

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 365. RURAL WATER ASSISTANCE FUND

The Texas Water Development Board (TWDB) proposes amendments to 31 Texas Administrative Code (TAC) §§365.2, 365.3, 365.5, 365.21 - 365.23, 365.41, and §§365.43 - 365.45.

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

Chapter 365 contains the agency's programmatic rules related to the Rural Water Assistance Fund. The TWDB proposes to amend the rules to implement legislation and clarify the method in which interest rates will be set for loans when the source of funding is other than bond proceeds. Additionally, TWDB proposes to amend the rules to modernize the language, provide consistency with TWDB's general financial assistance programs' rules, and clarify requirements for borrowers.

Senate Bill 469, 88th R.S. (2023), amended Chapters 15 and 17 of the Water Code by adding a general definition of "rural political subdivision." This general definition replaces the current definition applicable to the Rural Water Assistance Fund. This rulemaking implements SB 469's definition of "rural political subdivision" applicable to the Rural Water Assistance Fund.

Senate Bill 28, 88th R.S. (2023), amended Chapter 15 of the Water Code to authorize the TWDB to use money in the Rural Water Assistance Fund to contract for outreach, financial, planning, and technical assistance to assist rural political subdivisions for a purpose described by Section 15.994 (Use of Fund), including obtaining and using financing from funds and accounts administered by TWDB. This rulemaking implements SB 28's expansion of allowable technical assistance applicable to the Rural Water Assistance Fund.

31 Texas Administrative Code §365.5 contains rules related to the setting of interest rates. The rule does not currently address how interest rates will be set for loans when the funding source is other than bond proceeds. This rulemaking proposes the Executive Administrator determine lending rate scales for loans funded by a source other than bond proceeds.

This rulemaking includes substantive and non-substantive changes and updates to make this chapter more consistent with TWDB rules and to clarify requirements for TWDB borrowers.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Chapter 365 Rural Water Assistance Fund

Subchapter A. Introductory Provisions

Section 365.2. Definitions of Terms.

The proposed amendment revises the definition of rural political subdivision in §365.2(6) to implement SB 469. The rule proposes to include as a rural political subdivision those municipalities with a population of 10,000 or less.

While the definition in SB 469 excluded municipalities with a population of 10,000 or less no part of the service area of which is located in an urban area with a population of more than 50,000, the definition in SB 469 also includes an entity that "demonstrates in a manner satisfactory to the board that the entity is rural." (See Texas Water Code §15.001(14)(B)(i) and (D) as added by Acts 2023, 88th Leg., R.S., Ch. 1064 (SB 469)). The TWDB interprets these two pieces together to include all municipalities with a population of 10,000 or less in the definition of "rural political subdivision."

Section 365.3. Use of Funds.

The proposed amendment revises §365.3(c) to implement SB 28's technical assistance requirements applicable to the Rural Water Assistance Fund, which broadens the TWDB's authority to provide technical assistance.

Section 365.5. Interest Rates for Loans.

The proposed amendment seeks to address the setting of interest rates for loans funded by a source other than bond proceeds. For loans funded by a source other than bond proceeds the Executive Administrator will determine the lending rate scale.

Subchapter B. Application Procedures.

Section 365.21. Preapplication Meeting.

The proposed amendment requires an applicant to schedule a preapplication conference with board staff.

Section 365.22. Application for Assistance.

The proposed amendment modernizes the rule language, provides consistency with TWDB's general financial assistance programs' rules, and clarifies requirements for borrowers. The amendment proposes to remove the requirement that an application be in writing and replace it with the requirement that an application be in the form and numbers prescribed by the executive administrator. The amendment clarifies what application information is required for the application to be considered administratively complete. The proposed amendment clarifies that the executive administrator may return an incomplete application. The amendment proposes to require an additional statement in the required application affidavit that the applicant is, or will come into, compliance with all material contracts.

Section 365.23. Pre-design Funding Option.

The proposed amendment modernizes the rule language, provides consistency with TWDB's general financial assistance programs' rules, and corrects citations.

Subchapter C. Closing and Release of Funds

Section 365.41. Loan Closing.

The proposed amendment modernizes the rule language, provides consistency with TWDB's general financial assistance programs' rules, and clarifies requirements for borrowers. The amendment proposes to require the transcript of proceedings within 60 days of closing.

