public comment period without any public hearing.

Section 375.33. Criteria and Methods for Distribution of Funds.

Section 375.33 is revised to reflect a change in terminology and to provide greater clarity. It revises "subsidiaries" to "principal forgiveness" and "Invited Projects List" to "Project Priority List" to be consistent with other sections as well as the terminology in the Intended Use Plan. Other non-substantive changes are made.

Section 375.34. Changes to Project.

Section 375.34 is revised to adjust permitted changes in a proposed project listed in the Intended Use Plan without requiring a re-ranking of the project. First, the applicant for a proposed project may change provided the project itself does not change. Second, the fundable amount of a proposed project may not increase by more than 10% of the amount listed in the approved IUP. The rule is revised to allow the executive administrator to waive the 10% limit to not only incorporate additional elements to the project, but also increased project costs. Further, the section is revised to specify that any principal forgiveness awarded may not exceed the amount in the original Intended Use Plan. Other non-substantive changes are made.

Subchapter D. Application for Assistance.

Section 375.40. Pre-Application Conferences.

Section 375.40 is revised to allow individuals to participate in the conference without being in attendance.

Section 375.41. Timeliness of Application and Required Application Information.

Section 375.41 is revised to base the due date for curing a deficiency on the date of the notice to the applicant rather than the date the applicant receives the notice. This will allow enhanced tracking for program administration. This section specifies that the application must include a copy of any actual or proposed contracts covering revenues for the project for a duration specified by the agency. To allow additional flexibility to the agency, the rule would permit an alternative method of establishing a reliable accounting of the financial records of the applicant if approved by the executive administrator. The rule would clarify the listing within the application of all the funds used for the project. It is revised to include the Public Utility Commission in the list of agencies in relation to the Applicant's affidavit. This section is revised to list the application requirements for eligible private applicants.

Section 375.42. Review of Applications.

Section 375.42(c) is deleted because it is no longer necessary. New §375.42(c) is added to establish commitment timeframes for projects that qualify and have been designated to receive

principal forgiveness. Due to the high demand and limited availability of subsidized funding, it is imperative that applicants offered principal forgiveness proceed in a timely manner.

Section 375.43. Required Water Conservation Plan and Water Loss Audit.

Section 375.43 is revised to incorporate new statutory requirements. According to §16.0121(g), Water Code, a retail public utility providing potable water that receives financial assistance from the TWDB is required to use a portion of that financial assistance, or any additional financial assistance provided by TWDB, to mitigate the utility's system water loss if, based on a water audit filed by the utility, the water loss meets or exceeds the threshold established by TWDB rule. In accordance with §16.0121(g), Water Code, as amended by H.B. 949, 84th Legislative Session, §375.43 is revised to allow the TWDB, at the request of the retail public utility, to waive this requirement. TWDB rules regarding this waiver are located in 31 TAC §358.6. In accordance with §16.0121(h), Water Code, the TWDB shall adopt rules regarding the use of financial assistance from the TWDB as required by §16.0121(g) to mitigate system water loss. Section 375.43 is revised to incorporate the statutory requirements of §16.0121, Water Code, and to specify that use of financial assistance must be in accordance with the Act and the applicable Intended Use Plan.

Section 375.44. Board Approval of Funding.

Section 375.44 is revised to remove the commitment expiration timeframes from the rules and establish the expiration timeframes through the annual Intended Use Plan applicable to the project in order to provide greater flexibility in administering the program. Section 375.44 will allow multiple extensions instead of one extension and the language is revised to better instruct applicants on the procedure for requesting an extension.

Section 375.45. Multi-year Commitments.

Section 375.45 is added to implement multi-year commitments to provide a reliable source of capital based on a commitment structure that meets the annual capital requirements of the project. In order to provide a reliable source of capital based on a commitment structure that meets the annual capital requirements of the project, the TWDB is proposing to offer multi-year commitments. Multi-year commitments should assist entities that need to fund large projects over a period of time. Further, to assist in providing for long-term financial planning, the minimum interest rate reduction for the multi-year commitments will be established and locked for the five-year period based on the interest rate reduction prescribed in the IUP for the first year's commitment.

Subchapter E. Environmental Reviews and Determinations.

Section 375.60. Definitions.

The definition of "Affected community" is revised to clarify its meaning in the context of its use within the subchapter.

The definitions of "Categorical Exclusion," "Environmental Assessment," "Environmental Impact Statement," "Environmental Information Document," "Finding of No Significant Impact," "Record of Decision," and "Statement of Finding" are added to provide greater clarity on what is included in these various documents, which party prepares the documents, and their use.

The definitions of "Federal Environmental Cross-cutters" and "Human environment" are added to clarify terminology utilized within the subchapter.

The definition of "Mitigation" is revised to better reflect the federal definition by adding fuller explanations of the avoidance, minimization, and rectification aspects of mitigation. Therefore, because it is no longer necessary to retain separate definitions of "Avoidance" and "Minimization," they have been deleted.

Section 375.61. Environmental Review Process.

Section 375.61 is revised to add subsection (e) to establish a key difference in the environmental review process between equivalency and non-equivalency projects. For equivalency projects, TWDB will inform EPA when consultation or coordination by EPA with other federal agencies is necessary to resolve issues regarding compliance with applicable federal authorities. Section 375.61 is revised to delete references to avoidance and minimization, which are both included in the definition of mitigation. In addition, disbursement of funds information was removed as this information is already provided in §375.93, relating to Disbursement of Funds. Section 375.61 is further revised to add more details on the timing and preparation of different environmental documents in order to provide greater clarity. Certain terminology is revised in order to avoid confusion between state and federal environmental documents. Other non-substantive and grammatical changes are made for clarification purposes.

Section 375.62. Board's Environmental Finding: Categorical Exclusions.

The title of §375.62 is revised from "Types of Environmental Determinations: Categorical Exclusion" to "Board's Environmental Finding: Categorical Exclusion" in order to provide greater clarity on which party is responsible for evaluating eligibility and issuing the Categorical Exclusion. It is further revised to clarify when a project can be categorically excluded from a full environmental review. Subsection (f) is deleted in order to move this information to new §375.63 in order to further separate and clarify Applicant versus TWDB responsibilities.

Section 375.63. Applicant Requirements: Categorical Exclusions.

New §375.63 is added in order to delineate between the Applicant's and the TWDB's responsibilities regarding a Categorical Exclusion. New §375.63 contains the Applicant's responsibilities. This change was made to provide greater clarity.

Section 375.64. Board's Environmental Finding: Findings of No Significant Impact.

New §375.64 is added to reorganize and revise previous provisions on the Finding of No Significant Impact in order to provide greater clarity on each party's responsibilities regarding this document. Language from previous §375.63 is added here and is revised to remove the statement that an environmental assessment is required for proposed projects involving new construction. This is because some minor new construction elements are eligible for a CE, which does not require an environmental assessment. The previous language is further revised to reflect the fact that an environmental assessment is not required if the action is categorically excluded or if the executive administrator has decided that an environmental impact statement is required. It is revised to require that all contracts, plans, specifications, or other applicable documents used during the design and construction of the project include reference to or descriptions of the mitigation measures. References to avoidance and minimization were deleted because both are included in the definition of mitigation. Other minor revisions were made to provide greater clarity.

Section 375.65. Applicant Requirements: Environmental Information Document.

New §375.65 is added to reorganize and revise previous provisions on the Environmental Information Document in order to provide greater clarity on each party's responsibilities regarding this document. Language from previous §375.64 is added here and revised to provide greater clarity. An Applicant must prepare an Environmental Information Document for projects that have potential environmental impacts and the significance of those impacts is unknown. New §375.65 provides greater clarity on when an Environmental Information Document is needed, which party prepares the document, and what the document must include.

Section 375.66. Environmental Impact Statements.

New §375.66 is added here to reorganize Subchapter E for greater clarity. The language from previous §375.67 is added here and non-substantive changes to that language are made for clarity purposes.

Section 375.67. Decision to Prepare an Environmental Impact Statement: Notice of Intent.

New §375.67 is added here to reorganize Subchapter E for greater clarity. The language from previous §375.65 is added here and non-substantive changes to that language are made for clarity purposes.

Section 375.68. Board's Environmental Finding: Record of Decision.

New §375.68 is added here to reorganize Subchapter E for greater clarity. The language from previous §375.66 is added here and non-substantive changes to that language are made for clarity purposes. That language is revised to delete references to avoidance and minimization because both are included in the definition of mitigation. The language is further revised to clarify that the TWDB may provide written notification regarding the outcome of the mitigation measures rather than issue a statement of findings.

Section 375.69. Applicant Requirements: Environmental Impact Statement.

New §375.69 is added here to reorganize Subchapter E for greater clarity. The language from previous §375.68 is added here and non-substantive changes to that language are made for clarity purposes.

Section 375.70. Proposed Project Alterations.

New §375.70 is added here to reorganize Subchapter E for greater clarity. The language from previous §375.69 is added here and revised to state that the executive administrator's review of proposed project alterations may result in a notation to the file when the alterations are minor. It is further revised for clarity to explain the process of confirming that project alterations are within the scope of the original environmental finding.

Section 375.71. Use of Previously Prepared Environmental Findings.

New §375.71 is added here to reorganize Subchapter E for greater clarity. The language from previous §375.70 is added here and revised to allow the executive administrator to adopt previous environmental findings issued by other agencies, not just federal agencies, provided that the finding is compliant with NEPA. It is also revised to clarify that only mitigation measures from the previous findings that are applicable to the proposed

project components will be applied as conditions of the financial assistance. It is revised to state that the executive administrator may provide written notification of the outcome of the mitigation measure proposed in an environmental finding to interested agencies and public groups. References to avoidance and minimization were deleted because both are included in the definition of mitigation. Certain wording from previous language is revised in order to provide greater clarity.

Subchapter F. Engineering Review and Approval.

Section 375.81. Engineering Feasibility Report.

Section 375.81 is revised to require the engineering feasibility report to show how the project will remedy the drinking water issues and problems instead of simply that they will remedy the problems and issues. Other non-substantive changes are made for clarity purposes.

Section 375.82. Contract Documents: Review and Approval.

Section 375.82 is revised to provide greater clarity on what the term "contract documents" include for the purposes of this section and to reference the TWDB's authority to audit project files.

Section 375.83. Advertising and Awarding Construction Contracts.

Section 375.83 is revised to extend the required notification period for pre-construction conferences from five to ten days to ensure TWDB staff will be able to attend if desired.

Subchapter G. Loan Closing and Availability of Funds.

Section 375.90. Applicability.

Section 375.90 is revised to correct a past drafting error that failed to specify that this subchapter applies to both equivalency and non-equivalency projects.

Section 375.91. Financial Assistance Secured by Bonds or Other Authorized Securities.

Section 375.91 is revised to require the ordinance or resolution adopted by the governing body authorizing the issuance of debt to be sold to the Board to include a statement that all payments, including the origination fee, are made to the Board via wire transfer at no cost to the Board. Further, §375.91(a)(5) is revised to still require assurances that the Applicant will comply with any special conditions specified by the Board's environmental finding, but to delete the requirement that this assurance last until all financial obligations to the state have been discharged. Other non-substantive and grammatical changes are made for clarification purposes.

Section 375.92. Financial Assistance Secured by Promissory Notes and Deeds of Trust.

Section 375.92 is added to establish closing requirements for water supply corporations, eligible private Applicants, and other Applicants that are not authorized to issue bonds or other securities.

Section 375.93. Disbursement of Funds.

Section 375.93 is added and the language of former §375.92 is revised to amend subsection (b), describing the current method of releasing funds to the recipient's construction account for principal forgiveness. These revisions are made to provide greater clarity. It is also revised to eliminate the environmental affirmation by the Board but still require the environmental review to be completed before release of funds for design.

Section 375.94. Remaining Unused Funds.

Section 375.94 is added and the language of former §375.93 is revised to use the term "unused funds" instead of "surplus funds" for consistency purposes.

Subchapter H. Construction and Post Construction Requirements.

Section 375.101. Inspection During Construction.

Section 375.101 is revised to eliminate the reference to "sound engineering principles" for consistency with §17.185 of the Texas Water Code. Further, on-site observations were added to the scope of inspections as part of TWDB's actions to confirm ongoing compliance with all applicable requirements. Other minor revisions were made to provide greater clarity.

Section 375.102. Alterations During Construction.

Section 375.102 is revised to include the requirement in §17.186 of the Texas Water Code that the Texas Commission on Environmental Quality must give its approval before any substantial or material changes are made in any previously approved plans for wastewater treatment plants or other facilities.

Section 375.106. Final Accounting.

Section 375.106 is revised to specify that remaining surplus funds may be used as specified in any applicable bond ordinance for certain purposes.

Section 375.108. Release of Retainage.

Section 375.108 is revised to clarify that the TWDB must issue a Certificate of Approval prior to approving the full release of retainage on a contract. Other non-substantive changes are made.

Non-substantive or grammatical changes are made to the following sections for clarification and grammatical purposes: §§375.19, 375.103, 375.104, 375.107, 375.109, 375.201, 375.203, and 375.206.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS.

Ms. Cindy Demers, 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.

There is no change in costs because there are no direct costs associated with the proposed amendment. No state or local governments are required to engage in the CWSRF program. Therefore, no state or local governments are required to expend funds because of these rules. This rule is not expected to have any impact on state or local revenues. The rule does not require any increase in expenditures for state or local governments as a result of administering the rule. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from the rule.

PUBLIC BENEFITS AND COSTS.

Ms. Demers 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 provides clarity regarding the TWDB's Clean Water State Revolving Fund program and is consistent with changes made at the federal level for the Clean Water State Revolving Fund.

LOCAL EMPLOYMENT IMPACT STATEMENT.

The board has determined that a local employment impact statement is not required because the proposal does not adversely affect a local economy in a material way for the first five years that the proposal is in effect because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking. The board 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.

The board 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 provide greater clarity regarding the Clean Water State Revolving Fund and to implement changes to federal requirements for that fund.

Even if the proposal 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 the Federal Water Pollution Control Act or any other 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 it is also proposed under authority of Texas Water Code §15.605. Therefore, this proposed rulemaking does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The board 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.

The board evaluated this proposed rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to more closely align the TWDB's rules related to the Clean Water State Revolving fund to state statutes and federal requirements. The proposed rulemaking would substantially ad-

vance this stated purpose by clarifying rules related to the Clean Water State Revolving fund, incorporating applicable language from state and federal laws and rules, and reflecting the current state and federal requirements for the Clean Water State Revolving Fund.

The board'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 federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that administers the Clean Water State Revolving Fund for the State of Texas.

Nevertheless, the board further evaluated these proposed rules 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 rule-making does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, this rulemaking requires compliance with state and federal laws and rules regarding the Clean Water State Revolving Fund. These requirements will not burden, restrict, or limit an owner's right to property. Therefore, the proposed rules do not constitute a taking under Texas Government Code, Chapter 2007.

SUBMISSION OF COMMENTS.

Written comments on the proposed rulemaking may be submitted by mail to Mr. Les Trobman, 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 the 5:00 p.m. of the 31st day following publication the *Texas Register*.

SUBCHAPTER A. GENERAL PROGRAM REQUIREMENTS

31 TAC §§375.1 - 375.3

STATUTORY AUTHORITY.

This rulemaking is proposed under the authority of Texas Water Code §15.605.

The proposed rulemaking affects Chapter 15 of the Texas Water Code.

§375.1. Definitions.

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

(1) Acquisition--The Applicant obtaining interests in land that are necessary for construction or land that will be an integral part of the treatment process (including land use for the storage of treated wastewater in land treatment systems prior to land application) or will be used for ultimate disposal of residues resulting from such treatment and acquisition of other land.

(2) [(4)] Act--The Federal Water Pollution Control Act, 33 U.S.C. §§1251 et seq.

(3) [(2)] Applicant--The entity applying for financial assistance from the CWSRF including:

(A) the entity that receives the financial assistance; and[-]

(B) the entity legally responsible to repay the debt. [that owns the project funded under this chapter or an entity authorized to act on behalf of another eligible Applicant.]

(4) [(3)] Application--The information and supporting documentation submitted by or on behalf of the Applicant that may be used in consideration for financial assistance from the CWSRF or that [forms provided by] the executive administrator determines [that] must be completed for consideration for financial assistance from the CWSRF.

(5) [(4)] Authorized representative--The signatory agent [of the Applicant] authorized and directed by the Applicant's governing body to file the application and to sign documents relating to the project, on behalf of the Applicant.

(6) [(5)] Board--The Texas Water Development Board.

(7) [(6)] Bonds--All bonds, notes, certificates of obligation, and book-entry obligations authorized to be issued by any political subdivision.

(8) [(7)] Bypass--To pass over a higher ranked project in favor of a lower ranked project to ensure that funds available are utilized in a timely manner, to select an interrelated project, or to meet statutory and capitalization grant requirements as [The selection of a project for funding independent of the project's ranking based on factors] delineated in the applicable IUP.

(9) [(8)] Capitalization grant--The federal grant funds awarded annually by the EPA to the State for capitalization of the CWSRF.

(10) [(9)] Certification of Trust--An instrument executed by a home rule municipality pursuant to Chapter 104, Local Government Code, governing the management of the financial assistance proceeds in accordance with §114.086, Texas Property Code.

(11) [(10)] Clean Water State Revolving Fund (CWSRF)--The financial assistance program authorized by Texas Water Code, Chapter 15, Subchapter J in accordance with the Act.

(12) [(11)] Closing--The exchange of the Applicant's approved debt instruments for CWSRF financial assistance.

(13) [(12)] Commission--The Texas Commission on Environmental Quality.

(14) [(13)] Commitment--An offer by the Board to provide financial assistance to an Applicant as evidenced by [who timely fulfills the conditions in] a Board resolution.

[(14) Commitment term--The amount of time, after the Board commitment, within which the commitment for financial assistance must be elapsed.]

(15) Construction--Any one or more of the following: preliminary planning to determine the feasibility of treatment works, engineering, architectural, legal, fiscal, or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures, field testing of innovative or alternative wastewater treatment processes and techniques meeting guidelines promulgated under 33 U.S.C. §1314(d)(3), or other necessary actions, erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works or the inspection or supervision of any of the foregoing items. [The erection, acquisition, alteration, remodel, rehabilitation, improvement, extension or other man-made change necessary for an eligible project or activity.]

(16) Construction account--A separate account created and maintained for the deposit of financial assistance and utilized by the Applicant to pay eligible expenses of the project.

(17) Construction phase--The erection, acquisition, alteration, remodel, rehabilitation, improvement, extension, or other man-made change necessary for an eligible project or activity.

(18) [(17)] Contract documents--The engineering documentation relating to the project including engineering drawings, maps, technical specifications, design reports, instructions, and other contract conditions and forms that are in sufficient detail to allow contractors to bid on the work.

(19) Cost and Effectiveness Analysis--The study and evaluation of the cost and effectiveness of the processes, materials, techniques, and technologies for carrying out the proposed project or activity; and the selection, to the maximum extent practicable, of a project or activity that maximizes the potential for efficient water use, reuse, recapture, and conservation, and energy conservation; taking into account (i) the cost of constructing the project or activity, (ii) the cost of operating and maintaining the project or activity over the life of the project or activity, and (iii) the cost of replacing the project or activity.

(20) [(18)] Davis Bacon Act--The federal statute at 40 U.S.C. §§3141 et seq. and in conformance with the U.S. Department of Labor regulations at 29 CFR Part 5 (Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction) and 29 CFR Part 3 (Contractors and Subcontractors on Public Work Financed in Whole or in Part by Loans or Grants from the United States).

(21) [(19)] Debt--All bonds or other documents issued or to be issued by any political subdivision or eligible Applicant pledging repayment of the Board's financial assistance.

(22) [(20)] Design--The project phase during which the [Applicant prepares the] project design documents are prepared by the Applicant. Documents may include [including] design surveys, plans, working drawings, specifications and any procedures and protocols to be used during the construction phase of the project.

(23) [(21)] Disadvantaged community--A community that meets the affordability criteria based on income, unemployment rates, and population trends. Specifically, the service area of an eligible applicant, the service area of a community that is located outside the entity's service area, or a portion within the entity's service area if the proposed project is providing new service to existing residents in unserved areas; and meets the following affordability criteria: (a) has an annual median household income that is no more than 75 percent of the state median household income using an acceptable source of socioeconomic data, and (b) the household cost factor that considers income, unemployment rates, and population trends must be greater than or equal to one percent if only water or sewer service is provided or greater than or equal to two percent if both water and sewer service are provided. The required data and calculations of the household cost factor are specified in the Intended Use Plan under which the project would receive funding. [The service area or portion of a service area that has an adjusted median household income that is no more than 75% of the State median household income for the most recent year for which statistics are available; and if the service area is only charged for one type of service, water or sewer, with a household cost factor for water or sewer rates that is greater than or equal to one percent; or if the service area is charged for both water and sewer services, with a combined household cost factor for water and sewer rates that is greater than or equal to two percent. The Board may provide financial assistance to an entity that

cannot otherwise afford financial assistance under the CWSRF based on considerations other than household cost factors if such considerations clearly warrant financial assistance.]

