

AGENDA ITEM MEMO

BOARD MEETING DATE: February 8, 2024

TO: Board Members

THROUGH: Jeff Walker, Executive Administrator
Ashley Harden, General Counsel
Rebecca Trevino, Chief Financial Officer
Matt Nelson, Deputy Executive Administrator, Office of Planning

FROM: Temple McKinnon, Director, Water Supply Planning
Sarah Lee, Manager, Regional Water Planning

SUBJECT: Proposed rulemaking in 31 TAC Chapter 357 related to regional water planning

ACTION REQUESTED

Consider authorizing publication of proposed amendment to 31 Texas Administrative Code (TAC) Chapter 357 relating to regional water planning.

BACKGROUND

The proposed amendment will implement legislative changes from House Bill (HB) 1565 from the 88th Regular Legislative Session (2023).

KEY ISSUES

House Bill 1565 added a requirement for regional water plans to include information on implementation of large projects, including reservoirs, interstate water transfers, innovative technology projects, desalination plants, and other large projects as determined by the Board. The information required includes expenditures of sponsor money, permit applications, and status updates on the phase of construction of a project.

RECOMMENDATION

The Executive Administrator recommends authorizing the publication of 31 TAC § 357.34 for public comment.

Attachment:

Preamble and Proposed Amendment to 31 TAC Chapter 357

The Texas Water Development Board (TWDB) proposes an amendment to 31 Texas Administrative Code (TAC) § 357.34(g).

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

House Bill 1565, 88th R.S. (2023), added a requirement for regional water plans to include information on implementation of large projects, including reservoirs, interstate water transfers, innovative technology projects, desalination plants, and other large projects as determined by the board. Information about the large projects includes expenditures of sponsor money, permit applications and status updates on the phase of construction of a project.

This rulemaking implements the requirements of HB 1565.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

§357.34 Identification and Evaluation of Potentially Feasible Water Management Strategies and Water Management Strategy Projects.

Subsection 357.34(g) is added to require that the regional water planning groups provide data related to recommended large water management strategies and associated projects in order to comply with HB 1565, 88th R.S. (2023). The proposed rule lists the information needed and the types of strategies and projects that fall under the rule. More exact thresholds of what constitutes “large” will be provided in regional water planning contract technical guidance.

Remaining subsections are renumbered to accommodate the new provision.

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

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration.

This rule is not expected to result in reductions in costs to either state or local governments. There is no net change in costs for state and local government. This rule is not expected to have any impact on state or local revenues. The rule may require an increase in expenditures for state or local governments as a result of administering it, but grant funding for the regional water planning groups will increase to cover the additional cost. Additionally, there are no foreseeable implications relating to state or local governments’ costs or revenue resulting from this rule.

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

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

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

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as it will require the regional water plans to include additional information related to large water supply projects. Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the rules will not impose an economic cost on persons required to comply with the rule as the regional water planning groups will receive grant funding for the task.

ECONOMIC AND LOCAL EMPLOYMENT IMPACT STATEMENT (Texas Government Code §§2001.022, 2006.002); REGULATORY FLEXIBILITY ANALYSIS (Texas Government Code §2006.002)

The TWDB has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The TWDB also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of enforcing this rulemaking. The TWDB also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION (Texas Government Code §2001.0225)

The TWDB reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the rulemaking is not subject to Texas Government Code §2001.0225, because it does not meet the definition of a “major environmental rule” as defined in the Administrative Procedure Act. A “major environmental rule” is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to require additional information related to large water supply projects in the regional water plans.

Even if the proposed rule were a major environmental rule, Texas Government Code §2001.0225 still would not apply to this rulemaking because Texas Government Code §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a

standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather Texas Water Code §§6.101 and 16.053. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

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

TAKINGS IMPACT ASSESSMENT (Texas Government Code §2007.043)

The TWDB evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to require additional information related to large water supply projects in the regional water plans. The proposed rule will substantially advance this stated purpose by requiring the regional water planning groups to include new information related to the implementation status of large water management strategies that are listed in the regional water plan.

The TWDB's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation as required by state law, which is exempt under Texas Government Code §2007.003(b)(4). The TWDB is the agency that collects, analyzes, and disseminates water-related data and provides other services necessary to aid in planning and managing the state's water resources.

Nevertheless, the TWDB further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT (Texas Government Code §2001.0221)

The TWDB reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the

first five years the proposed rule would be in effect, the proposed rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy.

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

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov, or by fax to (512) 475-2053. Comments will be accepted until 5:00 p.m. of the 31st day following publication in the Texas Register. Include 357.34 in the subject line of any comments submitted.

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

The amendment is proposed under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code § 16.053. This amendment is proposed under the authority of House Bill 1565, passed during the 88th Texas Legislative Regular Session.

*n

§357.30 Description of the Regional Water Planning Area. No change.

§357.31 Projected Population and Water Demands. No change.

§357.32 Water Supply Analysis. No change.

§357.33 Needs Analysis: Comparison of Water Supplies and Demands. No change.