Section 365.43. Release of Funds.

The proposed amendment modernizes the rule language, provides consistency with TWDB's general financial assistance pro-

grams' rules, clarifies requirements for borrowers, and corrects citations. The amendment proposes that for release of funds for building purposes, prior executive administrator approval is required if the applicant is relying on evidence of its legal authority to complete necessary acquisitions. The amendment proposes that for projects constructed through one or more construction contracts, the executive administrator may approve the release of funds only for a construction contract that has been approved for construction.

Section 365.44. Loan Agreements for Nonprofit Water Supply or Sewer Service Corporations.

The proposed amendment deletes the current list of information required and cites to §15.996 of the Water Code for applicable requirements.

Section 365.45. Engineering Design Approvals.

The amendment proposes to modernize the rules language, deletes the current list of information required, and cites to 31 Texas Administrative Code §363.41 for applicable contract document requirements.

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

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

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for state or local governments as the rules are necessary to implement legislation and participation in TWDB's financial assistance programs is voluntary. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

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

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

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

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as it clarifies eligibility, requirements, and methodology for TWDB borrowers. Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the rules will not impose an economic cost on persons required to comply with the rule as participation in TWDB financial assistance programs is voluntary.

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 clarify eligibility, requirements, and methodology for TWDB borrowers.

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 (1) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather Texas Water Code §15.995. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

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

TAKINGS IMPACT ASSESSMENT (Texas Government Code §2007.043)

The TWDB evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government

Code, Chapter 2007. The specific purpose of this rule is to clarify eligibility, requirements, and methodology for TWDB borrowers. The proposed rules would substantially advance this stated purpose by aligning the rule's definitions and permissible use of funds with Water Code, Chapter 15, clarifying how interest rates will be set for TWDB borrowers, and providing greater consistency between TWDB program rules.

The TWDB's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code §2007.003(b)(4). The TWDB is the agency that implements the Rural Water Assistance Fund Program.

Nevertheless, the TWDB further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, this rule is merely an amendment to conform with statutory changes and clarify program methodology. It does not require regulatory compliance by any persons or political subdivisions. 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 Chapter 365 in the subject line of any comments submitted.

SUBCHAPTER A. INTRODUCTORY PROVISIONS

31 TAC §§365.2, 365.3, 365.5

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 §15.995.

This rulemaking affects Water Code, Chapter 15.

§365.2. *Definitions of Terms.*

Words and terms used in this chapter shall have the following meanings, unless the context clearly indicates otherwise. Words defined in Texas Water Code Chapter 15 or 17 and not defined here shall have the meanings provided by the appropriate Texas Water Code chapter.

(1) Applicant--A rural political subdivision, including a rural political subdivision which has entered into an agreement with a Federal Agency or State Agency for the purpose of submitting a joint application.

(2) District--A conservation or reclamation district created under Texas Constitution, Section 52, Article III, or Section 59, Article XVI.

(3) Federal agency--An agency or other entity of the United States, including the United States Department of Agriculture or an agency or entity that is acting through or on behalf of that department.

(4) Fund--The Rural Water Assistance Fund.

(5) Nonprofit water supply or sewer service corporation--A water or sewer service corporation operating under Texas Water Code, Chapter 67.

(6) Rural political subdivision--

(A) A nonprofit water supply or sewer service corporation created and operating under Chapter 67 of the Texas Water Code or a [] district [] or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, no part of the service area of [municipality with a service area of 10,000 or less in population or that otherwise qualifies for financing from a federal agency or a county in] which is located in an [no] urban area with a population of more than [exceeds] 50,000 in population;

(B) a municipality;

(i) with a population of 10,000 or less; or

(ii) located wholly in a county in which no urban area has a population of more than 50,000;

(C) a county in which no urban area has a population of more than 50,000; or

(D) an entity that:

(i) is a nonprofit water supply or sewer service corporation created and operating under Chapter 67 of the Texas Water Code, a district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, a municipality, county, or other political subdivision of the state, or an interstate compact commission to which the state is a party; and

(ii) demonstrates in a manner satisfactory to the board that the entity is rural or the area to be served by the project is a wholly rural area despite not otherwise qualifying under subparagraph (A), (B), or (C) of this paragraph.