(24) [(22)] Disaster--The occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, extreme heat, other public calamity requiring emergency action, or energy emergency as defined in Texas Government Code, §418.004.

(25) [(23)] Eligible Applicant--Any of the following entities:

(A) a waste treatment management agency including any interstate agencies, or any city, commission, county, district, river authority, or other public body created by or pursuant to state law that has authority to dispose of sewage, industrial wastes, or other waste, or a special purpose district that finances, on behalf of its members, waste disposal projects;

(B) an authorized Indian tribal organization;

(C) any person applying for financial assistance to build a nonpoint source pollution control project pursuant to 33 U.S.C. §1329; [the Act, §319; or]

(D) any person applying for financial assistance for an estuary management project pursuant to 33 U.S.C. §1330; [the Act, §320.]

(E) any entity or person applying for financial assistance as authorized under 33 U.S.C. §1383(c); or

(F) any other entity eligible under federal law to receive funds from the CWSRF.

(26) [(24)] Engineering feasibility report--Those necessary plans and studies that directly relate to the project and that are needed in order to assure compliance with the enforceable requirements of the Act and state statutes.

[(25) Environmental affirmation--The Board's acceptance of the environmental determination made prior to the release of funds for design or construction for an equivalency project receiving pre-design financial assistance.]

(27) [(26)] EPA--The United States Environmental Protection Agency or a designated representative.

(28) [(27)] Equivalency projects--Those projects funded that must follow all federal cross cutter requirements.

(29) [(28)] Escrow account--A separate account maintained by an escrow agent until such funds are eligible for release to the construction account.

(30) [(29)] Escrow agent--Any of the following:

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

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

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

(31) [(30)] Estuary management plan--A plan for the conservation and management of an estuary of national significance as described in 33 U.S.C. §1330 [the Act, §320].

(32) [(31)] Estuary management project--A project to develop or implement an estuary management plan.

(33) [(32)] Executive administrator--The executive administrator of the Board or a designated representative.

(34) Expiration date--The date on which the Board's offer of financial assistance is no longer open or valid and by which a Closing must occur.

(35) [(33)] Financial assistance--Funding made available to eligible Applicants, as authorized in 33 U.S.C. §1383(d) [Loan funds], including principal forgiveness [and negative interest loans, provided to eligible Applicants].

(36) Fiscal sustainability plan--At a minimum, it includes:

(A) an inventory of critical assets that are part of the treatment works;

(B) an evaluation of the condition and performance of inventoried assets or asset groupings;

(C) a certification that the assistance recipient has evaluated and will be implementing water and energy conservation efforts as part of the plan; and

(D) a plan for maintaining, repairing, and, as necessary, replacing the treatment works and a plan for funding such activities.

(37) [(34)] Force majeure--Acts of god, strikes, lockouts, or other industrial disturbances, acts of the public enemy, war, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, droughts, tornadoes, hurricanes, arrests and restraints of government and people, explosions, breakage or damage to machinery, pipelines or canals, and any other incapacities of either party, whether similar to those enumerated or otherwise, and not within the control of the party claiming such inability, which by the exercise of due diligence and care such party could not have avoided.

(38) [(35)] Green project--A project or components of a project that, when implemented, will result in energy efficiency, water efficiency, green infrastructure, or environmental innovation and that are characterized as green projects either categorically or by utilizing a business case as approved by the executive administrator.

(39) [(36)] Green project reserve--A federal directive requiring a specified portion of the capitalization grant to finance [be used for] green projects.

(40) Initial Invited Project List--That portion of the Project Priority List listing the eligible projects, ranked according to their rating, that will initially be invited to submit applications in accordance with procedures and deadlines as detailed in the applicable Intended Use Plan.

(41) [(37)] Intended Use Plan [use plan] (IUP)--A document prepared annually by the Board, after public review and comment, which identifies the intended uses of all CWSRF program funds and describes how those uses support the overall goals of the CWSRF.

[(38) Invited Projects List--That portion of the IUP listing eligible projects ranked according to their rating which will be invited to submit applications in accordance with procedures and deadlines as detailed in the applicable IUP.]

(42) [(39)] Lending rate--The rate of interest applicable to [a particular] financial assistance that must be repaid [under the CWSRF].

(43) [(40)] Market interest rate--Interest rates comparable to those attained for [municipal] securities in an open market offering.

(44) [(41)] Municipality--A city, town, borough, county, parish, district, association, or other public body created by or pursuant to state law, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under 33 U.S.C. §1288.

(45) [(42)] Non-equivalency projects--All projects other than Equivalency projects. [Those projects funded from financial assistance that follow all state requirements and are not subject to compliance with applicable federal cross cutter requirements.]

(46) [(43)] Nonpoint source pollution plan--A plan for managing nonpoint source pollution as described in 33 U.S.C. §1329 [the Act, §319]. Nonpoint source pollution is any source of water pollution that does not enter water from a point source and includes pollution generally resulting from land runoff, precipitation, atmospheric deposition, drainage, seepage, or hydrologic modification.

(47) [(44)] Nonpoint source pollution project--A project implemented pursuant to a nonpoint source pollution plan.

(48) [(45)] Outlay report--The Board's form used to report costs incurred on the project.

(49) [(46)] Permit--Any permit, license, registration, or [and] other legal document required from any local, regional, state, or federal government for construction of the project.

(50) [(47)] Person--An individual, corporation, partnership, association, State, municipality, commission, or political subdivision of the State, or any interstate body.

(51) Planning--The project phase during which the Applicant identifies and evaluates potential alternatives to meet the needs of the proposed project. It includes the cost and effectiveness analysis and environmental review described in Subchapter E of this chapter and preparation of the engineering feasibility report described in Subchapter F of this chapter.

(52) [(48)] Point source--Any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(53) [(49)] Political subdivision--A municipality, intermunicipal, interstate, or state agency, or any other public entity eligible for assistance under Texas Water Code Chapter 16, Subchapter J, or a nonprofit water supply corporation created and operating under Texas Water Code Chapter 67, if such entity is eligible for financial assistance under federal law.

(54) [(50)] Population--The number of people who reside within the territorial boundaries of or receive wholesale or retail wastewater service from the Applicant based upon data that is acceptable to the executive administrator and which includes the following:

(A) acceptable demographic projections or other information in the engineering feasibility report or the latest official data from the U.S. Census Bureau [census] for an incorporated city; or

(B) information on the population for which the project is designed, where the Applicant is not an incorporated city or town.

(55) Principal forgiveness--A type of additional subsidization authorized by 33 U.S.C. §1383(i) or federal appropriations acts, as detailed in the Intended Use Plan and principal forgiveness agreement or bond transcript applicable to the project.

(56) [(51)] Private Placement Memorandum (PPM)--A document functionally similar to an "official statement" used in connection with an offering of municipal securities in a private placement.

(57) [(52)] Project--The planning, acquisition [of land and permits], environmental review, design, construction, and other activities designed to accomplish the objectives, goals, and policies of the Act by providing assistance for projects and activities identified in 33 U.S.C. §1383(c), which may include those projects eligible for funding under §375.2 of this title. [improve, extend, rehabilitate and construct wastewater treatment facilities and nonpoint source or national estuary program projects eligible for funding under the Act.]

(58) [(53)] Project engineer--The engineer retained by the Applicant to provide professional engineering services during any phase of a project.

(59) [(54)] Project information form (PIF)--The form that the executive administrator determines must be submitted by Applicants for rating and ranking in an IUP.

(60) [(55)] Project Priority List--A [That portion of the IUP] listing, found in the IUP, of projects eligible for funding, [projects] ranked according to their rating criteria score and that may be further prioritized as described in the applicable IUP.

(61) [(56)] Ready to proceed--A project for which available information indicates that there are no significant permitting, land acquisition, social, contractual, environmental, engineering, or financial issues that would keep the project from proceeding in a timely manner to the construction phase of a project.

(62) [(57)] Release of funds--The sequence and timing for Applicant's release of financial assistance funds from the escrow account to the construction account.

(63) Small and Medium-Sized Publicly Owned Treatment Works--A Publicly Owned Treatment Work with a design flow equal to or less than 5 million gallons per day.

(64) [(58)] Small systems--Those systems that serve a population of not more than ten thousand individuals.

(65) [(59)] State--The State of Texas.

(66) [(60)] Subsidy--A reduction in the interest rate from the market interest rate. [Any special financial terms and conditions available including loan forgiveness, negative interest rates, or other financial incentives as detailed in an IUP.]

(67) [(61)] Treatment works--Any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature to implement 33 U.S.C. §1281, or necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment, and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units, clear well facilities and distribution facilities for recycled or reused water; and acquisition of the land that will be an integral part of the treatment process (including land use for the storage of treated wastewater in land treatment systems prior to land application) or

will be used for ultimate disposal of residues resulting from such treatment and acquisition of other land, and interests in land, that are necessary for construction. The term also means any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewer systems. [Any devices, facilities and systems that are used in the storage, treatment, recycling, and reclamation of waste or that are necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of, or used in connection with, the treatment process (including land used for the storage of treated water in land treatment systems prior to land application) or is used for ultimate disposal of residues resulting from such treatment; or facilities to provide for the collection, control, and disposal of waste. The term also means any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, and waste combined in storm water and sanitary sewer systems; the type of projects that often arise in response to emergency events.]

(68) Utility Commission--The Public Utility Commission of Texas.

(69) [(62)] Water conservation plan--A report outlining the methods and means by which water conservation may be achieved within a particular facilities planning area.

(70) [(63)] Water conservation program--A comprehensive description and schedule of the methods and means to implement and enforce a water conservation plan.

(71) [(64)] Water quality management plan--A plan prepared and updated annually by the State and approved by the Environmental Protection Agency that determines the nature, extent, and causes of water quality problems in various areas of the State and identifies cost-effective and locally acceptable facility and nonpoint measures to meet and maintain water quality standards.

§375.2. Projects [Entities] and Activities Eligible for Assistance.

The specific projects and activities eligible for assistance for a particular funding year will be established annually in the IUP based on the activities authorized by the Act, which allows the CWSRF to provide financial assistance:

(1) to any municipality or intermunicipal, interstate, or State agency for construction of publicly owned treatment works (as defined in 33 U.S.C. §1292);

(2) for the implementation of a management program established under 33 U.S.C. §1329;

(3) for development and implementation of a conservation and management plan under 33 U.S.C. §1330;

(4) for the construction, repair, or replacement of decentralized wastewater treatment systems that treat municipal wastewater or domestic sewage;

(5) for measures to manage, reduce, treat, or recapture stormwater or subsurface drainage water;

(6) to any municipality or intermunicipal, interstate, or State agency for measures to reduce the demand for publicly owned

treatment works capacity through water conservation, efficiency, or reuse;

(7) for the development and implementation of watershed projects meeting the criteria set forth in 33 U.S.C. §1274;

(8) to any municipality or intermunicipal, interstate, or State agency for measures to reduce the energy consumption needs for publicly owned treatment works;

(9) for reusing or recycling wastewater, stormwater, or sub-surface drainage water;

(10) for measures to increase the security of publicly owned treatment works; and

(11) to any qualified nonprofit entity that has federal tax-exempt status to provide assistance to owners and operators of small and medium-sized publicly owned treatment works:

(A) to plan, develop, and obtain financing for eligible projects, including planning, design, and associated preconstruction activities; and

(B) to assist such treatment works in achieving compliance with the Act.

[(a) Financial assistance from the CWSRF is available to eligible projects for the following:]

[(1) for the construction of or improvements to publicly-owned treatment works;]

[(2) for the implementation of a non-point source project under §319 of the Act;]

[(3) for the development and implementation of a conservation and management plan for bays and estuaries under §320 of the Act; and]

[(4) for projects which qualify as green projects based upon information provided within the submitted project information form, the application, and if necessary, the business case.]

[(b) Financial assistance from the CWSRF is available for nonpoint source pollution projects consistent with the following definitions:]

[(1) BMP—Best management practices are those practices determined to be the most efficient, practical, and cost-effective measures identified to guide a particular activity or address a particular problem.]

[(2) National Estuary Program—A program created by the Water Quality Act of 1987 and administered according to §320 of the Act.]

[(3) NPS Loan Program—Nonpoint Source Pollution Loan Program established to provide low interest loans to persons for the implementation of approved nonpoint source pollution control and abatement projects and estuary management projects.]

[(4) NPS Management Program—The most recent Texas Nonpoint Source Management Program adopted by the Commission.]

[(c) Financial assistance from the CWSRF is available for non-point source pollution projects consistent with the following eligibilities:]

[(1) The executive administrator may provide financial assistance to persons for nonpoint source pollution control projects or for national estuary program projects.]

[(2) An Applicant for financial assistance for a nonpoint source or estuary program project shall submit an application in the form and number prescribed by the executive administrator. The executive administrator shall determine the type of financial assistance available to an Applicant for a nonpoint source pollution project or a national estuary program project.]

[(3) The Board may provide financial assistance to applicants by either purchasing bonds issued by such applicant or by receiving a promissory note and entering into a loan agreement with such Applicant. If, however, an Applicant is a governmental entity that is fully authorized to issue bonds, the Applicant may not enter into a loan agreement as provided in this section.]

[(d) Financial assistance from the CWSRF is available for nonpoint source pollution control or estuary management projects consistent with the following conditions:]

[(1) an identified practice within a Water Quality Management Plan;]

[(2) a BMP listed in the NPS Management Program; or]

[(3) the National Estuary Program efforts for the State.]

§375.3. Federal Requirements.

(a) Davis-Bacon Act Prevailing Wage Provision. The Applicant must comply with the requirements of section 513 of that Act (33 U.S.C. §1372) in all procurement contracts and sub-grants, and require that loan recipients, procurement contractors, and sub-grantees include such a term and condition in subcontracts and other lower tiered transactions. The Davis Bacon prevailing wage requirements, as provided in 40 U.S.C. §§141 et seq. and the Department of Labor's implementing regulations, apply to any project for the construction of treatment works that are funded by the CWSRF.

(b) National Environmental Policy Act-like environmental review. The National Environmental Policy Act provisions apply to all CWSRF assistance for the construction of treatment works. The requirements are specified in Subchapter E of this chapter.

(c) Generally Accepted Accounting Principles. Assistance recipients must maintain project accounts according to Generally Accepted Accounting Principles as issued by the Governmental Accounting Standards Board, including standards relating to the reporting of infrastructure assets.

(d) Cost and Effectiveness Analysis. A municipality or intermunicipal, interstate, or State agency that receives assistance from the CWSRF must certify that they have conducted a cost and effectiveness analysis. A cost and effectiveness analysis is an eligible cost under the CWSRF. The certification must be provided before CWSRF assistance is provided for final design or construction phase.

(e) Architectural and Engineering Contracts. For equivalency projects only, a contract to be carried out using funds directly made available by a capitalization grant for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services must be negotiated in the same manner as a contract for architectural and engineering services is negotiated under 40 U.S.C. §§1101 et seq. This applies to new solicitations, significant contractual amendments, and contract renewals.

(f) Fiscal Sustainability Plan. A recipient of a loan for a project that involves the repair, replacement, or expansion of a publicly owned treatment works must develop and implement a fiscal sustainability plan or certify that it has already developed and implemented a fiscal sustainability plan.

(g) American Iron and Steel Requirements. All of the iron and steel products used in the construction, alteration, maintenance, or repair of treatment works must be produced in the United States, as provided in 33 U.S.C §1388.

(h) Signage. Equivalency projects must comply with the EPA signage requirements implemented to enhance public awareness of CWSRF projects.

(i) Other Federal Requirements. Other federal statutory, regulatory, executive order, and/or guidance and policy authority may apply. Federal requirements are further detailed in the IUP under which a project was funded.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601320

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Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



SUBCHAPTER B. FINANCIAL ASSISTANCE

31 TAC §§375.10 - 375.19

STATUTORY AUTHORITY.

This rulemaking is proposed under the authority of Texas Water Code §15.605.

The proposed rulemaking affects Chapter 15 of the Texas Water Code.

§375.10. *Types of Financial Assistance.*

The executive administrator shall determine the type of financial assistance available to the Applicant based on the evaluation of the project information forms, the application, and the availability of funds in accordance with the types of assistance authorized in 33 U.S.C. §1383(d).

§375.11. *Refinancing.*

(a) The executive administrator may accept applications to refinance existing debt for eligible projects when sufficient funds are available. If refinancing funds are available, then the Applicant shall describe the need for the eligible project and provide other specific information detailed in the project information form or as otherwise requested by the executive administrator.

(b) An application for refinancing of existing debt shall be the same as an application for financial assistance under this chapter. The executive administrator may consider an application for refinancing when:

(1) the project meets all of the requirements under this chapter, including information evidencing that the environmental review, programmatic requirements, and engineering criteria required meets the criteria under law and this chapter for the same or similar projects; and

(2) the federal tax regulations allow such refinancing.

§375.12. *Financing of Planning, Acquisition, and Design Phases [Funding].*

[(a)] Applicants may request [This type of] financial assistance [is available] for the planning, acquisition [of land], and the design for a proposed project without a readiness to proceed determination.

[(b) Applicants who have completed the planning, acquisition, and design for a proposed project within three years of the closing date for financial assistance will receive priority for construction funding of the project in the next available IUP if the project is ready to proceed.]

§375.13. *Construction Phase Funding.*

This type of financial assistance is available for the construction phase of an eligible project that is ready to proceed.

§375.14. *Pre-Design Funding Option.*

This type of financial assistance is available for the planning, design, acquisition, and construction phases of a project. This option allows the commitment of construction funding where planning and design are not yet completed. This option is available only when the executive administrator recommends it to the Board based on a finding that the project is ready to proceed.

§375.15. *Lending Rates.*

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

(1) Average life--The number determined by dividing the sum of all [the] payment periods [of all maturities of a loan] by the total principal amount [number of maturities].

(2) Borrower--Each eligible Applicant that has received a commitment [receiving a loan] from the Board.

(3) Interest [Loan interest] rate--The individual interest rate for each maturity in an amortized debt schedule [of a loan] as identified by the executive administrator under this chapter.

(4) Market rate--The individual interest rate for each maturity in an amortized debt schedule [of a loan] payment that is the borrower's market cost of funds based on the MMD scale for the borrower as identified under subsection (c)(1) of this section.

(5) MMD--Thomson Reuters Municipal Market Data Range of Yield Curve Scales.

(6) Payment period--The number determined by multiplying the total principal amount due for an individual maturity as set forth in the debt instrument [loan] by the standard period for the debt instrument [loan].

(7) Standard period--The number identified by determining the number of days between the date of delivery of the funds to a borrower and the date of the maturity of a bond or loan payment pursuant to which the funds were provided calculated on the basis of a 360-day year composed of twelve 30-day periods and dividing that number by 360.

(8) Term--For bonds, the length of time between when the bond is issued and the final maturity in the debt instrument; for loans, the period of time any principal is outstanding.

(b) Procedure for setting fixed interest rates. [The interest rates will be determined by this section and as described in an IUP.]

(1) The executive administrator will set fixed interest rates, as described in the IUP and further determined in this section, [rates for loans] on a date that is:

(A) no earlier than five business days prior to the adoption of the political subdivision's bond ordinance or resolution or the execution of a loan agreement; and

(B) not more than 45 days before the anticipated closing of a commitment [the loan] from the Board.

(2) After 45 days from the assignment of the interest rate [on the loan], rates may be extended only with the executive administrator's approval.

(c) Fixed rates [for non-equivalency projects]. The fixed interest rates for financial assistance under this chapter will be determined as provided in this subsection. The executive administrator will identify the market rate for the borrower, determine the amount of adjustment from the market interest rate scale appropriate for the borrower, apply the identified interest rate adjustment to the market rate for each year of the borrower's scale [borrower] to determine the [loan] interest rate, and apply the [loan] interest rate to the proposed principal schedule, as more fully set forth in this subsection.

(1) Identifying [To identify] the market rate for eligible borrowers.[:]

(A) for borrowers that have a rating by a recognized bond rating entity and will not have bond insurance, the executive administrator will rely on the higher of the appropriate MMD scale for the current bond rating of the borrower or the appropriate MMD BAA scale; or

(B) for borrowers with no rating by a recognized bond rating entity or for borrowers with a rating that is less than investment grade as determined by the executive administrator, the executive administrator will rely on the appropriate MMD BAA scale.[: or]

[(C) for borrowers that are rated by a recognized rating entity with bond insurance or for borrowers with no rating by a recognized bond rating entity with insurance, the executive administrator will rely on the higher of the borrower's uninsured fixed rate scale or the insurer's fixed rate scale.]

(2) The fixed rate scale shall be established for each borrower using individual coupon rates for each maturity of proposed debt based on the appropriate scale.

(3) [(2)] The program is designed to provide borrowers with an interest rate [a] reduction from the fixed rate scale applicable to the borrower [not to exceed 130 basis points below the market rate] based on a level debt service schedule, or if applicable, the reduction is set at the total basis points below the fixed rate scale for borrowers as derived under paragraph (4) of this subsection. Notwithstanding the foregoing, in no event shall the [loan] interest rate as determined under this section be less than zero.