§357.34 Identification and Evaluation of Potentially Feasible Water Management Strategies and Water Management Strategy Projects

(a) No change.

(b) No change.

(c) No change.

(d) No change.

(e) No change.

(f) No change.

(g) Implementation of large recommended WMSs and associated WMSPs.

(1) For large recommended WMSs and associated WMSPs, RWPGs must include the following information:

(A) expenditures of sponsor money;

(B) permit applications, including the status of a permit application; and

(C) status updates on the phase of construction of a project.

(2) For purposes of this subchapter, large WMSs include:

(A) any reservoir,

(B) any seawater desalination

(C) large direct potable reuse strategies

(D) large brackish groundwater strategies

(E) large aquifer storage and recovery strategies

(F) all water transfers to or from out of state

(G) any other innovative technology strategies the Executive Administrator considers appropriate

(h)~~(g)~~ If an RWPG does not recommend aquifer storage and recovery strategies, seawater desalination strategies, or brackish groundwater desalination strategies it must document the reason(s) in the RWP.

(i)~~(h)~~ In instances where an RWPG has determined there are significant identified Water Needs in the RWPA, the RWP shall include an assessment of the potential for aquifer storage and recovery to meet those Water Needs. Each RWPG shall define the threshold to determine whether it has significant identified Water Needs. Each RWP shall include, at a minimum, a description of the methodology used to determine the threshold of significant needs. If a specific assessment is conducted, the assessment may be based on information from existing studies and shall include minimum parameters as defined in contract guidance.

(j)~~(i)~~ Conservation, Drought Management Measures, and Drought Contingency Plans shall be considered by RWPGs when developing the regional plans, particularly during the process of identifying, evaluating, and recommending WMSs. RWPGs shall incorporate water conservation planning and drought contingency planning in the RWPA.

(1) Drought Management Measures including water demand management. RWPGs shall consider Drought Management Measures for each need identified in §357.33 of this title and shall include such measures for each user group to which Texas Water Code §11.1272 (relating to Drought Contingency Plans for Certain Applicants and Water Right Holders) applies. Impacts of the Drought Management Measures on Water Needs must be consistent with guidance provided by the Commission in its administrative rules implementing Texas Water Code §11.1272. If an RWPG does not adopt a drought management strategy for a need it must

document the reason in the RWP. Nothing in this paragraph shall be construed as limiting the use of voluntary arrangements by water users to forgo water usage during drought periods.

(2) Water conservation practices. RWPGs must consider water conservation practices, including potentially applicable best management practices, for each identified Water Need.

(A) RWPGs shall include water conservation practices for each user group to which Texas Water Code §11.1271 and §13.146 (relating to Water Conservation Plans) apply. The impact of these water conservation practices on Water Needs must be consistent with requirements in appropriate Commission administrative rules related to Texas Water Code §11.1271 and §13.146.

(B) RWPGs shall consider water conservation practices for each WUG beyond the minimum requirements of subparagraph (A) of this paragraph, whether or not the WUG is subject to Texas Water Code §11.1271 and §13.146. If RWPGs do not adopt a Water Conservation Strategy to meet an identified need, they shall document the reason in the RWP.

(C) For each WUG or WWP that is to obtain water from a proposed interbasin transfer to which Texas Water Code §11.085 (relating to Interbasin Transfers) applies, RWPGs shall include a Water Conservation Strategy, pursuant to Texas Water Code §11.085(l), that will result in the highest practicable level of water conservation and efficiency achievable. For these strategies, RWPGs shall determine, and report projected water use savings in gallons per capita per day based on its determination of the highest practicable level of water conservation and efficiency achievable. RWPGs shall develop conservation strategies based on this determination. In preparing this evaluation, RWPGs shall seek the input of WUGs and WWPs as to what is the highest practicable level of conservation and efficiency achievable, in their opinion, and take that input into consideration. RWPGs shall develop water conservation strategies consistent with guidance provided by the Commission in its administrative rules that implement Texas Water Code §11.085. When developing water conservation strategies, the RWPGs must consider potentially applicable best management practices. Strategy evaluation in accordance with this section shall include a quantitative description of the quantity, cost, and reliability of the water estimated to be conserved under the highest practicable level of water conservation and efficiency achievable.

(D) RWPGs shall consider strategies to address any issues identified in the information compiled by the Board from the water loss audits performed by Retail Public Utilities pursuant to §358.6 of this title (relating to Water Loss Audits).

(3) RWPGs shall recommend Gallons Per Capita Per Day goal(s) for each municipal WUG or specified groupings of municipal WUGs. Goals must be recommended for each planning decade and may be a specific goal or a range of values. At a minimum, the RWPGs shall include Gallons Per Capita Per Day goals based on drought conditions to align with guidance principles in §358.3 of this title (relating to Guidance Principles).

(k)~~(j)~~ RWPs shall include a subchapter consolidating the RWPG's recommendations regarding water conservation. RWPGs shall include in the RWPs model Water Conservation Plans pursuant to Texas Water Code §11.1271.

§357.35 Recommended and Alternative Water Management Strategies and Water Management Strategy Projects. No change.