(7) State agency--An agency or other entity of the state, including the Texas Department of Agriculture and the Texas Department of Housing and Community Affairs and any agency or authority that is acting through or on behalf of the Texas Department of Agriculture or the Texas Department of Housing and Community Affairs.

§365.3. *Use of Funds.*

(a) The fund may be used to provide low-interest loans to rural political subdivisions for:

(1) water or water-related projects and for water quality enhancement projects, including but not limited to:

(A) the construction of infrastructure facilities for wholesale or retail water or sewer service;

(B) desalination projects;

(C) the purchase or lease of water well fields;

(D) property necessary for water well fields;

(E) the purchase or lease of rights to produce groundwater;

(F) onsite or wetland wastewater treatment facilities; and

(G) the interim financing of construction projects;

(2) water projects included in the state water plan or a regional water plan;

(3) development of groundwater sources and acquisition of water rights, including groundwater and surface water rights;

(4) the acquisition of retail public utilities as defined by §13.002 of the Texas Water Code;

(5) the acquisition of water supply or sewer services facilities or systems owned by municipalities or other political subdivisions;

(6) construction, acquisition, or improvement of water and wastewater projects to provide services to an economically distressed area;

(7) planning and design costs, permitting costs, and other costs associated with state or federal regulatory activities with respect to a project; and

(8) obtaining water or wastewater service supplied by other political subdivisions or financing the consolidation or regionalizing of neighboring political subdivisions, or both.

(b) The fund may be used to provide zero interest loans, negative interest loans, loan forgiveness, or grants for any purpose described in subsection (a) of this section under criteria developed by the board.

(c) The board may use money in the fund to contract for outreach, financial, planning, and technical assistance to assist rural political subdivisions [in obtaining and using financing from any source] for a purpose described by §15.994 of the Texas Water Code, including in obtaining and using financing from funds and accounts administered by the board.

(d) The fund may be used to buy down interest rates on loans.

(e) The fund may be used to finance a joint application submitted by a rural political subdivision and a federal agency, a state agency, or another rural political subdivision where the parties have entered into an agreement to submit a joint application for financial assistance.

(f) The fund may be used as a source of revenue for the repayment of principal and interest on water financial assistance bonds issued by the board if the proceeds of the sale of these bonds will be deposited into the fund.

§365.5. *Interest Rates for Loans.*

The procedure and method for setting fixed interest rates includes the following.

(1) The executive administrator will set fixed interest rates under this section for loans on a date that is five business days prior to the political subdivision's adoption of the ordinance or resolution authorizing its bonds and not more than 45 days before the anticipated closing of the loan from the board. After 45 days from the establishment of the interest rate of a loan, rates will be reconsidered, and may be extended only with the approval of the executive administrator.

(2) For loans from the Rural Water Assistance Fund, the executive administrator will set the interest rates in accordance with the following:

(A) to the extent that the source of funding is provided from bond proceeds issued through the Water Development Fund specifically designated for this fund, the lending rate scale(s) will be determined as provided under §363.33(b) of this title (relating to Interest Rates for Loans and Purchase of Board's Interest in State Participation Projects); ~~or~~

(B) for loans where the interest rates calculated in subparagraph (A) of this paragraph results in a true interest cost that is less than the minimum true interest cost of the lending rate scale established for those funds, interest will be calculated at a rate increased to match the minimum true interest costs so the board may recover all costs attributed to the bonds sold by the board; ~~or~~

(C) for loans funded by the board with proceeds of bonds, the interest for which is intended to be tax exempt for purposes of federal tax law, the executive administrator will limit the interest set pursuant to this subsection at no higher than the rate permitted under federal tax law to maintain the tax exemption for the interest on the board's bonds; or [-]

(D) for loans funded without bond proceeds, the lending rate scale(s) will be determined by the executive administrator.

(3) The board, at its discretion, may require applicants to receive a portion of the project funding from other board loan programs.

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 April 12, 2024.

TRD-202401507

Ashley Harden

General Counsel

Texas Water Development Board

Earliest possible date of adoption: May 26, 2024

For further information, please call: (512) 463-6072



SUBCHAPTER B. APPLICATION PROCEDURES

31 TAC §§365.21 - 365.23

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 §15.995.

This rulemaking affects Water Code, Chapter 15.