(4) For loans and bond commitments with an average life in excess of 16 years for a term of up to 20 annual maturities or years or an average life in excess of 20 years for a term of up to 30 annual maturities or years, (or a pro-rata calculation for terms between 20 and 30 annual maturities or years) and at the discretion of the Board for loans and bond commitments that have debt schedules that produce a total fixed lending rate reduction in excess of a standard loan or bond commitment structure (defined as a debt service schedule in which the first year or the maturity schedule is interest only followed by principal maturing on the basis of level debt service), the following procedures will be used to determine the total fixed lending rate reduction:

(A) The interest rate component of level debt service will be determined by using the 15th year (19th year for 30-year terms) coupon rate of the appropriate scale of the MMD scales that corresponds to the 15th year (19th year for 30-year terms) of principal of the standard loan or bond commitment structure and that is measured 30 days from the date that the application is proposed to be presented to the Board for approval.

(B) Level debt service will be calculated using the 15th year (19th year for 30-year terms) MMD Scale coupon rate as described in subparagraph (A) of this paragraph and the par amount of the loan or bond commitment according to a standard loan or bond commitment structure. For a loan or bond commitment that has been proposed for a term of years equal to a standard loan or bond commitment structure, the dates specified in the application shall be used for interest and principal calculation. For a loan or bond commitment that has been proposed for a term of years less than a standard loan or bond commitment structure or longer than a standard loan or bond commitment structure, level debt service will be calculated beginning with the dated date, will be based upon the principal and interest dates specified in the application, and will continue for the term of a standard loan or bond commitment structure.

(C) A calculation will be made to determine how much a borrower's interest would be reduced if the loan or bond commitment had been made according to the total fixed lending rate reduction provided in paragraph (4) of this subsection and based upon the principal payments calculated in subparagraph (B) of this paragraph.

(D) The Board will establish a total fixed lending rate reduction for the loan or bond commitment that will achieve the interest savings in subparagraph (C) of this paragraph based upon the principal schedule proposed by the borrower.

(5) [(3)] To determine the [loan] interest rate, the following procedures will apply:

(A) Unless otherwise requested by the borrower under subparagraph (B) of this paragraph, the [loan] interest rate will be determined based on a debt service schedule that provides interest only to be paid in the first year of the debt service schedule and in which the remaining annual debt service payments are level, as determined by the executive administrator. The executive administrator will identify the appropriate MMD scale for the borrower and identify the market rate for the maturity due each year [in the year preceding the year in which the average life is reached]. The executive administrator will reduce that market rate of each year by the number of basis points applicable according to paragraph (2) of this subsection and thereby identify a proposed [loan] interest rate scale. The proposed [loan] interest rate scale will be applied to the proposed principal repayment schedule. If the resulting debt service schedule is level to the satisfaction of the executive administrator, then the proposed [loan] interest rate will be the [loan] interest rate for the commitment [loan]. If the resulting debt service schedule is not level to the satisfaction of the executive administrator, then the executive administrator may adjust the interest rate for any or all of the maturities to identify the [loan] interest rate that as closely as possible achieves the interest savings applicable.

(B) A borrower may request a debt service schedule in which the annual debt service payments are not level through the term of the amortized debt schedule [loan], as determined by the executive administrator. [In this event, the executive administrator will approximate a level debt service schedule for the loan amount and identify a proposed loan interest rate that provides for annual debt service payments that are level for the term of the loan following the procedures set forth in paragraph (1)(A) of this subsection.] From the level debt service schedule, the executive administrator will determine the amount of the subsidy applicable to the debt service schedule provided [that would have been provided if the annual debt service payments had been level]. The executive administrator will then identify the [loan] interest rate that as closely as possible provides the borrower the identified subsidy amount for the principal schedule requested by the borrower.

[(d) Fixed rates for equivalency projects. The fixed interest rates for CWSRF loans under this subchapter are set at rates not to

exceed 195 basis points below the fixed rate scale for borrowers plus an additional reduction under paragraph (1) of this subsection, or if applicable, are set at the total basis points below the fixed rate scale for borrowers derived under paragraph (2) of this subsection. The fixed rate scale shall be established for each uninsured borrower based on the borrower's market cost of funds as they relate to the MMD or the BAA scale of the MMD for borrowers with either no rating or a rating less than investment grade, using individual coupon rates for each maturity of proposed debt based on the appropriate scale. The fixed rate scale shall be established for each insured borrower based on the higher of the borrower's uninsured fixed rate scale or the MMD AA scale.]

[(1) Under §375.16 of this title (relating to Fees of Financial Assistance) an additional reduction not to exceed 25 basis points will be used, for total fixed interest rates not to exceed 195 basis points below the fixed scale for such borrower.]

[(2) For borrowers filing applications on or after September 21, 1997 for loans with an average bond life in excess of 14 years or, at the discretion of the Board for borrowers filing applications on or after September 21, 1997 for loans that have debt schedules less than 20 years and that produce a total fixed lending rate reduction in excess of a standard loan structure (defined as a debt service schedule in which the first year of the maturity schedule is interest only followed by 20 years of principal maturing on the basis of level debt service); the following procedures will be used in lieu of the provisions of paragraph (1) of this subsection to determine the total fixed lending rate reduction.]

[(A) The interest rate component of level debt service will be determined by using the 13th year coupon rate of the appropriate scale of the MMD scales that corresponds to the 13th year of principal of the standard loan structure and that is measured from the first business day on the month the loan application will be presented to the Board for approval.]

[(B) Level debt service will be calculated using the 13th year MMD Scale coupon rate as described in subparagraph (A) of this paragraph and the par amount of the loan according to a standard loan structure. For a loan that has been proposed for a term of years equal to a standard loan structure, the dates specified in the loan application shall be used for interest and principal calculation. For a loan that has been proposed for a term of years less than a standard loan structure or longer than a standard loan structure, level debt service will be calculated beginning with the dated date and based upon the principal and interest dates specified in the application, and continuing for the term of a standard loan structure.]

[(C) A calculation will be made to determine how much a borrower's interest would be reduced if the loan had been made according to the total fixed lending rate reduction provided in paragraph (1) of this subsection and based upon the principal payments calculated in subparagraph (B) of this paragraph.]

[(D) The Board will establish a total fixed lending rate reduction for the loan that will achieve the interest savings in subparagraph (C) of this paragraph based upon the principal schedule proposed by the borrower.]

(d) [(e)] Variable Rates. The interest rate for CWSRF variable rate debt [loans] under this chapter will be set at a rate equal to the actual interest cost paid by the Board on its outstanding variable rate debt plus the cost of maintaining the variable rate debt in the CWSRF. Variable rate debt is [loans are] required to be converted to long-term fixed rate financing [loans] within 90 days of project completion unless an extension is approved in writing by the executive administrator. Within the time limits set forward in this subdivision, borrowers may request to convert to a long-term fixed rate at any time, upon notification to the executive administrator and submittal of a resolution requesting such

conversion. The fixed lending rate will be calculated under the procedures and requirements of subsection (c) [subsections (b), (e) and (d)] of this section.

[(f) Private and taxable borrowers. The interest rate for loan agreements for those borrowers receiving financial assistance who are determined to be private or taxable issuers will be:]

[(1) for borrowers that have a rating by a recognized bond rating entity and will not have bond insurance, the executive administrator will rely on the higher of the MMD taxable scale for the current bond rating of the borrower or the MMD BAA taxable scale; or]

[(2) for borrowers with no rating by a recognized bond rating entity or for borrowers with a rating that is less than investment grade as determined by the executive administrator, the executive administrator will rely on the MMD BAA taxable scale; or]

[(3) for borrowers that are rated by a recognized bond rating entity with bond insurance or for borrowers with no rating by a recognized bond rating entity with insurance, the executive administrator will rely on the higher of the borrower's uninsured fixed rate taxable scale or the insurer's fixed rate taxable scale.]

(e) [(g)] Adjustments. The executive administrator may adjust a borrower's interest rate at any time prior to closing as a result of a change in the borrower's credit rating.

§375.16. Fees for [of] Financial Assistance.

(a) General. The Applicant will be assessed charges for the purpose of recovering administrative costs of all projects receiving CWSRF financial assistance. However, no fees or costs shall be assessed on the portion of the project that receives principal [subsidization through loan] forgiveness [or other subsidies] as detailed in the IUP.

(b) Origination [Loan origination] fee. An administrative [A loan origination] fee not to exceed [equal to] 1.85[%] percent of the project costs will be assessed, as a one-time non-refundable charge. Project costs upon which the fee will be assessed do not include the origination fee or those project costs that are funded through principal [loan] forgiveness. The fee is due and payable at the time of loan closing and may be financed as a part of the financial assistance.

§375.17. Term of Financial Assistance.

(a) The Board may offer financial assistance up to 30 years for the planning, acquisition, design, and/or construction phases of a project, in accordance with the Act and the IUP under which the project received funding.

(b) Notwithstanding the terms in subsection (a) of this section, the term of financial assistance offered may not exceed the projected useful [expected design] life of an eligible project, in accordance with the Act.

§375.18. Principal Forgiveness [Subsidies].

(a) The Board may provide principal forgiveness [subsidies] for financial assistance in accordance with 33 U.S.C. §1383(i) [for]:

(1) for an entity that meets the affordability criteria established in this chapter and in the IUP for a Disadvantaged Community; or

(2) to implement a process, material, technique, or technology [an entity that meets the criteria established in the IUP for other subsidies allowed under the federal appropriations law or the capitalization grant.]

(A) to address water-efficiency goals;

(B) to address energy-efficiency goals;

(C) to mitigate stormwater runoff; and/or

(D) to encourage sustainable project planning, design, and construction.

(b) Total amount of principal forgiveness [subsidies]. The total amount of principal forgiveness [subsidies] may not exceed the percentages established by federal law or by the capitalization grant.

§375.19. *Financial Guarantees for Political Subdivision Bonds.*

(a) Financial guarantees. The Board will consider accepting surety bonds in lieu of required cash reserve deposits and insurance policies for political subdivision bonds. At the time of loan commitment and at loan closing, only those financial guarantors that have been approved by the Board are authorized to underwrite financial guarantee policies on political subdivision bonds approved by the Board.

(b) Criteria for authorized list. The Board will maintain a list of authorized financial guarantors. In order to be considered for placement on the list, a guarantor must meet the following minimum criteria:

(1) the financial guarantor must be a nationally recognized provider of municipal bond insurance and must have a triple-A stable insurer financial strength rating with Standard & Poor's, Moody's Investors Service, Inc. and Fitch, Inc.; and

(2) the financial guarantor must have a triple-A insurer financial enhancement rating with Standard & Poor's.

(c) Review of policies. The executive administrator shall review all policies of insurance submitted by authorized financial guarantors and may reject any policy of insurance or surety bond that [which] does not protect the interests of the Board's financial program or that [which] subrogates the Board's rights.

(d) Removal from authorized list. The executive administrator may remove a financial guarantor from the authorized list at any time that a change in status would cause the financial guarantor to fail to meet the minimum criteria.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601321

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Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



SUBCHAPTER C. INTENDED USE PLAN

31 TAC §§375.30 - 375.34

STATUTORY AUTHORITY.

This rulemaking is proposed under the authority of Texas Water Code §15.605.

The proposed rulemaking affects Chapter 15 of the Texas Water Code.

§375.30. *Submission of Project Information Forms.*

(a) Eligible [The executive administrator will request eligible] Applicants may [to] submit a project information form for rating and

ranking on the applicable IUP. To be included in the IUP and on the initial Project Priority List, Applicants must [Applicants shall] submit a complete and accurate project information form by the date included in the notice. As further detailed in the applicable IUP, applicants may also submit a project information form after the date included on the notice for a project to be considered for inclusion on an amended Project Priority List published after the initial IUP has been approved. The required information that must be in a project information form will be specified in Board guidance and will include, but will not be [is not] limited[.] to, the following:

(1) a detailed description of the proposed project;

(2) a county map(s) showing the location of the service area;

(3) an estimated total project cost which:

(A) for an estimated financial assistance amount greater than \$100,000, the project information form shall be sealed [certified] by a registered professional engineer; or

(B) for an estimated financial assistance amount less than \$100,000, the project information form shall be accompanied by a statement signed by the system operator establishing the basis for the estimate;

(4) an estimated project schedule;

(5) the population currently served by the Applicant;

(6) the status of the Applicant's water conservation plan;

(7) signature of the Applicant's authorized representative; and

(8) additional information, as detailed within the solicitation for project information forms, needed to establish the priority rating score.

(b) The Applicant's failure to submit all of the information requested may result in a failure to include the project in the IUP.

§375.31. *Rating Process.*

(a) Projects in an IUP will be rated based upon the information, and any supporting documentation, submitted by the Applicant on the [detailed within the submitted] project information form.

(b) Rating criteria. For projects authorized under 33 U.S.C. §1383(c)(1) (§212 projects) [the Act's §212 projects] involving the construction or improvements to publicly [publically] owned treatment works the following factors will be considered:

(1) Impacts to water quality--Projects that protect stream segments and groundwater from pollution.

(2) Unserved areas--Projects that will bring individual systems into a centralized system or projects that address on-site systems.

(3) Regionalization of treatment works--Projects that will consolidate and eliminate systems.

(4) Reduction or prevention--Projects that will reduce or prevent sewer system overflows and inflow and infiltration.

(5) Eligibility as a Disadvantaged Community--Projects located in disadvantaged communities, as defined in Subchapter A of this Chapter. [Affordability--A Project located in a disadvantaged community shall have an affordability rating factor as defined within the applicable IUP.]

(6) Enforcement action--Corrective actions imposed by judicial authority or the Commission.

(7) Innovative or alternative technology or approaches--Projects that involve innovative or alternative technology or approaches, such as providing for the reclaiming and reuse of water, otherwise eliminate the discharge of pollutants, and utilize recycling techniques, land treatment, new or improved methods of waste treatment management for municipal and industrial waste (discharged into municipal systems) and the confined disposal of pollutants, so that pollutants will not migrate to cause water or other environmental pollution.

(8) Effective Management--Whether an entity has adopted or plans to prepare an Asset Management Plan and provide training to the Applicant's governing body and employees, whether the project addresses water conservation and energy efficiency, and whether the project implements a state or regional water plan.

(9) Reduction in Demand--Whether a majority of the funds being requested from the CWSRF for the project will be used to implement measures to reduce the demand for publicly owned treatment works capacity through water conservation, efficiency, or reuse.

(10) Non-profits--If the Applicant is a qualified nonprofit entity that has federal tax-exempt status, whether a majority of the funds being requested from the CWSRF for the project will be used to implement assistance to owners and operators of small and medium publicly owned treatment works to either (a) plan, develop, and obtain financing for eligible CWSRF projects, including planning, design, and associated preconstruction activities; or (b) assist such treatment works in achieving compliance with the Act.

~~{(6) Emergency relief--Projects which are affected by events of natural disaster.}~~

(11) ~~{(7) Additional factors as designated within the applicable IUP [and determined by the executive administrator].}~~

(c) Previously funded projects. Planning, acquisition, or design projects, completed within three years from the closing of the financial assistance will receive a priority for construction phase funding if there are no significant changes that affect the original project rating and the project is ready to proceed.

(d) For projects authorized under 33 U.S.C. §1383(c)(2) (§319 projects) [the Act's §319 projects] involving nonpoint source and projects authorized under 33 U.S.C. §1383(c)(3) (§320 projects) [§320 projects] involving estuary management, the following factors will be considered:

(1) Public health--Ability to improve conditions that a public health official has determined are a nuisance and are dangerous to public health and safety and that may result from water supply and sanitation problems in the area to be served by the proposed project.

(2) Groundwater--Minimization of impact of pollutants to an aquifer or groundwater.

(3) Impaired water body--Ability to improve conditions in any water body that does not meet applicable water quality standards or is threatened for one or more designated uses by one or more pollutants.

(4) Eligibility as a Disadvantaged Community--Projects located in disadvantaged communities, as defined in Subchapter A of this chapter. [Affordability--A Project located in a disadvantaged community shall have an affordability rating factor as defined within the IUP.]

(5) Additional factors as designated within the applicable IUP [and determined by the executive administrator].

(e) For all projects authorized under 33 U.S.C. §1383(c) that are made eligible in the Intended Use Plan:

(1) Whether a majority of the funds being requested from the CWSRF for the project will be used to implement innovative approaches to manage, reduce, treat, or recapture stormwater or subsurface drainage water.

(2) Whether a majority of the funds being requested from the CWSRF for the project will be used to implement reuse or recycling wastewater, stormwater, or subsurface drainage water.

(f) Emergency relief. Projects that are affected by natural disasters and according to the following requirements:

(1) The Applicant must demonstrate that a need for emergency relief from an imminent threat to public health, safety, environment, or welfare exists. The Applicant must describe the nature of the threat and provide a complete description of the proposed emergency relief project.

(2) The Board may authorize funding for the emergency relief project that meets the requirements of this title or as described in an IUP.

§375.32. *Public Notice.*

(a) In accordance with the Act, the executive administrator [Board] shall hold public hearings and allow a period for public review and comment before the Board considers [considering] the adoption and approval of the IUP and the Project Priority List.

(b) For any substantive amendments thereto, the executive administrator [Board] shall hold a public hearing and allow a period of public review and comment in accordance with the Act. The executive administrator may add projects to the Project Priority List after a 14-day public comment period without any public hearing.

§375.33. *Criteria and Methods for Distribution of Funds.*

(a) Amount of available funds. Annually, the executive administrator will determine the amount of funds available for wastewater system improvements and other projects for the fiscal year.

(b) Principal forgiveness [Subsidy] limits. The total amount of principal forgiveness [subsidies] in any fiscal year may not exceed the percentages established by federal law or by the capitalization grant.

(c) Small systems. Projects with identical combined rating scores, including rating scores of zero, will be listed in order of population. Projects serving fewer people will be listed above those projects serving a larger population.

(1) To the extent that eligible Applicants are available, a minimum of 15[%] percent of the funds will be made available to small systems.

(2) If small system projects on the Invited Projects List are less than 15[%] percent of the funds, then the executive administrator may bypass projects for systems serving larger populations to ensure inclusion of small system projects for at least 15[%] percent of available funds.

(d) Project Priority List. Available program funds will be applied to the list of projects designated to receive funding. The methods used for ranking include:

(1) Project costs. Project costs will be determined by cost estimates contained in the project information form if the executive administrator deems those costs reasonable and acceptable; the costs will also be reflected in the applicable IUP.

(2) Tie-breakers. If two or more projects receive the same rating, then the executive administrator will use the tie-breaker procedures described in the applicable IUP.

(3) Bypass procedure. The executive administrator may bypass higher rated and ranked projects if:

(A) an incomplete application is submitted as described in §375.41 of this title (relating to Timeliness of Application and Required Application Information); or

(B) a bypass is necessary to fund certain types of projects as detailed in the applicable IUP or as required by capitalization grant conditions.

(e) Projects submitted for financing will be screened for eligibility, scored, ranked, and listed on a Project Priority List. Applicants with projects on the Initial Invited Projects List will be invited to submit applications in accordance with the procedures and deadlines as detailed in the IUP. The project selection is subject to subsections (a) - (d) of this section. The Project Priority [~~Invited Projects~~] List will be reviewed periodically and additional invitations will be extended until all of the annual CWSRF funding amount is committed.

(f) Utilization of remaining funds. If there are insufficient applications for financial assistance to obligate available funds for the funding year, then the executive administrator shall utilize the remaining funds during the next funding year or at any time in combination with other Board financial assistance programs.

(g) Fund shortages. When the amount of funds required to fund all complete applications for financial assistance exceeds the amount of funds available in the funding year, a shortage of funds exists. In such an instance, the Board will fund Applicants until all funds have been utilized. The Board shall fund projects prioritized by the date and time of receipt of a complete application and the project's ability to proceed to commitment.

§375.34. *Changes to Project.*

Subsequent to adoption of an IUP, the Applicant for a proposed project listed within the Project Priority [~~Invited Projects~~] List may be allowed certain changes without requiring a re-ranking in the following circumstances:

(1) the Applicant for a proposed project changes but the project does not change;

(2) [(4)] the number of participants in a regional [~~consolidation~~] project changes and [~~may change provided that~~] the change does not result in a change [~~modification~~] to the rating; or [~~and~~]

(3) [(2)] the fundable [~~depending on the availability of funds; the total cost of the project may not increase in an~~] amount of a proposed project does not increase by more than 10[%] percent of the amount listed in the approved [~~adopted~~] IUP. The executive administrator may waive the 10[%] percent limit to incorporate additional elements or increased project costs; however, any principal forgiveness awarded may not exceed the original IUP amounts allocation [~~to the project~~].

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601322

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Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



SUBCHAPTER D. APPLICATION FOR ASSISTANCE

31 TAC §§375.40 - 375.45

STATUTORY AUTHORITY.

This rulemaking is proposed under the authority of Texas Water Code §15.605.

The proposed rulemaking affects Chapter 15 of the Texas Water Code.

