

**TO:** Board Members

**THROUGH:** Kevin Patteson, Executive Administrator  
Les Trobman, General Counsel

**FROM:** Todd Chenoweth, Senior Advisor

**DATE:** June 17, 2014

**SUBJECT:** Proposed Rulemaking  
31 TAC Chapter 363, Financial Assistance Programs  
31 TAC §353.3, Board Meetings  
31 TAC §356.10, Definitions  
31 TAC §367.2, Definitions

## **ACTION REQUESTED**

Authorize publication of proposed amendments to 31 Texas Administrative Code (TAC) Chapter 363 relating to Financial Assistance Programs, 31 TAC §353.3 relating to Board Meetings, 31 TAC §356.10 of Subchapter A relating to Definitions, and 31 TAC §367.2 relating to Definitions, along with the proposed addition of Subchapter M to 31 TAC Chapter 363 relating to the State Water Implementation Fund for Texas (SWIFT) and the State Water Implementation Revenue Fund for Texas (SWIRFT).

## **BACKGROUND**

House Bill 4 together with Senate Joint Resolution 1, passed by the 83rd Texas Legislature, created the SWIFT and the SWIRFT to help finance projects in the state water plan and to provide ongoing state financial assistance for water supplies. In accordance with Texas Water Code §15.439, the Board is required to adopt rules that provide for the use of funds in the SWIFT/SWIRFT; that establish standards for determining whether projects meet the criteria for rural political subdivisions, agricultural water conservation or water conservation and reuse; and that specify the Board's criteria for prioritization of projects. Pursuant to Texas Water Code §6.101, the Board also has the authority to adopt rules it deems necessary to carry out its powers and duties.

## **KEY ISSUES**

*Proposed Amendments to 31 TAC Chapter 363, Subchapter A (relating to General Provisions).*

### **Our Mission** : **Board Members**

To provide leadership, planning, financial assistance, information, and education for the conservation and responsible development of water for Texas : Carlos Rubinstein, Chairman | Bech Bruun, Member | Kathleen Jackson, Member  
: Kevin Patteson, Executive Administrator

The proposed amendment to §363.1 (relating to Scope of Subchapter) adds the State Water Implementation Fund for Texas and the State Water Implementation Revenue Fund for Texas to the list of financial assistance programs covered by Chapter 363. The change is required because the board is proposing to implement these new financial assistance programs by adding a Subchapter M to Chapter 363.

The proposed amendment to §363.2 (relating to Definitions of Terms) adds the acronym SWIFT for the state water implementation fund for Texas and the acronym SWIRFT for the state water implementation revenue fund for Texas to the definitions used in Chapter 363 in order to have a convenient way to refer to these programs through the Chapter.

The proposed amendment to §363.33 (relating to Interest Rates for Loans and Purchase of Board's Interest in State Participation Projects) adds loans from the SWIRFT to the list of loan financial programs for which the board will establish lending rate scales, in order to cover the new financial program established by HB 4.

The proposed amendments to §363.51 (relating to Inspection during Construction) adds the phrase "provisions for environmental mitigative measures," in order to be consistent with §363.731. The requirement that the project engineer give assurance that the project is constructed in accordance with engineering principles is deleted for consistency with Texas Water Code §§17.183(a)(5)(C), 17.185(a), and 17.187. The amendment also adds that the project is constructed in accordance with sound construction principles for consistency with Texas Water Code §17.183(a)(2)(A). And the proposed section adds the requirement that the political subdivision must take corrective action on a project as necessary to complete the project in accordance with the approved plans and specifications, in order to be consistent with §363.731, (relating to Inspection During Construction).

The proposed amendments to §363.731 (relating to Inspection During Construction) deletes the requirement that the project engineer give assurance that the project is constructed in accordance with engineering principles for consistency with Texas Water Code §§17.183(a)(5)(C), 17.185(a), and 17.187. The amendment also adds that the project is constructed in accordance with sound construction principles, in order provide oversight that the contractor is meeting the obligations of its performance bond and for consistency with Texas Water Code §17.183(a)(2)(A).

The proposed amendment to §363.951 (relating to Construction Contract Requirements) adds the requirement that the executive administrator certifies that work on construction of a project has been completed in accordance with the approved plans and specifications, as well as deleting the requirement that the certification include that the work was done in accordance with sound engineering principles and practices, in order to implement Texas Water Code §17.183(a)(5)(C).

The proposed amendment to §363.953 (relating to Inspection of Projects) deletes the requirement that the project engineer give assurance that the project is constructed in accordance with engineering principles for consistency with Texas Water Code §§17.183(a)(5)(C), 17.185(a), and 17.187. The amendment also adds that the project is constructed in accordance with sound construction principles in order provide oversight that the contractor is meeting the obligations of

its performance bond and for consistency with Texas Water Code §17.183(a)(2)(A). The rest of that section is reworded for consistency with §§363.51 and 363.731.