§365.21. Preapplication Meeting.

An applicant seeking financial assistance must ~~should~~ schedule a preapplication conference with the board staff to obtain guidance and establish basic eligibility of the project and of the rural political subdivision for financial assistance.

§365.22. Application for Assistance.

(a) ~~An [A rural political subdivision shall submit an]~~ application must be in the form and numbers prescribed by the executive administrator ~~[for financial assistance in writing].~~

(b) The executive administrator may request any additional information needed to evaluate the application and may return any incomplete applications.

(c) ~~[(b)]~~ The following information is required on all applications to the board for financial assistance to be considered an administratively complete application.

(1) General, fiscal and legal information required includes:

(A) the name and address of the rural political subdivision;

(B) a citation of the law under which the rural political subdivision operates and was created;

(C) the total cost of the project;

(D) the amount of financial assistance being requested;

(E) a description of the project;

(F) the name, address, email, and telephone number of the authorized representative, engineer, and any other consultant(s);

(G) the source of repayment and the status of legal authority to pledge selected revenues;

(H) the financing plan for repaying the total cost of the project;

(I) the rural political subdivision's default history;

(J) the most recent annual financial statements and latest monthly and year-to-date financial reports for the General Fund and Utility Fund of the political subdivision;

(K) a certified copy of a resolution of the rural political subdivision's governing body requesting financial assistance from the board, authorizing the submission of the application, and designating the authorized representative for executing the application, and for appearing before the board;

(L) a notarized affidavit from the authorized representative stating that:

(i) for a rural political subdivision, 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);

(ii) the information submitted in the application is true and correct according to the best knowledge and belief of the representative;

(iii) the applicant has no litigation or other proceedings pending or threatened against the applicant that would materially adversely affect the financial condition of the applicant or the ability of the applicant to issue debt;

(iv) the applicant has no pending, threatened, or outstanding judgments, orders, fines, penalties, taxes, assessment or

other enforcement or compliance issue of any kind or nature by EPA, the Texas Commission on Environmental Quality, Texas Comptroller, Texas Secretary of State, or any other federal, state or local government, except for such actions identified in the affidavit; ~~and~~

(v) the applicant is, or will become, in compliance with all material contracts; and

(vi) ~~(v)~~ the applicant is and must remain during the term of any financial assistance received from the board in 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;~~

(M) any special request for repayment structure that reflects the particular needs of the rural political subdivision.

(2) Preliminary Engineering Feasibility Report ~~[feasibility report]~~. An applicant must ~~shall~~ submit an engineering feasibility report in accordance with §363.13 of this title (relating to Preliminary Engineering Feasibility Report ~~[Data]~~).

(3) Environmental Assessment ~~[assessment]~~. An applicant must ~~shall~~ submit an environmental assessment in accordance with §363.14 of this title (relating to Environmental Assessment).

(4) Required Water Conservation Plan ~~[water conservation plan]~~. An applicant must ~~shall~~ submit a water conservation plan prepared in accordance with §363.15 of this title (relating to Required Water Conservation Plan).

(5) Funding from Other Sources ~~[other sources]~~. If additional funds are necessary to complete the project, or if the applicant has applied for or ~~and/or~~ received a commitment from any other funding agency for the project or any aspect of the project, an applicant must ~~shall~~ submit a listing of those sources, including total project costs, financing terms, and current status of the funding requests.

(6) Additional Application Information ~~[application information]~~. An applicant must ~~shall~~ submit any additional information requested by the executive administrator as necessary to complete the financial, legal, engineering, and environmental reviews.

(d) ~~(c)~~ A rural political subdivision may enter into an agreement with a federal agency, a state agency, or another rural political subdivision to submit a joint application for financial assistance under this subchapter.

§365.23. Pre-design Funding Option.

(a) This loan application option will provide an eligible applicant that meets all applicable board requirements an alternative to secure a commitment and close a loan for the pre-design, design or building costs associated with a project. Under this option, a loan may be closed and funds necessary to complete planning and design activities released. If planning requirements have not been satisfied, design and building funds will be held or escrowed and released in the sequence described in this section. Following completion of planning activities and environmental assessment, the executive administrator may require the applicant to make changes in order to proceed with the project. If the portion of a project associated with funds in escrow cannot proceed, the loan recipient must ~~shall~~ use the escrowed funds to pay off the obligations to the board in inverse order of maturity.