§375.40. *Pre-Application Conferences.*

The Applicant must schedule an appointment and participate in a pre-application conference to be held in person or by teleconference to discuss the eligibility of the project and of the Applicant for financial assistance; the general, engineering, environmental, fiscal, and legal requirements of an application; and to assist the Applicant in completing an application. The following individuals should participate in [~~attend~~] the conference: a member of the governing body of the Applicant; the consulting engineer; and the financial advisor.

§375.41. *Timeliness of Application and Required Application Information.*

(a) Time to submit applications. Applications and required additional data or information must be submitted in a timely basis. The failure to timely submit the application, the information necessary to complete the application or additional requested information will result in the bypass of the project [~~on the Invited Projects List~~].

(1) Deadline to submit application. Applicants shall submit a complete application by the deadlines established by the Board as detailed in the applicable IUP or the project will be bypassed [~~ineligible for funding~~]. The Applicant will be notified when an application is administratively complete.

(2) Incomplete applications. An Applicant shall cure any deficiency in an application upon request from the executive administrator and shall submit all requested information within fourteen days from receipt of the notice of a deficiency.

(3) Additional information. The Applicant shall submit any additional or modified information or data required by the executive administrator within fourteen days of the request for same, regardless of the expiration of other applicable deadlines in this section.

(4) Extension of time. The executive administrator may grant an extension of time to complete the application or to receive additional information and data if the Applicant can show good cause for the delay or if the delay is caused by an event of force majeure. The executive administrator exercises sole discretion in determining whether and to what extent to grant a time extension.

(b) Required application information. For eligible public Applicants, an [~~An~~] application shall be in the form and number of copies [~~numbers~~] prescribed by the executive administrator and, in addition to any other information that may be required by the executive administrator or the Board, the Applicant shall provide [~~at a minimum,~~] the following documentation:

(1) a resolution from its governing body that shall:

(A) request financial assistance, identifying the amount of requested assistance;

(B) designate the authorized representative to act on behalf of the governing body; and

(C) authorize the representative to execute the application, appear before the Board on behalf of the Applicant, and submit such other documentation as may be required by the executive administrator;

(2) a notarized affidavit from the authorized representative stating that:

(A) the decision to request financial assistance from the Board was made in a public meeting held in accordance with the Open Meetings Act (Texas Government Code, Chapter 551) and after providing all such notice as is required by the Open Meetings Act or, for a corporation, that the decision to request financial assistance from the Board was made in a meeting open to all customers after providing all customers written notice at least 72 hours prior to such meeting;

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

(C) the Applicant has no outstanding judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issues of any kind or nature by EPA, the Commission, Texas Comptroller of Public Accounts, the Utility Commission, Texas Office of the Secretary of State, or any other federal, state, or local government, that would materially affect the Applicant's ability to repay its debt, or identifying such judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issue as may be outstanding for the Applicant;

(D) the Applicant warrants compliance with the representations made in the application in the event that the Board provides the financial assistance; and

(E) the Applicant will comply with all applicable federal laws, rules, and regulations as well as the laws of this State and the rules and regulations of the Board;

(3) copies of the following project documents:

(A) any draft or executed contracts for consulting services to be used by the Applicant in applying for financial assistance or constructing the proposed project, including but not limited to, financial advisor, engineer, and bond counsel; and

(B) contracts for engineering services should include the scope of services, level of effort, costs, project schedules, and other information necessary for adequate review by the executive administrator. A project schedule shall be provided with the contract; the schedule must provide firm timelines for the completion of each phase of a project and note the milestones within the phase of the project;

(4) a citation to the specific legal authority in the Texas Constitution and statutes under which the Applicant is authorized to provide the service for which the Applicant is receiving financial assistance as well as the legal documentation identifying and establishing the legal existence of the Applicant;

(5) if the Applicant provides or will provide wastewater service to another service provider, or receives such service from another service provider, the proposed agreement, contract, or other documentation which legally establishes such service relationship, with the final and binding agreements provided prior to closing;

(6) documentation of the ownership interest, with supporting legal documentation, for the property on which the proposed project shall be located, or if the property is to be acquired, certification that the Applicant has the necessary legal power and authority to acquire the property;

(7) if financing of the project will require a contractual loan agreement or the sale of bonds to the Board payable either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts, for a duration specified by the executive administrator, under which the Applicant's gross income is expected to accrue. Before the financial assistance is closed, an Applicant shall submit executed copies of such contracts to the executive administrator;

(8) if the bonds to be sold to the Board are revenue bonds secured by a subordinate lien, a copy of the authorizing instrument of the governing body for all prior and outstanding bonds shall be furnished;

(9) if a bond election is required by law to authorize the issuance of bonds to finance the project, the executive administrator may require Applicant to provide the election date and election results necessary for the issuance of the bonds as part of the application or prior to closing;

(10) an audit of the Applicant for the preceding year prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant, unless an alternative method of establishing a reliable accounting of the financial records of the Applicant is approved by the executive administrator; and

(11) a listing of all the funds used for the project, including funds already expended from sources other than financial assistance offered from the Board, such as from participating local government entities or prior-issued debt. [if additional funds are necessary to complete the project, or if the applicant has applied for and/or received a commitment from any other source for the project or any aspect of the project, a listing of those sources, including total project costs, financing terms, and current status of the funding requests.]

(c) For eligible private Applicants, an application shall be in the form and number of copies prescribed by the executive administrator, and, in addition to any other information that may be required by the executive administrator or the Board, such Applicant shall provide:

(1) the legal documentation identifying and establishing the legal existence of the Applicant, including articles of incorporation with certificate of account status or partnership agreements;

(2) the documentation identifying and establishing full legal and equitable ownership interests of the real and personal property that constitute the water system held by the Applicant;

(3) the Applicant shall provide:

(A) identification of any affiliated interests or affiliates;
and

(B) a notarized statement from the sole proprietor or each entity holding an ownership interest:

(i) identifying an individual whom may act as the representative on behalf of the sole proprietor or each legal entity which has been identified as maintaining an ownership interest in the Applicant;

(ii) authorizing such representative to submit an application and such other documentation as may be required by the executive administrator;

(4) identification of the authority to provide the service for which the assistance is requested which shall include:

(A) a map of the area served acceptable to the executive administrator;

(B) if the Applicant provides or will provide wastewater collection or treatment service to another service provider, or receives such service from another service provider, the proposed agreement, contract, or other documentation which legally establishes such service relationship, with the final and binding agreements provided prior to closing; and

(C) for utilities, as defined pursuant to Utility Commission rules, the Certificate of Convenience and Necessity number and a service area map;

(5) a notarized affidavit by the designated representative of the Applicant:

(A) requesting financial assistance and identifying the amount of requested assistance;

(B) stating that the information submitted in the application is true and correct according to belief and knowledge of the representative;

(C) stating that the Applicant or any of its affiliates or affiliated interests has no outstanding judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issue of any kind or nature by EPA, the Commission, Texas Comptroller of Public Accounts, Utility Commission, Texas Office of the Secretary of State, or any other federal, state, or local government, that would materially affect the Applicant's ability to repay its debt, or identifying such judgments, orders, fines, penalties, taxes, assessment, or other enforcement or compliance issue as may be outstanding against the Applicant or any of its affiliates or affiliated interests;

(D) stating that each entity with an ownership interest warrants compliance with representations made in the application in the event that the Board provides the financial assistance;

(E) for eligible private Applicants, stating that the decision to request financial assistance from the Board was made in accordance with any applicable bylaws or charter of the Applicant; and

(F) assuring compliance with all applicable federal laws, rules, and regulations as well as the laws of this State and the rules and regulations of the Board;

(6) copies of the following project documents:

(A) any draft or executed contracts for consulting services to be used by the Applicant in applying for financial assistance or constructing the proposed project, to include, but not limited to, financial advisor, engineer, and bond counsel; and

(B) contracts for engineering services should include the scope of services, level of effort, costs, project schedules, and other information necessary for adequate review by the executive administrator. A project schedule shall be provided with the contract; the schedule must provide firm timelines for the completion of each phase of a project and note the milestones within the phase of the project;

(7) a business plan that:

(A) identifies by month for the next 18 months, or for the time period of project construction, whichever is longer, anticipated revenues, including any anticipated rate increases, and anticipated expenditures; and

(B) provides five year historical data on system revenue and expenditures;

(8) copies of the federal income tax returns for the Applicant for the two previous tax years;

(9) documentation of any bankruptcy proceedings for the Applicant or any affiliated interests or affiliates for the preceding five years or a sworn statement that the Applicant or any affiliated interests or affiliates has not been a party to a bankruptcy proceeding for the preceding five years;

(10) if any part of the community water system has been pledged or otherwise used as security for any other indebtedness of the Applicant or an affiliate or affiliated interest, a copy of the outstanding indebtedness;

(11) if financing of the project will require a contractual loan agreement or the sale of bonds to the Board payable either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts, for a duration specified by the executive administrator, under which Applicant's gross income is expected to accrue. Before the financial assistance is closed, an Applicant shall submit executed copies of such contracts to the executive administrator;

(12) if the Applicant is required to utilize a surcharge or otherwise intends to rely on an increase in the rate that it is charging in order to repay the requested financial assistance, a copy of the acknowledgment from the Utility Commission that the proposed rate change filing has been received;

(13) an audit of the Applicant for the preceding year prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant, unless an alternative method of establishing a reliable accounting of the financial records of the Applicant is approved by the executive administrator; and

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

§375.42. Review of Applications.

(a) Review of applications. The executive administrator will review the application to ensure that sufficient information has been provided to support the eligibility of the Applicant and the project. The executive administrator may request that the information or data for any portion of the application be modified or supplemented.

(b) Submittal of requested information. If the Applicant fails to submit information or data requested within the established time period, then the executive administrator may notify the Applicant that the application is incomplete and will be bypassed.

(c) If an applicant does not proceed through the application process and obtain a commitment within the application timeframes established within the applicable IUP, the principal forgiveness may be re-allocated to another eligible project. An extension of time for obtaining a commitment may be granted at the discretion of the executive administrator.

{(e) If the applicant has received an obligation of federal funds by the United States Department of Agriculture-Rural Development that would duplicate funding from the board for the same project, as evidenced in writing from the United States Department of Agriculture-Rural Development, or if the applicant has canceled such an obligation, the executive administrator shall not submit the application to the board and shall notify the applicant that its application will no longer be considered for this reason, unless good cause is shown that the application should be submitted to the board.]

§375.43. Required Water Conservation Plan and Water Loss Audit.

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

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

(c) If a retail public utility's total water loss meets or exceeds the threshold for that utility in accordance with §358.6 of this title, the retail public utility must use a portion of any new financial assistance, or any other financial assistance provided by the Board, for projects costs that are eligible under the Act and the applicable IUP to mitigate the utility's water loss. However, at the request of a retail public utility, the Board may waive this requirement in accordance with §358.6 of this title.

§375.44. *Board Approval of Funding.*

(a) Presentation to Board. The Board must consider each application at a public meeting. The executive administrator will notify the Applicant when the Board's consideration of the application is scheduled for a public meeting.

(b) Action by Board. After considering the executive administrator's recommendation and comments from the Applicant and other interested persons, the Board may:

(1) resolve to approve an application only when it finds that the revenue or taxes or both revenue and taxes pledged by the Applicant will be sufficient to meet all obligations that will be assumed by the Applicant;

(2) resolve to disapprove or amend the proposed conditions for the financial assistance;

(3) request additional information related to the eligibility of the Applicant or the project or withdraw the application for consideration at another time; and

(4) approve an application for pre-design funding despite a negative recommendation from the executive administrator.

(c) Board's resolution. The Board's approval of an application and award of a commitment is recorded through the issuance of a resolution.

(d) Expiration of Board commitment. The Board's commitment for financial assistance expires on the date noted in the commitment, as delineated in the IUP applicable to the project. [~~or if no date is noted then the commitment expires after:~~]

~~{(1) 12 months for a commitment for financial assistance that includes construction, including financial assistance under the pre-design funding option; or}~~

~~{(2) six months for a commitment for financial assistance for planning, acquisition and design.}~~

(e) Extension of expiration date. Upon [commitment. The Board is not required to approve the request for an extension of time to close the commitment for financial assistance. The Board is released from its offer to provide financial assistance for the project when the commitment expires. However, upon] good cause shown or upon a showing that an event of [a] force majeure, as defined in this chapter, [event] caused the Applicant's failure to [close the commitment] timely close the commitment, then an extension of the expiration date may be granted at the discretion of the Board. [the Applicant may receive one extension of time by:]

(1) The Applicant must submit [submitting] a written request, at least 45 [30] days prior to the expiration date, except in the event of force majeure, as defined in this chapter, that contains [containing] an explanation of the need for the extension and a request for a specific date for closing.; and]

(2) The [the] Board may, but is not required to, approve the request for an [approves the] extension of time [by minute order or resolution] and may allow a longer extension as appropriate to the circumstances in the event of force majeure.

§375.45. *Multi-year Commitments*

(a) Commitment periods may be set for a period of up to five years. The minimum interest rate reduction for the multi-year commitments will be established for the five year period based on the interest rate reduction prescribed in the IUP for the first year's commitment.

(b) This option is only available for projects that do not receive principal forgiveness based on the affordability criteria. However, the entity receiving a multi-year commitment may receive principal forgiveness for the other eligible options, such as principal forgiveness for green projects, for the amount of funds committed for the initial year.

(c) Any entity receiving a multi-year commitment must annually re-confirm its anticipated funding commitments established with the initial commitment.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601323

Les Trobman

General Counsel

Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



SUBCHAPTER E. ENVIRONMENTAL
REVIEWS AND DETERMINATIONS
DIVISION 2. FEDERAL PROJECTS

31 TAC §§375.60 - 375.71

STATUTORY AUTHORITY.

This rulemaking is proposed under the authority of Texas Water Code §15.605.

The proposed rulemaking affects Chapter 15 of the Texas Water Code.

§375.60. *Definitions [for Equivalency Projects].*

Unless specifically defined differently within this subchapter, the following terms and acronyms, used in this subchapter, mean:

(1) Affected community--A community potentially impacted by the proposed project. [where the proposed project is expected to result in environmental impacts or potential human health or environmental effects including minority communities, low-income communities or federally-recognized Indian tribal communities.]

(2) Categorical Exclusion (CE)--An environmental finding issued by the Board for projects that would not individually or cumulatively have a significant adverse effect on the human environment and

for which, therefore, the Applicant is not required to prepare an Environmental Information Document or an Environmental Impact Statement.

(3) Environmental Assessment--A public document prepared by the executive administrator for projects that may result in adverse environmental impacts and the significance of those impacts is not known. The Environmental Assessment, based primarily on the Environmental Information Document, must provide sufficient evidence and analysis to determine whether to prepare a Finding of No Significant Impact or an Environmental Impact Statement.

(4) Environmental Impact Statement (EIS)--A detailed written statement prepared by a third-party contractor, in close coordination with the executive administrator, that analyzes environmental impacts of project alternatives for projects with significant adverse impacts on the quality of the human environment. An EIS is required for projects that do not qualify for a Finding of No Significant Impact. An EIS provides the most comprehensive and detailed information about potential environmental impacts and mitigation required to comply with the NEPA. It is the basis for the Record of Decision issued by the Board.

(5) Environmental Information Document (EID)--A written analysis prepared by the Applicant that provides sufficient information, including appropriate regulatory agency correspondence and public participation documentation, for the executive administrator to undertake an environmental review and determine if the project qualifies for a Finding of No Significant Impact or if an Environmental Impact Statement will be required. An EID is not always necessary to determine if the project will require preparation of an EIS.

(6) Federal Environmental Cross-cutters--Federal environmental statutes, laws and Executive Orders that apply to projects and activities with a federal nexus, including the receipt of federal financial assistance.

(7) Finding of No Significant Impact (FONSI)--An environmental finding issued by the Board when the environmental assessment prepared for the project supports the determination that the project will not have a significant adverse effect on the human environment and therefore, does not require the preparation of an environmental impact statement.

(8) Human environment--The natural and physical environment and the relationship of people with that environment.

(9) Indian tribes--Federally recognized Indian tribes.

[(2) Avoidance--Avoiding the impact altogether by not taking a certain action or parts of an action during project implementation.]

[(3) NEPA--The federal National Environmental Policy Act, 42 U.S.C. §§4321 et seq.]

[(4) Indian tribes--Federally recognized Indian tribes.]

[(5) Minimization--Minimizing impacts by limiting the degree or magnitude of the action during project implementation.]

(10) [(6)] Mitigation--

(A) avoiding the impact altogether by not taking a certain action or parts of an action;

(B) minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(C) rectifying the [an] impact by repairing, rehabilitating, or restoring the affected environment;

(D) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the project; and

(E) compensating for the impact by replacing or providing substitute resources or environments.

(11) NEPA--The Federal National Environmental Policy Act, 42 U.S.C. §§4321 et seq.

(12) Record of Decision (ROD)--An environmental finding issued by the Board that identifies the selected project alternative, presents the basis for the decision, identifies all the alternatives considered, specifies the environmentally preferable alternative, and provides information on the adopted means to mitigate for environmental impacts. The ROD is based on the conclusions of the EIS.

(13) Statement of Finding (SOF)--An environmental finding issued by the Board to correct, clarify, modify, or adopt a previous environmental finding, issued by the Board or other agency.

§375.61. Environmental Review Process.

(a) Policy and purpose. This subchapter governs the environmental review of projects funded in whole or in part by the CWSRF. Environmental review of all proposed infrastructure projects is a condition of the use of CWSRF financial assistance and is subject to annual audits by the EPA. This subchapter follows the procedures established by the EPA for implementing the National Environmental Policy Act [NEPA] set forth at 40 CFR Part 6. The environmental review [must be completed prior to the release of funds for design and construction and the review] is subject to public comment. The Applicant, at all times throughout the design, construction, and operation of the project, shall comply with the findings [determinations] resulting from the environmental review.

(b) Timing. The environmental review process is a component of the planning phase and must be completed prior to the executive administrator's approval of the Applicant's engineering feasibility report.

(c) [(b)] Types of environmental findings. At [determinations. An environmental determination is issued by the executive administrator at] the culmination of the environmental review process described in this subchapter[- After gathering and reviewing relevant information and data, soliciting comments from state and federal agencies and receiving and analyzing public comments], the Board [executive administrator] will issue one of the following findings [determinations]:

(1) a Categorical Exclusion:[;]

(A) based on review [submission] of information submitted by [from] the Applicant; and

(B) the eligibility criteria described in §375.62 of this subchapter.

(2) a Finding of No Significant Impact:[;]

(A) based on review of the Applicant's Environmental Information Document; and

(B) the executive administrator's [Board's] Environmental Assessment; [or]

(3) a Record of Decision:[;] based on review of the [an] Environmental Impact Statement prepared by the Applicant's third party contractor; or[-]

(4) a Statement of Findings:

(A) based on review of a previous environmental finding for the proposed project;

(B) based on review of proposed project modifications for consistency with a previous environmental finding; and/or

(C) to correct, clarify, or modify an environmental finding.

(d) [(e)] General review by the executive administrator.

(1) The executive administrator shall ensure that [conduet] an inter-disciplinary, inter-agency, and public review is conducted consistent with the NEPA. The purpose of this review is to ensure that the proposed project will comply with the applicable local, state, and federal laws and regulations relating to the identification of potential [the] environmental impacts of a proposed project and the necessary steps required to [avoid, minimize and, if necessary,] mitigate such impacts. The scope of the environmental review will depend upon the type of proposed action, the reasonable alternatives, and the type of environmental impacts.

(2) For all environmental findings [determinations] that are five years old or older, and for which the proposed infrastructure project has not yet been implemented, the executive administrator must re-evaluate the proposed financial assistance application as well as the environmental conditions and public comment to determine whether to conduct a supplemental environmental review in compliance with the NEPA, or to reaffirm the original finding [determination]. If there has been substantial change in the proposed infrastructure project that is relevant to environmental concerns, or if there are significant new circumstances, changes in federal environmental cross-cutter requirements that affect the environmental finding, or information relevant to environmental concerns, the executive administrator must conduct a supplemental environmental review and complete an appropriate finding [determination] in compliance with the NEPA. The executive administrator may consider environmental findings [determinations] issued by other entities.

(e) Equivalency projects. The Board will inform EPA when consultation or coordination by EPA with other federal agencies is necessary to resolve issues regarding compliance with applicable federal authorities.

§375.62. Board's Environmental Finding [Types of Environmental Determinations]: Categorical Exclusions.

(a) A proposed project can be categorically excluded from a full environmental review if the proposed project:

(1) fits within the category of action that is eligible for exclusion, as listed in subsection (b) of this section;

(2) [Categorical Exclusions may be available for projects that] will not result in significant impacts on the quality of the human environment; and

(3) does [that do] not involve extraordinary circumstances, as listed in subsection (d)(1) - (9) of this section.

(b) Projects that may be eligible for a categorical exclusion include the following actions on existing systems:

(1) those that involve upgrades that are minor;

(2) minor expansion of system capacity;

(3) the rehabilitation, including functional replacement of the existing system and system components; and

(4) the construction of new minor ancillary facilities located adjacent to or on the same property as existing facilities.