The proposed amendments to §363.955 (relating to Certificate of Approval) adds the words, “and specifications,” and deletes, “sound engineering principles,” in order to implement Texas Water Code §17.187.

*Proposed Amendment to 31 TAC Chapter 363 by addition of a New Subchapter M (relating to State Water Implementation Fund for Texas and State Water Implementation Revenue Fund for Texas)*

The new §363.1301 (relating to Scope of Subchapter M) is proposed to specify the scope and coverage of the Subchapter M. Subchapter M governs the board’s new financial program to provide loans to political subdivisions to finance management strategies in the state water plan. Subchapter A of Chapter 363 will also apply to the program except to the extent there is a conflict with Subchapter M, in which case Subchapter M will apply.

The new proposed §363.1302 (relating to Definition of Terms) is proposed to provide definitions of terms used throughout Subchapter M.

The proposed definition of “Agricultural water conservation” is defined by referring to the board’s existing Agricultural Water Conservation Program. Those types of projects covered by the Agricultural Water Conservation Program would be eligible for funding under the SWIFT/SWIRFT loan program if it were otherwise qualified, e.g. the project was a water management strategy in the state water plan.

The proposed definition of “Agricultural irrigation project” includes projects on agricultural lands that improve water delivery or application efficiency. Also included in the proposed definition are projects that install new water sources, such as a well, or new irrigation systems on agricultural land. Finally the proposed definition would also cover the purchase and installation of meters.

The proposed rules define “Alternative facility,” “Excess capacity,” and “Existing needs,” consistent with the use of those terms for the board’s existing state participation program, 31 TAC §§363.1001- 363.1017.

The rule proposes to define “Historically Underutilized Business,” consistent with the definition in Texas Water Code §15.431, which references Section 2161.001, Government Code, and the implementing regulations of that section.

The proposed rule would define “Reuse,” as the use of groundwater or surface water that has already been beneficially used because this is the definition used in the state water plan. See Water for Texas 2012, pages 170 and 249. This definition would include both direct reuse, where water that has been used once is treated and then reused, and indirect reuse where the once

used water is treated, discharged to a surface water body or injected into an aquifer, and then retrieved at a later time.

The proposed rule would define “Rural,” as required by Texas Water Code §15.434(b)(1)(A), which is to use the definition found in Texas Water Code §15.992. The proposed rule uses that definition but further specifies that the board will use the most current data available from the U.S. Bureau of the Census or board-approved projections for the population figures.

The proposed rule would define “Water conservation,” consistent with the definition in the state’s best management practices guide for water conservation, first developed by the Water Conservation Implementation Task Force in 2004 and since updated and maintained by the Water Conservation Advisory Council established pursuant to Texas Water Code Chapter 10. The preamble notes that Texas Water Code §15.434(b)(2) seems to draw a distinction between “water conservation,” and “reuse.” In light of this statutory language, the preamble specifically invites comments on whether the phrase “or increase the recycling and reuse of water,” should be deleted from the final definition of “water conservation.” The preamble notes that if this deletion was made, reuse projects would still count toward satisfying the requirements of the 20% of funds for water conservation and reuse.

The proposed rule would define “Water plan project,” in a manner consistent with the use of the term in the state water plan and common usage among water professionals dealing with water resources planning in Texas.

The proposed rule would define “Water supply need,” in a manner consistent with the use of the term in the state water plan and common usage among water professionals dealing with water resources planning in Texas and consistent with the use of the term in Texas Water Code §16.053.

Proposed §363.1303 (relating to the Prioritization System) provides a prioritization system required by Texas Water Code §15.437. The proposed prioritization system functions similar to the prioritization system for the current Water Infrastructure Fund of §363.1207, but dates and timing of SWIFT/SWIRFT applications will not be fixed by rule to give the board additional flexibility in the timing of when it will make funds available.

Proposed §363.1304 (relating to Prioritization Criteria) incorporates a priority criteria into the SWIFT/SWIRFT rules required by Texas Water Code §15.437. The proposed criteria provide for consideration of the various statutorily required factors, giving the most weight to those factors required by statute to receive the highest consideration. The proposed rules would implement the criteria for the local contribution to finance the project and the criteria related to federal funding for the project being used or sought by combining those two criteria into one category for obtaining points. In keeping with Texas Water Code §15.437(d)(6), the proposed rule has a proposed criteria relative to water conservation. While the proposed priority system does not have criteria for projects that serve rural political subdivisions, the executive administrator is of the opinion that many rural political subdivisions will be able to obtain points for the project meeting the needs of a high percentage of the water supply needs of the water users to be served.

Proposed §363.1305 (relating to Use of Funds) incorporates restrictions on the use of funds provided by Texas Water Code §15.474.

Proposed §363.1306 (relating to Interest Rates on Loans) identifies the timing and general method that the board would use to set the interest rates for SWIFT and SWIRFT project funding and payment deferrals.

Proposed §363.1307 (relating to Pre-design Funding Option) sets out the requirements for projects under this Subchapter to utilize the pre-design funding option.