(b) The executive administrator may recommend to the board the use of this section if, based on available information, there appear to be no significant permitting, social, environmental, engineering, or financial issues associated with the project. An application for pre-design funding may be considered by the board despite a negative recommendation from the executive administrator.

(c) Applications for pre-design funding must include the following information:

(1) for loans including building cost, a preliminary engineering feasibility report which will include at minimum: a description and purpose of the project; area maps or drawings as necessary to fully locate the project area(s); a proposed project schedule; estimated project costs and budget including sources of funds; current and future populations and projected water needs and sources; alternatives considered; and a discussion of known permitting, social or environmental issues which may affect the alternatives considered and the implementation of the proposed project;

(2) contracts for engineering services, which may be in draft form;

(3) evidence that an approved water conservation plan will be adopted prior to the release of loan funds;

(4) all information required in §365.22 ~~[§384.22(b)(1)]~~ of this title (relating to Application for Assistance); and

(5) any additional information the executive administrator may request to complete evaluation of the application.

(d) After board commitment and completion of all closing and release prerequisites as specified in §365.41 ~~[§384.41]~~ of this title (relating to Loan Closing), §365.42 ~~[§384.42]~~ of this title (relating to Deed of Trust and Other Required Documentation), and §365.43 ~~[§384.43]~~ of this title (relating to Release of Funds), funds will be released in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase;

(2) for design costs, after receipt of executed contracts for the design phase and upon approval of an engineering feasibility report as specified in §363.13 of this title (relating to Engineering Feasibility Data) and compliance with §363.14 of this title (relating to Environmental Assessment);

(3) for building costs, after issuance of any applicable permits, and after bid documents are approved and executed construction documents are contingently awarded.

(e) Board staff will use preliminary environmental data provided by the applicant, as specified in subsection (d) of this section and make a written report to the executive administrator on known or potential significant social or environmental concerns. Subsequently, these projects must have a favorable executive administrator's recommendation which is based upon a full environmental review during planning, as provided under §363.14 of this title.

(f) The executive administrator will advise the board concerning projects that involve major economic or administrative impacts to the applicant resulting from environmentally related special mitigative or precautionary measures from an environmental assessment under §363.14 of this title.

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 April 12, 2024.

TRD-202401521



SUBCHAPTER C. CLOSING AND RELEASE OF FUNDS

31 TAC §§365.41, 365.43 - 365.45

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 §15.995.

This rulemaking affects Water Code, Chapter 15.

§365.41. *Loan Closing.*

(a) Instruments ~~Needed~~ ~~[needed]~~ for Closing ~~[closing]~~. The documents which shall be required at the time of closing ~~[shall]~~ include the following:

(1) if not closing under the pre-design funding option, evidence that 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 bond ordinance, order or resolution adopted by the governing body authorizing the issuance of debt to be sold to the board, or an executed promissory note and loan agreement, that is acceptable to the executive administrator and which must ~~[shall]~~ have sections providing as follows:

(A) if loan proceeds are to be deposited into an escrow account, at the closing on all or a portion of the loan or grant, then an escrow account must ~~[shall]~~ be created that must ~~[shall]~~ be separate from all other accounts and funds, as follows:

(i) the account must ~~[shall]~~ be maintained by an escrow agent as defined in §363.2 of this title (relating to Definitions of Terms);

(ii) funds must ~~[shall]~~ not be released from the escrow account without written approval by the executive administrator;

(iii) upon request of the executive administrator, the escrow account statements must ~~[shall]~~ be provided to the executive administrator;

(iv) the investment of any loan or grant proceeds deposited into an escrow account must ~~[shall]~~ be handled in a manner that complies with the Public Funds Investment Act, Texas Government Code, Chapter 2256; and

(v) the escrow account must ~~[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, Texas Government Code, Chapter 2257;

(B) that a construction account must ~~[shall]~~ be created, which must ~~[shall]~~ be separate from all other accounts and funds of the applicant;

(C) that a final accounting be made to the board of the total sources and authorized use of project funds within 60 days of the completion of the project and that any surplus loan funds be used in a manner as approved by the executive administrator;

(D) that an annual audit of the rural political subdivision, prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant be provided annually to the executive administrator;