(c) Projects not eligible for a CE include:

(1) projects that would otherwise be eligible for a CE but due to extraordinary circumstances, as listed in subsection (d)(1) - (9) of this section, are not eligible for a CE;

(2) projects that involve new or relocated discharges to surface or ground water;

(3) projects that will likely result in the substantial increase in the volume or the loading of a pollutant to the receiving water;

(4) projects that will provide capacity to serve a population 30[%] percent greater than the existing population;

(5) projects that are not supported by the state, or other regional growth plan or strategy; and

(6) projects that directly or indirectly involve or relate to upgrading or extending infrastructure systems primarily for the purposes of future development.

(d) Extraordinary circumstances may become known at any time during the planning, design, or construction of a project and may cause the project to be ineligible for a CE. Extraordinary circumstances include, but are not limited to, the following known or expected impacts:

(1) potentially significant environmental impacts on the quality of the human environment either individually or cumulatively over time;

(2) disproportionately high and adverse human health or environmental effects on any community, including minority communities, low-income communities, or federally-recognized Indian tribal communities;

(3) a significant effect on federal or state-listed threatened or endangered species or their critical habitat;

(4) a significant effect on national or state natural landmarks or property with nationally significant or state historic, architectural, prehistoric, archeological, or cultural value;

(5) a significant effect on environmentally important natural resource areas such as wetlands, floodplains, significant agricultural lands, aquifer recharge zones, coastal zones, barrier islands, wild and scenic rivers, and significant fish or wildlife habitat;

(6) a significant adverse air quality effect;

(7) a significant effect on the pattern and type of land use or growth and distribution of population including altering the character of existing residential areas, or may not be consistent with state or local government, or federally-recognized Indian tribe approved land use plans or federal land management plans;

(8) significant public controversy about a potential environmental impact of the proposed project; and

(9) conflict with federal, state, or local government, or federally-recognized Indian tribe environmental, resource-protection, or land-use laws or regulations.

(e) Upon the discovery of extraordinary circumstances, the executive administrator may deny a CE or rescind an existing CE.

~~[(f) An Applicant shall submit sufficient information to demonstrate why the project is eligible for a CE including, but not limited to the following documentation:]~~

~~[(1) a brief but complete description of the project;]~~

~~[(2) plan maps or maps of the project depicting the location of all construction areas, the planning area boundaries, and any known environmentally important natural areas;]~~

~~[(3) information regarding the eligibility of the project for a CE under the criteria listed in subsection (b) of this section; and]~~

~~[(4) any information that may be helpful to determine whether any extraordinary circumstances, as listed in subsection (d)(1) - (9) of this section, apply to the project.]~~

~~(f) [(g)] The executive administrator shall review the information submitted by the Applicant and may request additional information as needed to complete the finding [determination] regarding the eligibility of a proposed project for a categorical exclusion.~~

~~(g) [(h)] The Board's finding [executive administrator's determination] relating to a CE shall be subject to public notice, which shall be published either in a newspaper of general circulation in the county or counties of the affected community or on the agency's website and referenced in a public notice in a newspaper of general circulation in the county or counties of the affected community.~~

§375.63. Applicant Requirements: Categorical Exclusions.

(a) Projects that qualify to be categorically excluded from a full environmental review fit into a category of actions, identified by the EPA, that do not individually or cumulatively have a significant effect on the human environment and do not involve extraordinary circumstances. This determination is based upon the criteria established in §375.62 of this subchapter (relating to Board's Environmental Finding: Categorical Exclusions).

(b) An Applicant shall submit sufficient information to demonstrate why the project is eligible for a CE including, but not limited to the following documentation:

(1) a brief but complete description of the project;

(2) plan maps or maps of the project depicting the location of all construction areas, the planning area boundaries, and any known environmentally important natural areas;

(3) information regarding the eligibility of the project for a CE under the criteria listed in §375.62 of this subchapter;

(4) any information that may be helpful to determine whether any extraordinary circumstances, as listed in §375.62 of this subchapter, apply to the project; and

(5) any information that may be helpful to determine if mitigation measures are required to ensure the project will not individually or cumulatively have a significant adverse impact on the human environment. This includes, but is not limited to, coordination with applicable regulatory agencies regarding resources within their jurisdiction that may be adversely impacted by the project.

§375.64. Board's Environmental Finding: Finding of No Significant Impact.

(a) Purpose and applicability. A Finding of No Significant Impact (FONSI) may be issued if the proposed action will not have a significant effect on the human environment. A FONSI shall be based upon the information submitted by the Applicant and upon the environmental assessment (EA) prepared by the executive administrator.

(b) Environmental Assessment. An Environmental Assessment is required when the proposed project is expected to result in environmental impacts and the significance of those impacts is not known. When the executive administrator preliminarily determines that the impacts will not be significant and may be addressed by ordinary mitigation measures, then an Environmental Assessment will be prepared. An Environmental Assessment is not required if the proposed action is categorically excluded or if an Environmental Impact Statement is required.

(c) Contents of an Environmental Assessment.

(1) An Environmental Assessment shall include a brief discussion of the following:

(A) the purpose and need for the proposed project and an estimate of cost of the project;

(B) the alternatives considered, including the no action alternative, and the reasons for the rejection or acceptance of the alternatives;

(C) the affected environment, including baseline conditions that may be impacted by the proposed actions and the alternatives;

(D) the environmental impacts of the proposed project and the alternatives, including any unresolved conflicts concerning alternative use of available resources; and

(E) applicable environmental laws and executive orders.

(2) The form of the Environmental Assessment generally shall include:

(A) a listing or summary of coordination and consultation undertaken with any federal, state, local, or Indian tribe government regarding compliance with applicable environmental laws and executive orders;

(B) identification and description of the mitigation measures considered, including mitigation measures that must be adopted to ensure the proposed project will not have significant impacts; and

(C) incorporation of documents by reference, including the Environmental Information Document submitted by the Applicant.

(d) Contents of a FONSI. When the Environmental Assessment supports a finding that the proposed project will not have a significant effect on the human environment, then the Board may issue a FONSI. The FONSI must include the following components:

(1) an Environmental Assessment;

(2) a brief description of the reasons why there are no significant impacts;

(3) any commitments to mitigation measures that are essential to render the impacts of the proposed project insignificant;

(4) the date of issuance and signature of the executive administrator; and

(5) the executive administrator's statement that the Applicant has committed to the mitigation measures and that the Applicant has the ability and the authority to fulfill the commitment to mitigation;

(e) Public comments and the issuance of a FONSI.

(1) The executive administrator shall make the Environmental Assessment and preliminary FONSI available on the Board's website for review and public comment for a period of at least thirty (30) days.

(2) If no substantive comments are received, the executive administrator may proceed with the proposed project subject to the mitigation measures identified in the FONSI. If substantive comments are received, then the executive administrator shall respond to the comments and revise the FONSI accordingly, if necessary.

(3) The executive administrator shall ensure that the mitigation measures necessary to the FONSI determination are enforceable and shall conduct appropriate monitoring of these measures. All contracts, plans, specifications, and other applicable documents used during the design and construction of the project shall contain reference to

or descriptions of the mitigation measures included in the FONSI, as required by this subchapter.

(f) Dissemination of information about mitigation measures. The executive administrator may provide written notification describing the outcome of the mitigation measure proposed in an environmental finding to interested agencies and public groups.

§375.65. Applicant Requirements: Environmental Information Document.

(a) An Applicant shall prepare an Environmental Information Document (EID) in consultation with the executive administrator for projects that have potential adverse environmental impacts and the significance of those impacts is not known. The executive administrator will provide guidance on the format and contents of the EID prior to the initiation of planning for the proposed project or as soon as practicable upon receipt of an application. An EID is not required when:

(1) the project is eligible for a CE or requires the preparation of an EIS;

(2) the Applicant submits a previous environmental finding that meets CWSRF program requirements, including compliance with the NEPA; or

(3) the Applicant prepares and submits a draft EIS and supporting documents that meet CWSRF program requirements, including compliance with the NEPA.

(b) Coordination. The Applicant shall prepare the EID in coordination with the appropriate federal agencies, state, and local governments, Indian tribes, and other potentially affected parties. The Applicant must also notify the executive administrator regarding any private entities or organizations affected by the proposed project.

(c) Contents of EID. The EID shall include, but is not limited to:

(1) a description of the project;
(2) the need for the proposed project;
(3) the alternatives to the project, including the no action alternative;

(4) the affected environment, including baseline conditions that may be impacted by the proposed project and the alternatives;

(5) the environmental impacts of the proposed action and alternatives, including unresolved conflicts concerning alternative uses of available resources;

(6) potential impacts on resources protected by the federal environmental cross-cutters;

(7) documentation showing that requisite regulatory agencies have been consulted;

(8) proposed mitigation measures supporting the issuance of a FONSI;

(9) documentation showing that the requisite public participation requirements have been satisfied; and

(10) any other information required by the executive administrator.

§375.66. Environmental Impact Statements.

(a) Purpose and applicability. An EIS examines impacts from the proposed project that are significantly affecting the human environment, requires close coordination with the Board and other agencies, and is the primary basis for the Board's issuance of a Record of Decision.

(b) Required EIS. An EIS shall be prepared for:

(1) new regional water supply systems for a community with a population greater than 100,000;

(2) actions likely to have a significant adverse effect on:

(A) local ambient air quality;

(B) local ambient noise levels;

(C) surface water reservoirs or navigation projects;

(D) the environment due to the releases of radioactive, hazardous, or toxic substances or biota;

(E) federal or state natural landmarks or any property eligible for the national or state register of historic places; or

(F) environmentally important natural resources such as wetland, floodplains, significant agricultural lands, aquifer recharge zones, coastal zones, barrier islands, wild and scenic rivers, and significant fish or wildlife habitat;

(3) actions inconsistent with federal, state, local, or Indian tribe environmental, resources protection, or land use laws or approved land use plans or regulations;

(4) actions likely to significantly affect the pattern and type of land use or growth and distribution of population, including altering the character of residential areas;

(5) actions that in conjunction with federal, state, local, or Indian tribe projects are likely to produce significant cumulative impacts; and

(6) actions with uncertain environmental effects or highly unique environmental risks that are likely to be significant.

§375.67. Decision to Prepare an Environmental Impact Statement: Notice of Intent.

(a) Notice of Intent (NOI) to prepare an EIS. When the executive administrator recommends the issuance of an EIS, a NOI will be published in the *Texas Register* in order to provide the public with the opportunity to participate in a scoping meeting.

(b) Contents of NOI. The NOI shall contain information about a scoping meeting which shall be held no sooner than fifteen days after the publication of the notice of intent. The public comment period for the proposed scope of the EIS shall be at least forty-five days.

§375.68. Board's Environmental Finding: Record of Decision.

(a) General. A Record of Decision (ROD) results from an extensive environmental review of a proposed project's potential environmental impacts as detailed in an EIS.

(b) Contents of ROD. A ROD must include the following components:

(1) a brief description of the proposed project and the alternatives considered in the EIS as well as the environmental factors considered and the project's impacts;

(2) commitments to implement mitigation measures;

(3) an explanation if the environmentally preferred alternative was not selected;

(4) responses to substantive comments on the final EIS;

(5) the executive administrator's statement that the Applicant has committed to the mitigation measures and that the Applicant has the ability and the authority to fulfill the commitment to the measures; and

(6) the date of issuance and the signature of the executive administrator.

(c) Issuance of the ROD. The issuance of a ROD allows the Applicant to proceed with the proposed action subject to mitigation measures described in the ROD. The ROD shall be made available to the public.

(d) Monitoring of mitigation measures. The executive administrator shall ensure that adequate monitoring of the mitigation measures occurs throughout the construction of the project. Additionally all contracts, plans, specifications, and other applicable documents used during the planning, design, and construction of the project shall contain reference to or descriptions of the mitigation measures.

(e) Dissemination of information about mitigation measures. The executive administrator may provide written notification describing the outcome of the mitigation measures proposed in an environmental finding to interested agencies and public groups.

§375.69. Applicant Requirements: Environmental Impact Statement.

(a) Third party contractor. The Applicant shall contract with a third-party contractor at its own expense to prepare an EIS and any associated documents required for consideration by the executive administrator.

(b) Executive administrator approval. The executive administrator must approve of and participate in the Applicant's selection of the third-party contractor. The third party contractor shall be selected on the basis of its qualifications to prepare the EIS, including experience with data collection and analyses as well as with the clear presentation of information and data. The third-party contractor shall be responsible for providing technical advice to the Applicant and for receiving and incorporating technical advice from the executive administrator.

(c) The third-party contractor shall not have any financial or other interest in the proposed project and must submit a disclosure statement to the executive administrator documenting the fact that it has no financial or other interest in the project.

(d) Contract with third party. The Applicant and the executive administrator must agree to the creation and terms of a contract with the third party jointly selected by them to prepare the EIS. The contract terms must ensure that the third party does not have recourse to the Board or the EPA for financial or other claims arising under the contract.

(e) The third-party contractor shall cooperate with the executive administrator and shall provide draft documents, analyses, and conclusions that adequately assess the relevant environmental issues for review, comment, and direction from the executive administrator. The executive administrator shall have sole responsibility to ensure that the EIS and any associated documents adequately address the relevant environmental issues.

§375.70. Proposed Project Alterations.

(a) Proposed project changes during review. The Applicant must notify the executive administrator if during the environmental review process, the Applicant:

(1) changes its plans for the project as originally submitted;
or

(2) changes its schedule for the project from the originally submitted schedule.

(b) Alterations of proposed project. Any alteration to a project after the issuance of an environmental finding requires the Applicant to notify the executive administrator in writing in a timely manner. The

Applicant shall briefly describe the reasons for the alterations in the proposed project.

(c) The executive administrator shall examine the contract documents, application, and other related documents to evaluate the proposed alterations to ensure consistency with the environmental finding. The executive administrator's review of proposed project alterations may result in:

(1) a notation to the file that the proposed alterations are minor in nature as described in subsection (d) of this section;

(2) the issuance of a SOF to confirm that project alterations are within the scope of the original environmental finding and do not require preparation of a new EID;

(3) the issuance of a FONSI when a CE has been revoked, or the issuance of a public notice that the preparation of an EIS will be required;

(4) the issuance of an amendment to a FONSI, or the revocation of a FONSI and the issuance of a public notice that the preparation of an EIS will be required; or

(5) the issuance of a supplement to a ROD, or the revocation of the ROD and issuance a public notice that financial assistance for the proposed project will not be provided.

(d) Minor changes to the proposed or reviewed project that do not create previously unconsidered adverse environmental impacts usually will not affect the ability of the proposed project alterations to proceed without additional formal environmental review.

(e) Major changes to the proposed or reviewed project that are previously unexamined and that have the potential to create adverse environmental impacts may result in a decision to revoke a CE or a FONSI and to proceed with a more detailed level of environmental review consistent with this subchapter.

§375.71. Use of Previously Prepared Environmental Findings.

(a) Adoption of a previous environmental finding. Previous environmental findings issued by the EPA and other agencies may be adopted in accordance with this section, provided that the finding was produced through procedures in compliance with the NEPA. The executive administrator must re-evaluate the proposed financial assistance application as well as environmental conditions and public comment to determine whether to conduct a supplemental environmental review of the action and complete an appropriate document in compliance with the NEPA, or to reaffirm the original finding.

(b) Previously required mitigation measures. Any and all mitigation measures specified in the previous finding for the applicable project components shall be applied as conditions of the commitment and closing for financial assistance documents and shall be consistent with the requirements of this subchapter.

(c) Method of adoption of a previous environmental finding. The previous finding will be adopted through the issuance of a Statement of Findings when the proposed project and its previous finding will be adopted without substantial modifications. The previous finding may also be adopted in a FONSI.

(d) Validity of previous environmental findings and re-evaluation. An environmental finding shall be re-evaluated if it was issued five years or more prior to the executive administrator's environmental review and if:

(1) the proposed project has not yet been implemented;

(2) there has been substantial change in the proposed infrastructure project that is relevant to environmental concerns; and

(3) there are significant new circumstances or information relevant to environmental impacts of the proposed action.

(e) Dissemination of information about mitigation measures. The executive administrator may provide written notification describing the outcome of the mitigation measures proposed in an environmental finding to interested agencies and public groups.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601324

Les Trobman

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Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



SUBCHAPTER F. ENGINEERING REVIEW AND APPROVAL

31 TAC §§375.81 - 375.83

STATUTORY AUTHORITY.

This rulemaking is proposed under the authority of Texas Water Code §15.605.

The proposed rulemaking affects Chapter 15 of the Texas Water Code.

§375.81. *Engineering Feasibility Report.*

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

- (1) a description and purpose of the project;
- (2) the names of the entities to be served, along with the current and future population;
- (3) the cost of the project;
- (4) a description of the alternatives considered and reasons for selection of the project proposed;
- (5) sufficient information to evaluate the engineering feasibility;
- (6) maps and drawings as necessary to locate and describe the project area;
- (7) sufficient detail to document how ~~that~~ the project will remedy the issues and problems that were evaluated for rating on the IUP;
- (8) information showing the project is cost effective, and for projects that implement new systems or significantly alter current systems a detailed cost-effective analysis, including detailed operation and maintenance costs, may be requested to document program eligibility;
- (9) a detailed project schedule with timelines for each phase of the project and the milestones within each phase of the project; and

(10) any other information or data necessary to evaluate the proposed project. The Applicant must submit any additional information requested by the executive administrator to document the project's eligibility for funding by the program.

(b) Approval of engineering feasibility report. The executive administrator will approve the engineering feasibility report when:

(1) the items listed in subsection (a) of this section have been completed, including requests for additional information or data;

(2) the appropriate environmental findings ~~[determinations]~~ have been completed in accordance with this chapter and the Applicant has agreed to incorporate into project documents, including contracts, all mitigation measures as a result of the environmental review; and

(3) the project and alternatives to the project have been analyzed and the proposed project is cost effective.

(c) Request for project amendment. A request for an amendment, after the approval of the engineering feasibility report, to a project shall be granted only if implementation of the amendment does not affect the original purpose of the project. The implementation of the project amendment must remedy the problems and issues identified in the Applicant's original project information form. Significant amendments to a project require previous approval by the executive administrator. The Applicant shall:

- (1) provide a description of and the need for amendment;
- (2) submit additional engineering or environmental information as requested by the executive administrator;
- (3) provide an estimate of any increase or decrease in total project costs resulting from the proposed amendment; and
- (4) certify that the proposed amendment will not significantly alter the purpose of the project.

(d) Alternative methods of project delivery. Design build, construction manager at risk₂ and other alternative methods of project delivery are eligible for available financial assistance, including combinations of planning, design₂ and construction funding, in accordance with programmatic requirements. The executive administrator will provide written guidance regarding modifications of the type of financial assistance₂ and the review, approval₂ and release of funds processes for alternative delivery projects. The Board may specify special conditions in the commitment as appropriate to accommodate an alternative method of project delivery.

§375.82. *Contract Documents: Review and Approval.*

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

(b) An Applicant shall submit three copies of proposed contract documents, including the engineering plans and specifications, which shall be as detailed as would be required for submission to contractors bidding on the work. The Applicant shall provide the executive administrator with all contract documents proposed for bid advertising. The executive administrator shall review contract documents:

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

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

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

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

(5) to ensure compliance with other requirements as provided in guidance forms and documents, including any additional documentation required by EPA for equivalency projects.

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

§375.83. *Advertising and Awarding Construction Contracts.*

(a) Applicable laws and rules. The Applicant shall comply with State procurement laws and rules and with applicable federal procurement rules depending on the equivalency requirements for the financial assistance.

(b) Executive administrator approval required. The Applicant shall not proceed to advertising for bids on the project without express written approval of the solicitation documents by the executive administrator. If the applicant proceeds to advertising without approval, it may affect eligibility for funding.

(c) Changes prior to award. If the Applicant needs to alter the plans, ~~and~~ specifications, or ~~and~~ contract documents after the executive administrator's approval, then the Applicant shall:

(1) provide the information and reasons relating to the changes if changes are required prior to bidding. The executive administrator must affirmatively approve any changes prior to advertising.

(2) Changes that occur after advertising must be incorporated into an addendum and provided to the executive administrator for approval as part of the bidding process.

(d) Contract award. The text of a construction contract or a contract containing construction phase work submitted for approval prior to advertising shall contain the same language and provisions as the contingently executed contract.

(e) Pre-construction conference. The Applicant shall conduct a pre-construction conference on significant construction contracts to address the contents of the executed contract documents with the project owner, the project engineer, the prime contractor, and other appropriate parties in attendance. The Applicant shall provide the executive administrator with at least 10 ~~five~~ days advance notice of the date, time and location of the conference.

(f) Notice to proceed. The executive administrator shall review the executed contract documents, including any additional documentation required by EPA for equivalency projects, and upon acceptance of same shall advise the Applicant that a notice to proceed may be issued to the contractor.