(E) that the rural political subdivision must ~~[shall]~~ fix and maintain rates and collect charges to provide adequate operation, maintenance and insurance coverage on the project in an amount sufficient to protect the board's interest;

(F) that the rural political subdivision must ~~[shall]~~ document the adoption and implementation of an approved water conservation program for the duration of the loan, in accordance with §363.15 of this title;

(G) that the rural political subdivision must ~~[shall]~~ maintain current, accurate and complete records and accounts in accordance with generally accepted accounting principles necessary to demonstrate compliance with financial assistance related legal and contractual provisions;

(H) that the rural political subdivision covenants to abide by the board's rules and relevant statutes, including the Texas Water Code, Chapters 15 and 17;

(I) that the rural political subdivision or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the rural political subdivision's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis substantially in the manner 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 rural political subdivision's obligations, if the board sells or otherwise transfers such obligations, and the beneficial owners of the board's obligations if the rural political subdivision is an obligated person with respect to such obligations under rule 15c2-12;

(J) that all payments must ~~[shall]~~ be made to the board via wire transfer or in a manner acceptable to the Executive Administrator at no cost to the board;

(K) that the partial redemption of bonds or other authorized securities be made in inverse order of maturity;

(L) that insurance coverage be obtained and maintained in an amount sufficient to protect the board's interest in the project;

(M) that the rural political subdivision must ~~[shall]~~ establish a dedicated source of revenue for repayment; and

(N) any other recitals mandated by the executive administrator;

(3) evidence that the rural political subdivision has adopted a water conservation program in accordance with §363.15 of this title (relating to Required Water Conservation Plan);

(4) an unqualified approving opinions of the attorney general of Texas and a certification from the comptroller of public accounts that such debt has been registered in that office;

(5) if obligations are issued, an unqualified approving opinion by a recognized bond attorney acceptable to the executive admin-

istrator, or if a promissory note and loan agreement is used, an opinion from the corporation's attorney which is acceptable to the executive administrator;

(6) executed escrow agreement entered into by the entity and an escrow agent satisfactory to the executive administrator, in the event that funds are escrowed, or a certificate of trust as defined in §363.2 of this title, if applicable; and

(7) other or additional data and information, if deemed necessary by the executive administrator.

(b) Certified Transcript [~~transcript~~]. Within 60 days of closing, [At such time as available following the final release of funds] the rural political subdivision must [~~shall~~] submit a transcript of proceedings relating to the debt purchased by the board which must [~~shall~~] contain those instruments normally furnished a purchaser of debt.

(c) Additional Closing Requirements [~~closing requirements~~] for Bonds [~~bonds~~]. A rural political subdivision will [~~shall~~] be required to comply with the following closing requirements if the applicant issues obligations that are purchased by the board:

(1) all bonds must [~~shall~~] be closed in book-entry-only form;

(2) the rural political subdivision must [~~shall~~] use a paying agent/registrant that is a depository trust company (DTC) participant;

(3) the rural political subdivision must [~~shall~~] be responsible for paying all DTC closing fees assessed to the rural political subdivision by the board's custodian bank directly to the board's custodian bank;

(4) the rural political subdivision must [~~shall~~] provide evidence to the board that one fully registered bond has been sent to the DTC or to the rural political subdivision's paying agent/registrant prior to closing; and

(5) the rural political subdivision must [~~shall~~] provide a private placement memorandum containing a detailed description of the issuance of debt to be sold to the board that is acceptable to the executive administrator.

§365.43. *Release of Funds.*

(a) Release of Funds for Planning, Design, and Permits [~~funds for planning, design and permits~~]. Prior to the release of funds for planning, design, and permits, the rural political subdivision must [~~shall~~] submit for approval to the executive administrator the following documents:

(1) a statement as to sufficiency of funds to complete the activity;

(2) certified copies of each contract under which revenues for repayment of the rural political subdivision's debt will accrue;

(3) executed consultant contracts relating to services provided for planning, design, and [~~and/or~~] permits;

(4) unless funds are released under the pre-design funding option, evidence that the requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations; and

(5) other such instruments or documents as the board or executive administrator may require.

(b) Pre-design Funding [~~funding~~]. The funds needed for the total estimated cost of the engineering, planning, and design cost if the engineering feasibility report required under §363.13 of this title (relating to Preliminary Engineering Feasibility Data) and the environ-

mental assessment required under §363.14 of this title (relating to Environmental Assessment) have been approved, the cost of issuance associated with the loan, and any associated capitalized interest will be released to the loan recipient and the remaining funds will be escrowed to the escrow agent until all applicable requirements in subsections (a) and (c) of this section and §365.23 [~~§384.23~~] of this title (relating to Pre-design Funding Option) have been met.

(c) Release of Funds for Building Purposes [~~funds for building purposes~~]. Prior to the release of funds for building purposes, the rural political subdivision must [~~shall~~] submit for approval to the executive administrator the following documents:

(1) a tabulation of all bids received and an explanation for any rejected bids or otherwise disqualified bidders;

(2) one executed original copy of each construction contract the effectiveness and validity of which is contingent upon the receipt of board funds;

(3) evidence that the necessary acquisitions of land, leases, easements and rights-of-way have been completed or, with prior approval by the executive administrator if all acquisitions have not been completed, evidence that the applicant has the legal authority necessary to complete the acquisitions;

(4) a statement as to sufficiency of funds if additional funds are necessary to complete the project;

(5) certified copies of each contract under which revenues to the project will accrue;

(6) evidence that all requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including permits and authorizations; and

(7) other such instruments or documents as the board or executive administrator may require.

(d) Water Rights Certification [~~rights certification~~]. Prior to release of construction funds, the executive administrator shall make a written finding that the applicant:

(1) has the necessary water rights authorizing the applicant to appropriate and use the water that the project will provide, if the applicant is proposing surface water development; or

(2) has the right to use water that the project will provide, if the applicant is proposing groundwater development.

(e) Release of Funds for Projects Constructed Through One or More Construction Contracts [~~funds for projects constructed through one or more construction contracts~~]. For projects constructed through one or more construction contracts, the executive administrator may approve the release of funds for all or a portion of the estimated project cost, provided all requirements of subsection (c) of this section have been met, only for the construction contract that has been approved for construction. [~~for at least one of the construction contracts.~~]

(f) Escrow of Funds [~~funds~~]. The executive administrator may require the escrow of an amount of project funding related to contracts which have not met the requirements of subsection (c) of this section at the time of loan closing.

(g) Release of Funds in Installments [~~funds in installments~~]. Funds may be released to rural political subdivisions in installments and pursuant to the provisions of this section.

§365.44. *Loan Agreements for Nonprofit Water Supply or Sewer Service Corporations.*

[~~(*)~~] The board may provide financial assistance to [~~an applicant that is~~] a nonprofit water supply or sewer service corporation by

entering into a loan agreement in accordance with §15.996 of the Water Code. [~~with the nonprofit water supply or sewer service corporation.~~]

~~[(b) In addition to executing a loan agreement, the applicant must execute a promissory note in the full amount of the loan.]~~

~~[(c) An applicant which utilizes the loan agreement option is not required to engage the services of a bond counsel or a financial advisor.]~~

~~[(d) The applicant must provide the board with an attorney's opinion as to the authority of the rural political subdivision to incur the debt.]~~

§365.45. *Engineering Design Approvals.*

A rural political subdivision must [~~shall~~] obtain executive administrator approval of contract documents, including engineering plans and specifications, prior to receiving bids and awarding the contract. The contract documents must [~~shall~~] be consistent with the engineering information submitted with the application and must contain the requirements in §363.41 of this title (relating to Engineering Design Approvals). [~~following:~~]

~~[(1) provisions assuring compliance with the board's rules and all relevant statutes;]~~

~~[(2) provisions providing for the rural political subdivision to retain a minimum of 5.0% of the progress payments otherwise due to the contractor until the building of the project is substantially complete and a reduction in retainage is authorized by the executive administrator;]~~

~~[(3) a contractor's act of assurance form to be executed by the contractor which shall warrant compliance by the contractor with all laws of the state and all rules and published policies of the board; and]~~

~~[(4) any additional information or conditions that may be requested by the executive administrator.]~~

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 April 12, 2024.

TRD-202401523

Ashley Harden

General Counsel

Texas Water Development Board

Earliest possible date of adoption: May 26, 2024

For further information, please call: (512) 463-6072