(g) No liability. The executive administrator and the Board shall have no liability for any event arising out of or in any way related to the contracts for or construction of the project.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601325

Les Trobman

General Counsel

Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



SUBCHAPTER G. LOAN CLOSINGS AND AVAILABILITY OF FUNDS

31 TAC §§375.90 - 375.94

STATUTORY AUTHORITY.

This rulemaking is proposed under the authority of Texas Water Code §15.605.

The proposed rulemaking affects Chapter 15 of the Texas Water Code.

§375.90. *Applicability.*

This subchapter applies to financial assistance for non-equivalency and equivalency projects.

§375.91. *Financial Assistance Secured by Bonds or Other Authorized Securities.*

(a) Applicability and required documents. This section applies to closings for financial assistance with entities issuing bonds or other authorized securities. The following documents are required for closing financial assistance secured by bonds or other authorized securities:

(1) evidence that applicable requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) a certified copy of the ordinance or resolution adopted by the governing body authorizing the issuance of debt to be sold to the Board that is acceptable to the executive administrator. The ordinance or resolution shall have sections providing as follows:

(A) if financial assistance proceeds are to be deposited into an escrow account at the time of closing, then an escrow account shall be created that shall be separate from all other accounts and funds, as follows:

(i) the account shall be maintained by an escrow agent as defined in §375.1 of this title (relating to Definitions);

(ii) funds shall not be released from the escrow without prior written approval from the executive administrator who shall issue written authorization for the release of the funds;

(iii) upon request of the executive administrator, escrow account statements shall be provided to the executive administrator;

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

(v) the escrow account shall be adequately collateralized in a manner sufficient to protect the Board's interest in the project

in a manner that complies with the Public Funds Collateral Act; Texas Government Code, Chapter 2257;

(B) that the Applicant shall fix and maintain rates, in accordance with state law, and collect charges to provide adequate operation and maintenance of the project;

(C) that a construction account shall be created which shall be kept separate from all other accounts and funds of the Applicant;

(D) that bonds shall be closed in book-entry-only form;

(E) the use of a paying agent/registrar that is a Depository Trust Company (DTC) participant;

(F) that the payment of all DTC closing fees assessed by the Board's custodian bank be directed to the Board's custodian bank by the Applicant;

(G) evidence that one fully registered bond has been sent to the DTC or to the Applicant's paying agent/registrar prior to closing;

(H) that all payments, including the origination fee, are made to the Board via wire transfer at no cost to the Board;

(I) that the partial redemption of bonds or other authorized securities be made in inverse order of maturity;

(J) that insurance coverage be obtained and maintained in an amount sufficient to protect the Board's interest in the project;

(K) that the Applicant, or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the Applicant's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis as required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the Board were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the Board and the beneficial owner of the political subdivision's obligations, if the Board sells or otherwise transfers such obligations, and the beneficial owners of the Board's bonds if the political subdivision is an obligated person with respect to such bonds under rule 15c2-12. The ordinance or resolution shall also contain any other requirements of the SEC or the IRS relating to arbitrage, private activity bonds or other relevant requirements regarding the securities held by the Board;

(L) the maintenance of current, accurate, and complete records and accounts in accordance with generally accepted accounting principles to demonstrate compliance with requirements in the financial assistance documents;

(M) that the Applicant shall annually submit an audit, prepared by a certified public accountant in accordance with generally accepted auditing standards;

(N) that the Applicant shall submit a final accounting within 60 days of the completion of the project;

(O) that the Applicant shall document the adoption and implementation of an approved water conservation program for the duration of the financial assistance;

(P) the Applicant's agreement to comply with special environmental conditions specified in the Board's environmental finding [determination] as well as with any applicable Board laws or rules relating to use of the financial assistance;

(Q) that the Applicant shall establish a dedicated source of revenue for repayment of the financial assistance;

(R) that interest payments shall commence no later than one year after the date of closing; ~~and~~

(S) that annual principal payments will commence no later than one year after completion of project construction; and

(T) ~~(S)~~ any other recitals mandated by the executive administrator;

(3) unqualified approving opinions of the attorney general of Texas and, if bonds or other authorized securities are issued, a certification from the comptroller of public accounts that such debt has been registered in that office;

(4) an unqualified approving opinion by a recognized bond attorney;

(5) assurances that the Applicant will comply with any special conditions specified by the Board's environmental finding [determination until all financial obligations to the State have been discharged];

(6) a Private Placement Memorandum containing a detailed description of the issuance of debt to be sold to the Board. The Applicant shall submit a draft Private Placement Memorandum at least 30 days prior to the closing of the financial assistance; a final electronic version of the Memorandum shall be submitted no later than seven days before closing;

(7) when any portion of the financial assistance is to be held in an escrow account, the Applicant shall execute an escrow agreement, approved as to form and substance by the executive administrator;

(8) if applicable, a home rule municipality pursuant to Chapter 104, Local Government Code, shall execute a Certification of Trust as defined in §375.1 of this title; and

(9) any additional information specified in writing by the executive administrator.

(b) Certified bond transcript. Within sixty (60) days of closing the financial assistance, the Applicant shall submit a transcript of proceedings relating to the debt purchased by the Board which shall contain those instruments normally furnished by a purchaser of debt.

(c) Phased closing. The executive administrator may determine that closing the financial assistance in phases is appropriate when:

(1) the project has distinct phases for planning, design, acquisition, and ~~for~~ construction or if any one of the phases can be logically and practically divided into discrete sections;

(2) the project utilizes the design-build or construction manager-at-risk process or any process wherein there is simultaneous design and construction;

(3) there are limitations on the availability of funds;

(4) additional oversight is required due to the financial condition of the Applicant or the complexity of the project; or

(5) due to any unique facts arising from the particular transaction.

§375.92. Financial Assistance Secured by Promissory Notes and Deeds of Trust.

(a) Applicability. This section contains closing requirements for a water supply corporation or an eligible private Applicant or other Applicant that is not authorized to issue bonds or other securities. This

section applies to financial assistance for either pre-design or construction funding.

(b) Use of consultants. The executive administrator may recommend, but not require, that the entity engage the services of a financial advisor or other consultant to ensure the appropriateness of the proposed debt and to provide advice to the entity.

(c) Documents required for closing. The executive administrator shall ensure that the following documents have been submitted prior to closing financial assistance secured by promissory notes and deeds of trust:

(1) evidence that applicable requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) an executed promissory note and loan agreement in a form approved by the executive administrator;

(3) a Deed of Trust and Security Agreement that shall contain a first mortgage lien evidenced by a deed of trust on all the real and personal property of the water system;

(4) an owner's title insurance policy for the benefit of the Board covering all the real property identified in the deed of trust;

(5) evidence that the rates on which the Applicant intends to rely for repayment of the financial assistance have received final and binding approval from the Utility Commission and, for Applicants required to utilize a surcharge account, evidence that the approval of the Utility Commission was conditioned on the creation of a surcharge account;

(6) a certified copy of the resolution adopted by the governing body authorizing the indebtedness and a certificate from the secretary of the governing body attesting to adoption of the resolution in accordance with the by-laws or rules of the governing body and in compliance with the Open Meetings Act, if applicable;

(7) a legal opinion from Applicant's counsel that provides:

(A) that the entity has the legal authority to enter into the loan agreement and to execute a promissory note;

(B) that the entity is not in breach or default of any state or federal order, judgment, decree, or other instrument which would have a material effect on the loan transaction;

(C) that there is no pending suit, action, proceeding, or investigation by a public entity that would materially adversely affect the enforceability or validity of the required financial assistance documents;

(D) evidence that the entity is in good standing with the Texas Office of the Secretary of State; and

(E) a statement relating to any other issues deemed relevant by the executive administrator.

(8) evidence that an approved water conservation plan has been adopted and will be implemented through the life of the project;

(9) evidence of the Applicant's agreement to comply with special environmental conditions contained in the Board's environmental finding;

(10) evidence that the Applicant has adopted final water rates and charges that are not subject to appeal to the Utility Commission;

(11) copies of executed service and revenue contracts;

(12) when any portion of the financial assistance is to be held in an escrow account, the Applicant shall execute an escrow agreement, approved as to form and substance by the executive administrator; and

(13) any other documents relevant to the particular transaction.

(d) If in the event that financial assistance proceeds are to be deposited into an escrow account at the time of closing the financial assistance, then an escrow account shall be created that shall be separate from all other accounts and funds, as follows:

(1) the account shall be maintained by an escrow agent as defined in §375.1 of this title (relating to Definitions);

(2) funds shall not be released from the escrow account without prior written approval of the executive administrator who shall issue written authorization for the release of funds;

(3) upon request of the executive administrator, escrow account statements shall be provided on a monthly basis to the executive administrator;

(4) the investment of any financial assistance proceeds deposited into an approved escrow account, shall be handled in a manner that complies with the Public Funds Investment Act, Government Code, Chapter 2256; and

(5) the escrow account shall be adequately collateralized in a manner sufficient to protect the Board's interest in the project and that complies with the Public Funds Collateral Act, Government Code, Chapter 2257.

(e) Construction account. A construction account shall be created that shall be kept separate from all other accounts and funds of the Applicant.

(f) Phased closing. The executive administrator may determine that closing the financial assistance in phases is appropriate when:

(1) the project has distinct phases for planning, design, acquisition, and for construction or if any one of the phases can be logically and practically divided into discrete sections;

(2) the project utilizes the design-build or construction manager-at-risk process or any process wherein there is simultaneous design and construction;

(3) there are limitations on the availability of funds;

(4) additional oversight is required due to the financial condition of the Applicant or the complexity of the project; or

(5) due to any unique facts arising from the particular transaction.

§375.93. Disbursement of Funds.

(a) Escrow of funds. The executive administrator may deposit funds into an escrow account at the time of closing of the financial assistance. Releases from an escrow account shall occur on a reimbursement method as described in subsection (b), sequentially based on milestones as described in subsection (c) of this section, or in accordance with phasing required for the applicable project. The Applicant must submit outlays for all expenses incurred.

(b) Method of release of funds to construction account. There are two methods for the release of funds from the escrow account to the construction account depending on whether there is a principal forgiveness component. If there is no principal forgiveness, then the funds are released from the escrow account to the construction account when the Applicant has achieved the project milestones described in subsec-

tion (c) of this section or has completed the phases as approved by the Board, and requests in writing a release of funds. If there is a principal forgiveness component, then funds are released on a reimbursement method. The executive administrator may issue a written authorization for the release of funds from an escrow account based on the receipt of outlay reports supported by detailed invoices of expenditures. The outlays and the releases from an escrow account must be consistent with the approved project schedule. In addition, for all financial assistance the executive administrator may approve the deposit of funds for certain costs into the construction account at the time of closing on the financial assistance.

(c) Sequence of availability of funds. Financial assistance shall be available for disbursement in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase, and after approval of a water conservation plan and a project schedule;

(2) for design costs, after receipt of executed contracts for the design, after approval of an engineering feasibility report, and after completion of the environmental review; and

(3) for construction costs, after issuance of any applicable permits, after acquisition documents and contract documents (including plans and specifications) are approved and executed, and after the executive administrator has approved the issuance of a Notice to Proceed.

(d) Outlay reports. Applicants shall submit outlay reports supported by detailed invoices for incurred costs as the project progresses in accordance with the project schedule. Applicants shall submit outlay reports, in a form determined by the executive administrator, as follows:

(1) for financial assistance for planning, acquisition, and design, quarterly; and

(2) for financial assistance for construction, monthly.

(e) Consistency for project schedules and outlays. The executive administrator shall require that projects proceed in accordance with approved project schedules as closely as possible, and that outlays are submitted as required in subsection (d) of this section.

§375.94. Remaining Unused Funds.

(a) Remaining unused funds are those funds unspent after the original approved project is completed. Remaining unused funds may be spent for enhancements to the original project that are explicitly approved by the executive administrator, including green components.

(b) If there are no enhancements authorized, the Applicant shall be required to submit a final accounting and disposition of any unused funds.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601326

Les Trobman

General Counsel

Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



SUBCHAPTER H. CONSTRUCTION AND POST CONSTRUCTION REQUIREMENTS

31 TAC §§375.101 - 375.104, 375.106 - 375.109

STATUTORY AUTHORITY.

This rulemaking is proposed under the authority of Texas Water Code §15.605.

The proposed rulemaking affects Chapter 15 of the Texas Water Code.

§375.101. Inspection During Construction.

(a) Applicant's inspection. The Applicant shall provide for the adequate qualified inspection of the project under the supervision of a registered engineer and shall require the engineer's assurance that the work is being performed in a satisfactory manner in accordance with the approved plans, [and] specifications, and other engineering design or permit documents, approved alterations or changes, and in accordance with the requirements in the environmental finding [determination] applicable to the project, and to the sound engineering principles and construction practices.

(b) Board's inspection. The executive administrator may, at his discretion, inspect the construction and materials of any project at any time. The purpose of the inspection is to determine whether the contractor is substantially complying with the approved engineering plans of the project and is constructing the project in accordance with [sound engineering principles and] the approved project schedule. The inspection by the Board does not subject the state to any civil liability.

(c) Scope of inspections. Inspections may include, but are not limited to:

(1) on-site observations, review of the [physical] conditions at the construction sites, including compliance with environmental mitigation measures;

(2) review of documents related to the construction projects, including but not limited to:

(A) payroll, daily attendance, and any other records relating to person employed during the construction, and records relating to the Davis Bacon Act and related federal laws and regulations relating to prevailing wage rates;

(B) invoices, receipts for materials, accounting ledgers, and any other documents related to expenditure of funds to facilitate tracking project's progress;

(C) evidence of testing of installed materials and equipment;

(D) deviations from approved plans and specifications;

(E) change orders and supporting documents; and

(F) review of any other documents to ensure compliance with the terms of the approved contract documents and the Board's rules.

(d) The executive administrator [inspectors] may document issues to ensure compliance with applicable laws, rules, and contract documents, and may recommend to the owner that certain corrective actions occur to ensure compliance with laws, rules, and approved plans and specifications.

(e) The Applicant shall provide the executive administrator [inspectors] with a response to the issues relating to compliance.

§375.102. Alterations During Construction.

(a) Changes after approval of engineering feasibility report. The Applicant shall notify the executive administrator of any changes to the project that occur after the approval of the report but prior to the start of construction. The executive administrator shall review the proposed changes and notify the Applicant if additional engineering or other information is required. For wastewater treatment plants or other facilities required to have Commission approval, the Commission must give its approval before any substantial or material changes are made in the plans. No changes may be implemented without the express written approval of the executive administrator.

(b) Changes during construction. Any proposed change to the construction contract must be submitted to the executive administrator in the form of a formal change order; the change order will be reviewed for compliance with program requirements. Depending upon the scope and complexity of the proposed change, approval by the executive administrator also may require amendments to other engineering and environmental documents.

§375.103. *Force Account.*

Force Account Policy. The executive administrator expects that all significant elements of a project shall be constructed with skilled laborers and mechanics obtained through the competitive bidding process. Notwithstanding that expectation, the Applicant, with the prior approval of the executive administrator, may utilize its own employees and equipment for inspection or minor construction upon [a] showing that it possesses the necessary competence required to accomplish such work and that the work can be accomplished more economically by the use of the force account method.

§375.104. *As Built Plans.*

After a project is completed, the Applicant shall notify the executive administrator [that] of the receipt of a complete set of as-built drawings of the project from the project construction engineer.

§375.106. *Final Accounting.*

(a) Within 60 [sixty] days of Applicant's receipt of the certificate of approval for the final prime construction contract and the final inspection report, the Applicant shall submit a final accounting and a final funds requisition form.

(b) After the final accounting, the executive administrator shall notify the Applicant if remaining surplus funds exist and advise the Applicant that the remaining surplus funds may be used, as specified in any applicable bond ordinance, for:

- (1) payment of bonds in inverse order of maturity;
- (2) deposit into the interest and sinking fund; or
- (3) deposit to a reserve fund.

§375.107. *Records Retention.*

The Applicant shall retain all documents, records, and invoices [~~invoice, and records~~] whether in electronic form or otherwise relating to the expenditure of all financial assistance from the CWSRF for a period of three full state fiscal years after the completion of the project and the final certificate of approval.

§375.108. *Release of Retainage.*

(a) Retainage. The Applicant will withhold a minimum of five percent [5%] of each progress payment throughout the course of the construction contract.

(b) Full release of retainage. The executive administrator will approve the full release of retainage on a contract when:

- (1) the Applicant's engineer approves the contractor's request for release of retainage; ~~and~~

(2) the Applicant's governing body approves the release of retainage; ~~and~~[-]

(3) the executive administrator issues the Certificate of Approval.

(c) Partial release of retainage. If a project is substantially complete, the executive administrator may approve a partial release of retainage.

§375.109. *Responsibilities of Applicant.*

After the satisfactory completion of the project, the Applicant remains responsible for compliance with applicable laws and rules relating to the project and to the financial assistance documents required by the Board resolution or the bond ordinance or resolution including but not limited to submission of an annual audit, implementation and enforcement of the approved water conservation program, and other assurances made to the Board. The Board has a continuing interest in the State's investment and therefore, the Applicant shall be subject to the continuing authority of the Board and the executive administrator through final payment of the financial assistance.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601327

Les Trobman

General Counsel

Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



SUBCHAPTER I. NONPOINT SOURCE POLLUTION LINKED DEPOSITS PROGRAM

31 TAC §§375.201, 375.203, 375.206

STATUTORY AUTHORITY.

This rulemaking is proposed under the authority of Texas Water Code §15.605.

The proposed rulemaking affects Chapter 15 of the Texas Water Code.

§375.201. *Definitions.*

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

(1) Eligible lending institution--A financial institution that makes commercial loans, is either [a] designated as an [a] official state depository by the Texas comptroller of public accounts, herein referred to as a state depository, or an institution of the Farm Credit System headquartered in this state, agrees to participate in a linked deposit program established under §15.611 of the Water Code, and is willing to agree to provide collateral equal to the amount of linked deposits placed with it.

(2) Individual water quality management plan--An approved land management plan that considers site-specific characteristics (such as soil types, slope, climate, vegetation, and land usage) to improve or conserve water resources.

(3) Linked deposit--A deposit governed by a linked deposit agreement between the Board and an eligible lending institution that requires that:

(A) the eligible lending institution pay interest to the Board on the deposit at a rate equal to the asking yield for a U.S. Treasury note with a twelve-month maturity as of the date five days preceding the submission of all the documents required of the eligible lending institution requesting a linked deposit agreement;

(B) the state not withdraw any part of the deposit except as according to the terms of the linked deposit agreement and the terms of this division; and

(C) the eligible lending institution agrees to lend the value of the deposit to a person at a rate not to exceed the interest paid by the eligible lending institution to the Board plus four percent.

(4) Linked deposit agreement--A written agreement between the Board, acting through the executive administrator, and an eligible lending institution providing for the deposit by the Board of an amount of funds from the CWSRF program account with the eligible lending institution executed pursuant to the authority and according to the conditions of this subchapter.

(5) Pledged security--Means the securities authorized by these rules and the linked deposit agreement negotiated to secure the Board's deposit of funds with the eligible lending institution.

§375.203. *Conditions Prior to Execution.*

(a) Before the executive administrator may execute a linked deposit agreement, a lending institution shall submit to the executive administrator:

(1) the application of a person determined by the eligible lending institution to be eligible and creditworthy to receive a loan according to the criteria of the institution;

(2) a draft loan agreement with such person that:

(A) identifies the principal amount of the loan that shall not exceed \$250,000;

(B) identifies the interest rate to be paid by the borrower that shall not exceed the interest rate paid by the eligible lending institution to the Board plus four percent;

(C) includes a repayment schedule that identifies the dates on which payments are due from the loan recipient to the lending institution;

(D) limits the use of the loan funds to the project which is certified pursuant to this subchapter; and

(E) contains all such other terms and conditions determined by the eligible lending institution in its sole discretion to be reasonable for the purposes of a private loan agreement;

(3) a certification:

(A) from the eligible lending institution of the interest rate applicable to the proposed loan;

(B) for proposed project as identified under this subchapter; and

(4) such other information or documentation as determined by the executive administrator to be reasonable and necessary to fulfill the objectives of this division.

(b) Before the executive administrator executes a linked deposit agreement, the executive administrator shall review the information submitted in this section to determine if:

(1) the lending institution is an eligible lending institution as defined in §375.302 of this subchapter;

(2) the documents submitted by the lending institution comply with the requirements of this division; and

(3) execution of the linked deposit agreement fulfills the purposes and intent of this subchapter, the Clean Water Act, and the public interest.

§375.206. *Lending Institutions Obligations in Linked Deposits.*

(a) Upon execution of a linked deposit agreement and receipt of funds from the Board, the lending institution shall:

(1) provide collateral as required in this subchapter;

(2) lend the value of the deposit being provided by the Board substantially according to the terms and conditions of the draft loan agreement submitted by the lending institution to the executive administrator;

(3) pay to the Board interest on the deposit at a rate equal to the asking yield for a U.S. Treasury note with a twelve-month maturity as of the date five days preceding the submission of all the documents required of the eligible lending institution to the executive administrator requesting a linked deposit agreement;

(4) submit compliance reports to the executive administrator annually providing information on loans made, the performance of the terms of the loan by the person receiving the loan from the lending institution, and such other information or documents as specified in the linked deposit agreement;

(5) return the amount of funds provided as a linked deposit as specified in the linked deposit agreement; and

(6) perform such other terms and conditions as specified in the linked deposit agreement, this subchapter, the rules of the Board, and applicable federal and state law.

(b) A delay in payment or a default on a loan by the recipient of the loan from the lending institution does not affect the validity of the deposit agreement or the repayment of the deposit in accordance with the terms of the deposit agreement.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601328

Les Trobman

General Counsel

Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



CHAPTER 375. CLEAN WATER STATE REVOLVING FUND

The Texas Water Development Board ("TWDB" or "board") proposes to repeal 31 Texas Administrative Code (TAC) Chapter 375, §§375.50 - 375.56, §§375.63 - 375.70, and §375.92 and §375.93.

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

The TWDB proposes to repeal various sections of 31 TAC Chapter 375 in order to implement new federal requirements imposed by the Water Resources Reform and Development Act of 2014 (WRRDA), to provide greater clarity, and to streamline TWDB processes for implementation of the Clean Water State Revolving Fund (CWSRF). The TWDB proposes to repeal provisions that are no longer needed and to repeal other provisions in order to relocate them in other locations of 31 TAC Chapter 375 for clarification purposes. The specific provisions being repealed and the reasons for the repeals are discussed in more detail below.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Subchapter E, Environmental Reviews and Determinations, Division 1, State Projects.

Division 1 (State Projects) of Subchapter E (Environmental Reviews and Determinations), which includes §§375.50 - 375.56, is repealed. In accordance with WRRDA, National Environmental Policy Act (NEPA)-like environmental reviews are now required for all CWSRF assistance for the construction of treatment works, not just the equivalency projects. Therefore, TWDB is proposing to delete Division 1 of Subchapter E covering environmental reviews and determinations for state projects that was previously applied to the non-equivalency projects. The "Division 2 Federal Projects" title is therefore no longer necessary for the remaining provisions of the subchapter.

Subchapter E, Environmental Reviews and Determinations, Division 2, Federal Projects.

Sections 375.63 - 375.70 are repealed in order to provide greater clarity regarding the environmental requirements for the CWSRF. These changes will provide greater clarity on which documents are prepared by the Applicant, which documents are prepared by the TWDB, and which documents are prepared by a third party. These changes will also provide greater clarity on the timing of required environmental documentation. The repeal of these sections is proposed in order to reorganize and renumber this subchapter for greater clarity.

§375.92, Disbursement of Funds, and §375.93, Remaining Unused Funds

Section 375.92 and §375.93 are repealed in order to relocate them within 31 TAC Chapter 375 for greater clarity.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS.

Ms. Cindy Demers, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed repeal. For the first five years the repeal is in effect, there is no expected additional cost to state or local governments resulting from their administration.

There is no change in costs because there are no direct costs associated with the proposed repeal. This repeal is not expected to have any impact on state or local revenues. The repeal does not require any increase in expenditures for state or local governments as a result of administering the repeal. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from the repeal.

PUBLIC BENEFITS AND COSTS.

Ms. Cindy Demers also has determined that for each year of the first five years the proposed repeal is in effect, the public will ben-

efit from the repeal as it provides clarity regarding the TWDB's Clean Water State Revolving Fund program and is consistent with changes made at the federal level for the Clean Water State Revolving Fund.

LOCAL EMPLOYMENT IMPACT STATEMENT.

The board has determined that a local employment impact statement is not required because the proposed repeal does not adversely affect a local economy in a material way for the first five years that the proposed repeal is in effect because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this repeal. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the repeal as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION.

The board reviewed the proposed repeal in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the repeal 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 this repeal is to provide greater clarity regarding the Clean Water State Revolving Fund and to implement changes to federal requirements for that fund.

Even if the proposed repeal were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this repeal 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 repeal does not meet any of these four applicability criteria because it: 1) does not exceed the Federal Water Pollution Control Act or any other 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 it is also proposed under authority of Texas Water Code §15.605. Therefore, this proposed repeal does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The board 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.

The board evaluated this proposed repeal and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this repeal is to more closely align the TWDB's rules related to the Clean Water State Revolving fund to state statutes and federal requirements. The proposed repeal would substantially advance this stated purpose by reflecting the current state and federal requirements for the Clean Water State Revolving Fund.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed repeal because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that administers the Clean Water State Revolving Fund for the State of Texas.

Nevertheless, the board further evaluated this proposed repeal and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this proposed repeal 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 repeal does not burden nor 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 repeal requires compliance with state and federal laws and rules regarding the Clean Water State Revolving Fund. These requirements will not burden, restrict, or limit an owner's right to property. Therefore, the proposed repeal does not constitute a taking under Texas Government Code, Chapter 2007.

SUBMISSION OF COMMENTS.

Written comments on the proposed repeal may be submitted by mail to Mr. Les Trobman, 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 the 5:00 p.m. of the 31st day following publication the *Texas Register*.

SUBCHAPTER E. ENVIRONMENTAL REVIEWS AND DETERMINATIONS

DIVISION 1. STATE PROJECTS

31 TAC §§375.50 - 375.56

STATUTORY AUTHORITY.

This repeal is proposed under the authority of Texas Water Code §15.605.

The proposed repeal affects Chapter 15 of the Texas Water Code.

- §375.50. *Definitions for Non-Equivalency Projects.*
- §375.51. *Environmental Review Process.*
- §375.52. *Types of Environmental Determinations: Categorical Exclusions.*
- §375.53. *Types of Environmental Determinations: Full Review.*
- §375.54. *Environmental Assessment: Applicant Requirements.*
- §375.55. *Environmental Determinations Affected by Proposed Project Alterations.*
- §375.56. *Use of Environmental Determinations Prepared by Other Entities.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601317

Les Trobman

General Counsel

Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



DIVISION 2. FEDERAL PROJECTS

31 TAC §§375.63 - 375.70

STATUTORY AUTHORITY.

This repeal is proposed under the authority of Texas Water Code §15.605.

The proposed repeal affects Chapter 15 of the Texas Water Code.

- §375.63. *Types of Environmental Determinations: Finding of No Significant Impact.*
- §375.64. *Environmental Information Document: Applicant Requirements.*
- §375.65. *Decision to Prepare an Environmental Impact Statement: Notice of Intent.*
- §375.66. *Types of Environmental Determinations: Record of Decision.*
- §375.67. *Environmental Impact Statements.*
- §375.68. *Environmental Impact Statement: Applicant Requirements.*
- §375.69. *Proposed Project Alterations.*
- §375.70. *Use of Environmental Determinations Prepared by Other Entities.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601318

Les Trobman

General Counsel

Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



SUBCHAPTER G. LOAN CLOSINGS AND AVAILABILITY OF FUNDS

31 TAC §§375.92, §375.93

STATUTORY AUTHORITY.

This repeal is proposed under the authority of Texas Water Code §15.605.

The proposed repeal affects Chapter 15 of the Texas Water Code.

§375.92. *Disbursement of Funds.*

§375.93. *Remaining Unused Funds.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 21, 2016.

TRD-201601319

Les Trobman

General Counsel

Texas Water Development Board

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 463-8061



TITLE 34. PUBLIC FINANCE

PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 71. CREDITABLE SERVICE

34 TAC §71.31

The Employees Retirement System of Texas (ERS) proposes an amendment to 34 Texas Administrative Code (TAC) §71.31, concerning Credit Purchase Option for Certain Waiting Period Service.

Between 2003 and 2015, §812.003, Texas Government Code, required a 90-day wait for new employees to become contributing members of ERS. Members were also permitted to purchase that service at actuarial cost. ERS adopted §71.31 to govern the service purchase process.

Section 71.31 is proposed to be amended to remove the requirement that a person must be a contributing member to purchase waiting period service. This change will allow employee class members who have left state service, but kept their account at ERS, to purchase waiting period service.

Ms. Paula A. Jones, General Counsel and Chief Compliance Officer, has determined that for the first five-year period the rule is in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the rule. To Ms. Jones' knowledge, there are no known anticipated economic costs to persons who are required to comply with the rule as proposed other than to pay the required cost of purchasing waiting period service credit. And, to Ms. Jones' knowledge, small businesses should not be affected by the rule amendment.

Ms. Jones also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule would be to permit non-contributing members of the retirement system to purchase waiting period service at actuarial cost and allow more members to purchase service.

Comments on the proposed rule amendment may be submitted to Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or you may e-mail Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is Monday, May 2, 2016, at 10:00 a.m.

The amendment is proposed under the Texas Government Code, §815.102, which provides authorization for the ERS

Board of Trustees to adopt rules for eligibility of membership in the retirement system.

No other statutes are affected by the proposed amendment.

§71.31. *Credit Purchase Option for Certain Waiting Period Service.*

(a) An eligible employee class member may establish service credit for service performed during the waiting period as authorized by §813.514, Texas Government Code, and as provided in this section. The provisions of §71.14 of this title (relating to Payments to Establish or Reestablish Service Credit) do not apply to service credit established under this section.

(b) An employee class [A] member is eligible to establish service credit under this section if the member:

~~(1)~~ holds a position in the employee class;

~~(1)~~ ~~(2)~~ has completed the waiting period;

~~(2)~~ ~~(3)~~ has made a retirement contribution in accordance with §813.201, Texas Government Code; and

~~(3)~~ ~~(4)~~ makes application for the establishment of service credit and payment of the required contributions in accordance with procedures developed by ERS.

(c) An eligible member shall deposit with the system in a lump sum a contribution in the amount determined by the system to be the actuarial present value of the benefit attributable to the service credit established under this section. The tables recommended by the system's actuary and adopted by the board shall be used to determine the actuarial present value. The waiting period service credit tables are adopted by reference and made a part of this rule for all purposes. The 2009 waiting period service credit tables apply to service purchase calculations performed on or after September 1, 2009, and are those tables adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. The 2010 waiting period service credit tables apply only to those employees hired by the state of Texas on or after September 1, 2009, as defined in §73.2(c) of this title (relating to Determination of Date of Hire for Retirement Benefit Eligibility). The 2010 waiting period service credit tables apply to service purchase calculations performed on or after September 1, 2010, and are those tables adopted by the board on February 23, 2010, based on legislative changes to the retirement plan effective September 1, 2009. The 2014 waiting period service credit tables apply to service purchase calculations performed on or after September 1, 2014, and are those tables adopted by the board on February 25, 2014, based on assumptions adopted by the board on February 26, 2013, and on legislative changes to the retirement plan effective September 1, 2013. For service purchase calculations performed prior to September 1, 2014, the previously adopted tables apply. Copies of these tables are available from the System's executive director, Employees Retirement System of Texas at 200 E. 18th Street, P.O. Box 13207, Austin, Texas 78711-3207.

(d) Actuarial present value shall be based on:

(1) the member's age on the date of the deposit required by this subsection;

(2) the earliest date on which the member will become eligible to retire and receive a service retirement annuity after establishing service credit under this section; and

(3) the future employment, compensation, investment and retirement benefit assumptions recommended by the system's actuary and adopted by the board.

(e) Waiting period service credit shall be established in increments of one month.

(f) This section does not apply to service credit transferred as authorized by Texas Government Code, Chapter 805.

(g) A member who withdraws contributions and cancels service credit established under this section may not reestablish such credit under §813.102, Texas Government Code, but may again establish credit only as provided by this section.

(h) Credit established under this section may not be used to determine average monthly compensation for the purpose of computing an annuity.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 18, 2016.

TRD-201601287

Paula A. Jones

General Counsel and Chief Compliance Officer
Employees Retirement System of Texas

Earliest possible date of adoption: May 1, 2016

For further information, please call: (877) 275-4377



CHAPTER 85. FLEXIBLE BENEFITS

34 TAC §§85.1, 85.3, 85.5

The Employees Retirement System of Texas (ERS) proposes amendments to 34 Texas Administrative Code (TAC) Chapter 85 concerning Flexible Benefits, §85.1 (Introduction and Definitions), §85.3 (Eligibility and Participation), and §85.5 (Benefits).

ERS administers a program delivering various benefits called the TexFlex Program. It includes a flexible spending account (FSA) program. An FSA allows an employee to set aside, in a pre-tax process, a portion of earnings to pay or be reimbursed for certain qualifying expenses, such as dependent care and health care expenses. An FSA that is for all types of health care expenses is called a general purpose FSA.

In 2015, the Texas Legislature added Subchapter J to Chapter 1551, Texas Insurance Code. The new subchapter requires ERS to offer employees the option to enroll in a "consumer-directed health plan" (CDHP) within the HealthSelectSM of Texas managed care plan beginning in the 2016 plan year. This CDHP includes a high deductible health plan with a health savings account (HSA). The HSA is an account described by §223, Internal Revenue Code, as amended.

An HSA is a different type of pre-tax health account than an FSA, although both are used to reimburse certain qualifying medical expenses. Under the Internal Revenue Code, an employee may contribute to both accounts, but the FSA must be limited so that it may only be used for the limited purpose of reimbursing dental and vision expenses. This is considered a "limited purpose" FSA.

ERS has determined that the proposed amendments to §§85.1, 85.3, and 85.5 would benefit TexFlex program participants in a manner permitted by the Internal Revenue Code. The proposed amendments would also conform the TexFlex program to facilitate participation in the new CDHP while also allowing participants to enroll in a limited purpose FSA. Participation in a general purpose FSA is incompatible with contributing to an HSA account under federal law. The proposed amendments provide

a limited purpose FSA that is compatible for use for those enrolled in the CDHP.

Section 85.1 (Introduction and Definitions) is proposed to be amended to add a definition for a general purpose health care reimbursement account and for a limited purpose health care reimbursement account.

Section 85.3 (Eligibility and Participation) is proposed to be amended to allow participants in the CDHP to participate only in the limited purpose FSA program, in conformance with the Internal Revenue Code. Currently, unexpended balances over \$500 in the FSA are automatically carried over into an employee's general purpose FSA for the following plan year. An employee with any monetary balance in a general purpose FSA, or who attempts to contribute to both an HSA and a general purpose FSA simultaneously would violate the Internal Revenue Code, as the employee would be ineligible to contribute to an HSA. The proposed amendment provides that any monetary balance remaining in an FSA account on August 31 of a plan year or any carryover that might otherwise be permitted for an employee who chooses to enroll in the CDHP for the following plan year would go into a limited purpose FSA, subject to IRS maximums or be forfeited.

Section 85.5 (Benefits) is proposed to be amended to clarify that only qualifying dental and vision expenses may be reimbursed through a limited purpose FSA.

Ms. Paula A. Jones, General Counsel and Chief Compliance Officer, has determined that for the first five-year period the rules are in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the rules. To Ms. Jones' knowledge, there are no known anticipated economic costs to persons who are required to comply with the rules as proposed, and, to her knowledge, small businesses should not be affected.

Ms. Jones also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules include the reasons stated above, and also better serve and benefit state employees by permitting tax-advantaged reimbursement of dental and vision expenses, and preventing employees participating in the CDHP from being ineligible for contributions to an HSA.

Comments on the proposed rule amendments may be submitted to Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or you may e-mail Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is May 2, 2016, at 10:00 a.m.

The amendments are proposed under the Texas Insurance Code, §1551.052 and §1551.206, which provide authorization for the ERS Board of Trustees to develop, implement, and administer a cafeteria plan, and to adopt necessary rules.

No other statutes are affected by the proposed amendments.

§85.1. *Introduction and Definitions.*

(a) Summary. The purpose of these rules is to govern the flexible benefits program. These rules constitute the Plan document for the State of Texas Employees Flexible Benefit Program (TexFlex). The flexible benefits plan (the plan) includes reimbursement account arrangements with optional benefits available for selection by participants as described in the plan and these rules. The plan is intended to be qualified under the Internal Revenue Code (the Code), §125, as amended from time to time, and is intended to continue as long as it

qualifies under §125 and is advantageous to the state and institutions of higher education employees. Optional benefits offered under the plan for individual selection consist only of a choice between cash and certain statutory nontaxable fringe benefits as defined in the Code, §125, and regulations promulgated under the Code, §125. The plan may also include separate benefits as defined in the Code, §132, and regulations promulgated under the Code, §132, separate from the cafeteria plan, and governed by individual plan documents.

(b) Applicability of rules.

(1) These rules are applicable only to employees as defined in these rules, and terminated employees, as described in §85.3(b)(1)(B) and (C) of this title (relating to Eligibility and Participation).

(2) An employee who retired or separated from employment prior to September 1, 1988, shall not be entitled to benefits under the provisions of the plan and these rules, unless the employee is rehired and then becomes eligible for benefits.

(c) Definitions. The following words and terms when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise, and wherever appropriate, the singular includes the plural, the plural includes the singular, and the use of any gender includes the other gender.

(1) Act--The state law that authorized the establishment of a flexible benefits plan and is designated in the Texas Insurance Code, Chapter 1551, as amended.

(2) Account--A record keeping account established by the Employees Retirement System of Texas or its designee in the name of each participant for the purpose of accounting for contributions made to the account and benefits paid to a participant.

(3) Active duty--The expenditure of time and energy in the service of an employer as defined in these rules. An employee will be considered to be on active duty on each day of a regular paid vacation or on a non-work day, on which the employee is not disabled, if the employee was on active duty on the last preceding work day.

(4) Board of trustees--The board of trustees of the Employees Retirement System of Texas (ERS).

(5) Code--The Internal Revenue Code, as amended from time to time.

(6) Compensation--A participant's base salary, including amounts that would otherwise qualify as compensation but are not received directly by the participant pursuant to a good faith, voluntary, written or electronic salary reduction agreement in order to finance payments to a deferred compensation or tax sheltered annuity program specifically authorized by state law or to finance benefit options under this plan, plus longevity and hazardous duty pay and including non-monetary compensation, the value of which is determined by the Employees Retirement System of Texas, but excluding overtime pay.

(7) Debit Card--A bank issued convenience card or similar technology approved by the plan administrator and permitted to be used by participants as an optional method to pay for eligible transactions. Use of the card is governed by the plan administrator and issuing financial institution. The card is referred to as the Flex Debit Card.

(8) Dependent--An individual who qualifies as a dependent under the Code, §152, and when applicable taking into account the Code, §105, or any individual who is:

(A) a dependent of the participant who is under the age of 13 and with respect to whom the participant is entitled to an exemp-

tion under the Code, §151, or, is otherwise, a qualifying individual as provided in the Code, §21; or

(B) a dependent or spouse of the participant who is physically or mentally incapable of caring for himself or herself.

(9) Dependent care reimbursement account--The book-keeping account maintained by the plan administrator or its designee used for crediting contributions to the account and accounting for benefit payments from the account.

(10) Dependent care reimbursement plan--A separate plan under the Code, §129, adopted by the board of trustees, and designed to provide payment or reimbursement for dependent care expenses as described in §85.5(c) of this title (relating to Benefits).

(11) Dependent care expenses--Expenses incurred by a participant which:

(A) are incurred for the care of a dependent of the participant;

(B) are paid or payable to a dependent care service provider or to the participant as reimbursement for such expenses; and

(C) are incurred to enable the participant to be gainfully employed for any period for which there are one or more dependents with respect to the participant. Dependent care expenses shall not include expenses incurred for the services outside the participant's household for the care of a dependent, unless such dependent is a dependent under the age of 13 with respect to when the participant is entitled to a tax deduction under the Code, §151, or a dependent who is physically or mentally incapable of self support. In the event that the expenses are incurred outside the dependent's household, the dependent must spend at least eight hours each day in the participant's household. Dependent care expenses shall be deemed to be incurred at the time the services to which the expenses relate are rendered.

(12) Dependent care service provider--A person or a dependent care center (as defined in the Code, §21) who provides care or other services described in the definition of "dependent care expenses" in this section, but shall not include:

(A) a related individual described in the Code, §129; or

(B) a dependent care center which does not meet the requirements of the Code, §21.

(13) Effective date of the plan--September 1, 1988.

(14) Election form--A paper or electronic form provided by the Employees Retirement System of Texas that is an agreement by and between the employer and the participant, entered into prior to an applicable period of coverage, in which the participant agrees to a reduction in compensation for purposes of purchasing benefits under the plan.

(15) Eligible employee--An employee who has satisfied the conditions for eligibility to participate in the plan in accordance with the plan and §85.3(a)(1), and (b)(1) of this title (relating to Eligibility and Participation), and, to the extent necessary, a retired or terminated employee who is entitled to benefit payments under the plan.

(16) Employee--A person who is eligible to participate in the Texas Employees Group Benefits Program as an employee.

(17) Employer--The State of Texas, its agencies, commissions, institutions of higher education, and departments, or other governmental entity whose employees are authorized to participate in the Texas Employees Group Benefits Program.

(18) Expenses incurred--Expenses for services received or performed and for which the participant is legally responsible.

(19) Executive director--The executive director of the Employees Retirement System of Texas.

(20) Flexible benefit dollars--The dollars available to a participant which may be used for purposes of purchasing benefits under the plan.

(21) General purpose health care reimbursement account--
The account described in §85.5(b)(1).

(22) [(21)] Grace period--A two (2) month and 15 day period, adopted by the TexFlex plan pursuant to IRS Notice 2005-42, immediately following the end of the plan year during which participants may continue to incur expenses for reimbursement from the prior year account balance. The grace period does not apply to a health care reimbursement plan year that begins on or after September 1, 2014, but does apply to the dependent care reimbursement plan.

(23) [(22)] Health care expenses--Any expenses incurred by a participant, or by a spouse or dependent of such participant, for health care as described in or authorized in accordance with the Code, §105 and §213, but only to the extent that the participant or other person incurring the expense is not reimbursed for the expense by insurance or other means. The types of expenses include, but are not limited to, amounts paid for hospital bills, doctor bills, prescription drugs, hearing exams, vision exams, and eye exams.

(24) [(23)] Health care reimbursement account--The book-keeping account maintained by the plan administrator or its designee used for crediting contributions to the account and accounting for benefit payments from the account.

(25) [(24)] Health care reimbursement plan--A separate plan, under the Code, §105, adopted by the board of trustees, and designed to provide health care expense reimbursement as described in §85.5(b) of this title (relating to Benefits).

(26) [(25)] Institution of higher education--All public community/junior colleges, senior colleges or universities, or any other agency of higher education within the meaning and jurisdiction of the Education Code, Chapter 61, except the University of Texas System and the Texas A&M University System.

(27) [(26)] Leave of absence without pay--The status of an employee who is certified monthly by an agency or institution of higher education administrator to be absent from duty for an entire calendar month, and who does not receive any compensation for that month.

(28) Limited purpose health care reimbursement account--
The account described in §85.5(b)(3).

(29) [(27)] Option--Any specific benefit offering under the plan.

(30) [(28)] Participant--An eligible employee who has elected to participate in the plan for a period of coverage.

(31) [(29)] Period of coverage--The plan year during which coverage of benefits under the plan is available to and elected by a participant; however, an employee who becomes eligible to participate during the plan year may elect to participate for a period lasting until the end of the current plan year. In such case, the interval commencing on such employee's entry date and ending as of the last day of the current period of coverage shall be deemed to be such participant's period of coverage.

(32) [(30)] Plan--The flexible benefits plan established and adopted by the board of trustees pursuant to the laws of the state of

Texas and any amendments which may be made to the plan from time to time. The plan is referred to herein as TexFlex, and is comprised of a dependent care reimbursement plan, a health care reimbursement plan, an insurance premium conversion plan, and a qualified transportation benefit plan.

(33) [(31)] Plan administrator--The board of trustees of the Employees Retirement System of Texas or its designee.

(34) [(32)] Plan year--A 12-month period beginning September 1 and ending August 31.

(35) [(33)] Run-out period--The period following the end of the plan year between September 1 and December 31, during which participants may file claims for reimbursement of expenses incurred during the plan year.

(36) [(34)] Statutory nontaxable benefit--A benefit provided to a participant under the plan, which is not includable in the participant's taxable income by reason of a specific provision in the Code and is permissible under the plan in accordance with the Code, §125.

(37) [(35)] Spouse--The person to whom the participant is married. Spouse does not include a person separated from the participant under a decree of divorce, or annulment.

(38) [(36)] TexFlex--The flexible benefits plan adopted by the board of trustees.

(39) [(37)] Texas Employees Group Benefits Program--The employee insurance benefits program administered by the Employees Retirement System of Texas, pursuant to the Texas Insurance Code, Chapter 1551. The program consists of health, voluntary accidental death and dismemberment, optional term life, dependent term life, short and long term disability, and dental insurance coverages.

(40) [(38)] Third Party Administrator or TPA--The vendor, administrator or firm selected by the plan administrator to perform the day-to-day administrative responsibilities of the TexFlex program for participants of the Texas Employees Group Benefits Program who enroll in either the health care reimbursement plan, dependent care reimbursement plan or both.

§85.3. *Eligibility and Participation.*

(a) Dependent care reimbursement plan.

(1) Eligibility. Any employee eligible to participate in the Texas Employees Group Benefits Program may elect to participate in the dependent care reimbursement account.

(2) Participation.

(A) An employee who is eligible under paragraph (1) of this subsection may elect to participate by completing and submitting an election form either in writing or electronically on, or within 30 days after, the date on which the employee begins active duty. An employee, upon executing an election form for participation, either in writing or electronically, shall be deemed to have consented to and be bound by all the terms, conditions, and limitations of the plan, any and all amendments hereto, any administrative rules adopted by the plan administrator, and any decision or determinations made by the plan administrator with respect to the participant's eligibility, obligations, rights and benefits available under the plan. An election made on the date on which the employee begins active duty becomes effective on that date. An election made after the date on which the employee begins active duty becomes effective on the first day of the month following the date on which the employee begins active duty.

(B) An employee who is otherwise eligible to participate in the Texas Employees Group Benefits Program but who declined participation in the dependent care reimbursement account prior to the beginning of a plan year, and who, after the beginning of a plan year, has a qualifying life event, as defined in §85.7(c) of this title (relating to Enrollment), may elect to participate in the dependent care reimbursement account as provided in §85.7(c).

(C) A qualifying life event as defined in §85.7(c) of this title (relating to Enrollment) will permit a change or revocation of participation during the plan year as provided in §85.7(c).

(D) An eligible employee shall have an opportunity to enroll or change benefit options during the annual enrollment period. The annual enrollment period shall be prior to the beginning of a new plan year. Elections and changes in elections made during the annual enrollment period become effective on the first day of the plan year.

(E) The plan administrator shall maintain and update the participant enrollment records. Any and all changes will be communicated to the TPA via weekly file transfer protocol (FTP), tapes or other selected media.

(3) Duration of participation.

(A) An employee's election to participate or to waive participation in the dependent care reimbursement plan shall be irrevocable for the plan year unless there is a qualifying life event as defined in §85.7(c) of this title (relating to Enrollment).

(B) An employee returning to active duty following termination of employment, or following a period of approved leave without pay, during the same plan year shall reinstate the election in effect on the employee's last previous active duty date. Reinstatement becomes effective on the date on which the employee resumes active duty, unless the employee requests a change in election as provided in §85.7(c) of this title (relating to Enrollment).

(b) Health care reimbursement plan.

(1) Eligibility.

(A) Any employee eligible to participate in the Texas Employees Group Benefits Program may elect to participate in a health care reimbursement account, except that an employee participating in a consumer directed health plan with a health savings account, as permitted under Subchapter J, Chapter 1551, Insurance Code, may only participate in the limited purpose health care reimbursement account described by §85.5(b)(3) of this title (relating to Benefits). Only participants in a consumer directed health plan are eligible to elect to participate in the limited purpose health care reimbursement account described by §85.5(b)(3).

(B) Prior to September 1, 2014, an employee whose employment has been terminated, voluntarily or involuntarily, and who had a health care reimbursement account at the time of termination, shall retain the health care reimbursement account for the applicable period of election. The terminated employee must pre-pay, on a monthly basis, the elected amount and any administrative fee for the plan year. Payments are due on the first day of each month and must be received no later than the 30th day of the month. Failure to pay will automatically cancel enrollment.

(C) On and after September 1, 2014, the employee's period of coverage ends on the date of termination of employment.

(2) Participation.

(A) An employee who is eligible under paragraph (1) of this subsection may elect to participate by completing and submitting an election form either in writing or electronically on, or within 30

days after, the date on which the employee begins active duty. An employee, upon executing an election form for participation, either in writing or electronically, shall be deemed to have consented to and be bound by all the terms, conditions, and limitations of the plan, any and all amendments hereto, any administrative rules adopted by the plan administrator, and any decision or determinations made by the plan administrator with respect to the participant's eligibility, obligations, rights and benefits available under the plan. An election made on the date on which the employee begins active duty becomes effective on that date. An election made after the date on which the employee begins active duty becomes effective on the first day of the month following the date on which the employee begins active duty.

(B) An employee who is eligible but who declined participation in the health care reimbursement account prior to the beginning of a plan year, and who, after the beginning of a plan year, has a qualifying life event, as defined in §85.7(c) of this title (relating to Enrollment), may elect to participate in a health care reimbursement account as provided in §85.7(c).

(C) A qualifying life event as defined in §85.7(c) of this title (relating to Enrollment) will permit the following changes in election during the plan year, as provided in §85.7(c):

(i) an increase in the election amount, if the increase is consistent with the qualifying life event; or

(ii) a decrease in the election or election amount, if the decrease is consistent with the qualifying life event.

(D) An eligible employee shall have an opportunity to enroll or to change benefit options during the annual enrollment period. The annual enrollment period shall be prior to the beginning of a new plan year. Elections and changes in elections made during the annual enrollment period become effective on the first day of the plan year.

(E) The plan administrator shall maintain and update the participant enrollment records. Any and all changes will be communicated to the TPA via weekly file transfer protocol (FTP), tapes or other selected media.

(F) If an eligible employee elects to enroll in a consumer directed health plan with a health savings account, any unspent flexible benefit plan dollars in the employee's health care reimbursement account at the end of the previous plan year shall automatically be transferred to and carryover into a limited purpose account as described by §85.5(b)(3) of this title, up to the maximum carryover permitted by the IRS. Such carryover shall comply with §85.7(g) of this title. Any flexible benefit plan dollars remaining that exceed the maximum carryover permitted by the IRS will be forfeited by the employee.

(3) Duration of participation.

(A) Except as otherwise provided in subparagraph (C)(ii) of paragraph (2), or subparagraph (D) of this paragraph, an employee's election to or not to participate in a health care reimbursement account shall be irrevocable for the plan year.

(B) An employee returning to active duty following termination of employment, or following a period of leave without pay, during the same plan year shall reinstate the election in effect on the employee's last previous active duty date. Reinstatement becomes effective on the date on which the employee resumes active duty, unless the employee requests a change in election as provided in §85.7(c) of this title (relating to Enrollment) or a different requirement is imposed by the Family and Medical Leave Act of 1993 (FMLA).

(C) For plan years beginning before September 1, 2014, an employee who is enrolled in a health care reimbursement account who terminates employment during the plan year must retain the health

care account for the remainder of the plan year and prepay premiums or make monthly premium payments due for the remainder of the plan year, as described in paragraph (1)(B) of this subsection.

(D) For plan years beginning on and after September 1, 2014, an employee who is enrolled in a health care reimbursement account who terminates employment during the plan year does not retain the health care account for the remainder of the plan year. The employee's period of coverage ends on the date of termination. An employee may only file a claim for reimbursement for expenses incurred before the date of termination.

(E) Notwithstanding any provision to the contrary in this Plan, if an employee goes on a qualifying unpaid leave under the Family Medical Leave Act (FMLA), to the extent required by the FMLA, the plan administrator will continue to maintain the employee's health care reimbursement account on the same terms and conditions as though he were still an active employee (i.e., the plan administrator or its designee will continue to provide benefits to the extent the employee opts to continue his coverage). If the employee opts to continue his coverage, the employee shall pay his or her contribution in the same manner as a participant on the non-FMLA leave, including payment with after-tax dollars while on leave. The employee may also be given the option to pre-fund all or a portion of the contribution for the expected duration of the leave on a pre-tax salary reduction basis out of his pre-leave compensation by making a special election to that effect prior to the date such compensation would normally be made available to him (provided, however, that pre-tax dollars may not be utilized to fund coverage during the next plan year).

§85.5. *Benefits.*

(a) Benefits available for selection by participants. A participant may elect, in accordance with the procedures set forth in this section, one or both of the following benefits, subject to all the requirements and conditions contained in these rules:

- (1) health care reimbursement plan;
- (2) dependent care reimbursement plan.

(b) Health care reimbursement plan.

(1) General purpose health care reimbursement account. Pursuant to the health care reimbursement plan, a participant may elect to receive reimbursements of certain health care expenses which are excludable from the participant's taxable income. The general purpose health care reimbursement account [plan] is intended to be qualified under the Code, §105, is an optional benefit under the flexible benefits plan, and constitutes a separate written employee benefit plan as contemplated by the Code, §105, and Treasury Regulation 1.105-11.

(2) Maximum benefit available. Subject to the limitations set forth in these rules, hereafter referred to as the plan, to avoid discrimination, the maximum amount of flexible benefit dollars that an employee may receive in any plan year for health care expenses under the health care reimbursement plan is the amount permitted under the Code, §105. Even if permitted under the Code, in no event shall the amount available exceed \$5,000 in a plan year. An employee may prepay the health care election amounts for the remainder of the plan year in anticipation of termination, retirement, or a period of leave without pay.

(3) Limited purpose health care reimbursement account. An employee who elects to participate in a consumer directed health plan with a health savings account as permitted by Subchapter J, Chapter 1551, Insurance Code, may elect to participate in a limited purpose health care reimbursement account. This limited purpose health care reimbursement account may only be used to reimburse eligible dental and vision care expenses incurred during the benefit plan year or per-

mitted carryover period. The limited purpose health care reimbursement account is intended to be qualified under the Code, §105, is an optional benefit under the flexible benefits plan, and constitutes a separate written employee benefit plan as contemplated by the Code, §105, and Treasury Regulation 1.105-11.

(c) Dependent care reimbursement plan.

(1) Pursuant to the dependent care reimbursement plan, a participant may elect to have payments made or receive reimbursement for dependent care expenses. The dependent care reimbursement plan is intended to be qualified under the Code, §129, is an optional benefit under the flexible benefits plan, and constitutes a separate written employee benefit plan as contemplated by the Code, §129.

(2) Maximum benefit available.

(A) Subject to any limitations imposed by these rules, hereafter referred to as the plan, to avoid discrimination, the maximum amount that an employee may receive in any plan year in the form of payment of or reimbursement for dependent care expenses under the dependent care reimbursement plan is the lesser of:

(i) the employee's earned income for the plan year (after all reductions in compensation including the reduction related to dependent care expenses);

(ii) the earned income of the employee's spouse for the plan year; or

(iii) the amount permitted under the Code, §129. Even if permitted under the Code, in no event shall the amount available exceed \$5,000 in a plan year.

(B) In the case of a participant's spouse who is a full-time student at an educational institution or who is physically or mentally incapable of caring for himself, such spouse shall be deemed to have earned income of not less than \$200 per month if the participant has one dependent and \$400 per month if the participant has two or more dependents in accordance with the Code, §21.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 18, 2016.

TRD-201601288

Paula A. Jones

General Counsel and Chief Compliance Officer

Employees Retirement System of Texas

Earliest possible date of adoption: May 1, 2016

For further information, please call: (877) 275-4377

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT

CHAPTER 221. PROFICIENCY CERTIFICATES 37 TAC §221.25

The Texas Commission on Law Enforcement (Commission) proposes an amendment to §221.25, concerning Civil Process Proficiency. Subsection (a)(1) adds the requirement of full-time experience in a constable or sheriff's office and changes the re-

quirement from serving civil process to working with civil process. Subsection (d) reflects the effective date.

This amendment is necessary to include clerks in a constable or sheriff's office that work with civil process to enhance their proficiency and professionalism.

John Beauchamp, General Counsel, has determined that for each year of the first five years the amendment as proposed will be in effect, there will be little or no effect on state or local governments as a result of administering this amendment.

Mr. Beauchamp has also determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by providing the clerks in a constable and sheriff's office the opportunity to enhance their professionalism.

Mr. Beauchamp has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments on the proposal may be submitted electronically to public.comment@tcole.texas.gov or in writing to Mr. Kim Vickers, Executive Director, Texas Commission on Law Enforcement, 6330 E. Highway 290, Suite 200, Austin, Texas 78723-1035.

The amendment is proposed under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority, and §1701.402, Proficiency Certificates.

The rule amendment as proposed is in compliance with Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority, and §1701.402, Proficiency Certificates.

No other code, article, or statute is affected by this proposal.

§221.25. *Civil Process Proficiency.*

(a) To qualify, an applicant for a civil process proficiency certificate must meet all proficiency requirements including:

(1) at least three years full-time experience in a constable or sheriff's office working with [serving] civil process;

(2) successful completion of 40 hours of civil process training, with at least 20 hours completed in the current training cycle; and

(3) pass the approved examination for civil process proficiency.

(b) A certificate will become invalid at the end of a training cycle unless the holder successfully completes a 20 hour course of training in civil process during the training cycle.

(c) If the certificate becomes invalid, a holder may obtain a new certificate under the application standards in this section.

(d) The effective date of this section is September 1, 2016. ~~[January 17, 2013.]~~

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 16, 2016.
TRD-201601257

Kim Vickers
Executive Director
Texas Commission on Law Enforcement
Earliest possible date of adoption: May 1, 2016
For further information, please call: (512) 936-7713



CHAPTER 225. SPECIALIZED LICENSES

37 TAC §225.1

The Texas Commission on Law Enforcement (Commission) proposes an amendment to §225.1, concerning Issuance of Jailer License through a Contract Jail Facility. Subsection (e) removes obsolete rule cross-referencing. Rule 217.11 was incorporated into rule 218.3. Subsection (f) reflects the effective date.

This amendment is necessary to reflect the correct rule cross-referencing.

John Beauchamp, General Counsel, has determined that for each year of the first five years the amendment as proposed will be in effect, there will be little or no effect on state or local governments as a result of administering this amendment.

Mr. Beauchamp has also determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by providing the public with the correct rule cross-referencing.

Mr. Beauchamp has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments on the proposal may be submitted electronically to public.comment@tcole.texas.gov or in writing to Mr. Kim Vickers, Executive Director, Texas Commission on Law Enforcement, 6330 E. Highway 290, Suite 200, Austin, Texas 78723-1035.

The amendment is proposed under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority.

The rule amendment as proposed is in compliance with Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority.

No other code, article, or statute is affected by this proposal.

§225.1. *Issuance of Jailer License through a Contract Jail Facility.*

(a) The commission shall issue a jailer license to an individual appointed by a contract jail facility who meets all the minimum standards for jailer licensure, and submits both the current commission application and any required fees.

(b) A contract jail facility that appoints an individual who already holds a valid, active jailer license shall meet the appointment requirements of §217.7 of this title (relating to Reporting the Appointment and Termination of a Licensee), including submitting any required fee.

(c) A contract jail facility that appoints an individual with a 180-day break in service shall meet the appointment requirements of §217.7 of this title, including submitting any required fee.

(d) The commission shall issue a temporary jailer license to an individual appointed by a contract jail facility who meets all the minimum standards for licensure except for training and testing, and

submits both the current commission application and any required fees. A temporary jailer license expires 12 months from the appointment date.

(e) Individuals licensed as jailers appointed by a contract jail facility shall meet the continuing education requirements in Chapter 218 of this title. [~~§217.11 of this title (relating to Legislatively Required Continuing Education for Licensees).~~]

(f) The effective date of this section is September 1, 2016. [~~July 15, 2010.~~]

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 16, 2016.

TRD-201601259

Kim Vickers

Executive Director

Texas Commission on Law Enforcement

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 936-7713



37 TAC §225.3

The Texas Commission on Law Enforcement (Commission) proposes an amendment to §225.3, concerning Issuance of Peace Officer License through a Medical Corporation. Subsection (d) removes obsolete rule cross-referencing. Rule 217.11 was incorporated into rule 218.3. Subsection (e) reflects the effective date.

This amendment is necessary to reflect the correct rule cross-referencing.

John Beauchamp, General Counsel, has determined that for each year of the first five years the amendment as proposed will be in effect, there will be little or no effect on state or local governments as a result of administering this amendment.

Mr. Beauchamp has also determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by providing the public with the correct rule cross-referencing.

Mr. Beauchamp has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small business, individuals, or both as a result of the proposed section.

Comments on the proposal may be submitted electronically to public.comment@tcole.texas.gov or in writing to Mr. Kim

Vickers, Executive Director, Texas Commission on Law Enforcement, 6330 E. Highway 290, Suite 200, Austin, Texas 78723-1035.

The amendment is proposed under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority.

The rule amendment as proposed is in compliance with Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority.

No other code, article, or statute is affected by this proposal.

§225.3. *Issuance of Peace Officer License through a Medical Corporation.*

(a) The commission shall issue a peace officer license to an individual appointed by a medical corporation who meets all the minimum standards for peace officer licensure, and submits both the current commission application and any required fees.

(b) A medical corporation that appoints an individual who already holds a valid, active peace officer license shall meet the appointment requirements of §217.7 (relating to Reporting the Appointment and Termination of a Licensee), including submitting any required fee.

(c) A medical corporation that appoints an individual with a 180-day break in service shall meet the appointment requirements of §217.7 of this title, including submitting any required fee.

(d) Individuals licensed as peace officers appointed by a medical corporation shall meet the continuing education requirements in Chapter 218 of this title. [~~§217.11 of this title (relating to Legislatively Required Continuing Education for Licensees).~~]

(e) The effective date of this section is September 1, 2016. [~~July 15, 2010.~~]

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 16, 2016.

TRD-201601260

Kim Vickers

Executive Director

Texas Commission on Law Enforcement

Earliest possible date of adoption: May 1, 2016

For further information, please call: (512) 936-7713