Proposed §363.1308 (relating to Board Participation Program) sets out the requirements for projects where the applicant desires the board to acquire an ownership interest in the project that the applicant will buy back over time.

Proposed §363.1309 (related to Findings Required) states the findings by the board that are required prior to approval of an application for financial assistance under the SWIFT and SWIRFT program.

Proposed §363.1310 (related to Action of the Board on Application) sets out the board's decision on an application. The recommended proposed rule states that the commitment will include a date after which the financial assistance will no longer be available. The recommended proposed rule did not set a specific date by rule in order to retain some flexibility in adjusting the time period. The executive administrator is of the opinion that the proposed rule would allow the board to make commitments over multiple years with specific take downs amounts each year, with the interest rate for each take down determined by the debt service schedule in effect at the time.

Proposed §363.1311 (relating to Rural and Water Conservation Reporting) sets out how the board would report and account for the project funds: (1) 10% of which support projects for rural political subdivisions and agricultural water conservation, and (2) 20% of which support projects for water conservation and reuse, including agricultural irrigation projects. This proposed section is in part to implement Texas Water Code §15.434(b).

The recommended proposed rule would require the executive administrator to assign costs to the specified categories. Any costs that are shared would be proportionally allocated. For example, for a project that served a diverse urban and rural area, the executive administrator would first decide which costs are associated with the urban area and which cost are associated with the rural area. For the remaining costs that are shared by both areas, the percentage allocated to rural would be the ratio of rural costs to the total of direct urban and rural costs.

Proposed §363.1312 (relating to Reporting Requirements Regarding Historically Underutilized Businesses) sets out a proposed requirement that political subdivisions report the use of historically underutilized businesses that worked on the board funded project. This reporting is intended to allow the executive administrator to then be able to report this information to the

State Water Implementation Fund for Texas Advisory Committee as required by Texas Water Code §15.438(n)(2).

*Proposed Amendment to 31 TAC Chapter 353, Subchapter A (relating to General Provisions).*

The proposed amendment to §353.3 (relating to Board Meetings) if adopted, would make changes to the scheduling of board meetings, the presiding board member in the absence of the Chairman, and the calling of special meetings of the board. The amendment is necessary because the 83<sup>rd</sup> Legislature passed House Bill 4, Section 1.06 which amended Texas Water Code Section 6.060 (relating to Board Meetings). The proposed rule is necessary to implement that provision.

*Proposed Amendments to 31 TAC Chapter 356, Subchapter A (relating to General Provisions).*

The proposed amendment to §356.10 (relating to Definitions) if adopted, would amend the definition of “Board,” for purposes of 31 TAC Chapter 356, (relating to Groundwater Management) by deleting any reference to the number of board members serving as the governing body of the state agency, the Texas Water Development Board. The amendment is necessary because the 83<sup>rd</sup> Legislature passed House Bill 4 which amended Texas Water Code Section 6.052 (relating to Members of the Board; Appointment) to change the composition of the board from six members to three members. The proposed amendment would implement this legislative change.

*Proposed Amendments to 31 TAC Chapter 367.2, (relating to Definitions).*

The proposed amendment to §367.2 (relating to Definitions) if adopted, would amend the definition of “Board,” for purposes of 31 TAC Chapter 367, (relating to Agricultural Water Conservation Program) by deleting any reference to the number of board members serving as the governing body of the state agency, the Texas Water Development Board. The amendment is necessary because the 83<sup>rd</sup> Legislature passed House Bill 4 which amended Texas Water Code Section 6.052 (relating to Members of the Board; Appointment) to change the composition of the board from six members to three members. The proposed amendment would implement this legislative change.

**RECOMMENDATION**

Authorize publication of proposed amendments to 31 TAC Chapter 363 relating to Financial Assistance Programs, 31 TAC §353.3 of Subchapter A relating to Board Meetings, 31 TAC § 356.10 of Subchapter A relating to Definitions, and 31 TAC § 367.2 relating to Definitions, along with the proposed addition of Subchapter M to 31 TAC Chapter 363 relating to the State Water Implementation Fund for Texas (SWIFT) and the State Water Implementation Revenue Fund for Texas (SWIRFT).

Draft Rulemaking

6/17/14

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This recommendation has been reviewed by legal counsel and the action requested is within the authority of the Board.

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Les Trobman  
General Counsel

Attachment: Proposed rulemaking for publication in the Texas Register

## CHAPTER 363. FINANCIAL ASSISTANCE PROGRAMS

The Texas Water Development Board (board or TWDB) proposes amendments to 31 TAC §§363.1, 363.2, 363.33, and 363.51 of Subchapter A, relating to General Provisions, to ensure consistency with recent statutory amendments made to Chapter 15, Texas Water Code, relating to the establishment of the State Water Implementation Fund for Texas (SWIFT) and the State Water Implementation Revenue Fund for Texas (SWIRFT), and to Chapter 17, Texas Water Code, relating to Construction Contract Requirements, Inspection of Projects, and Certificates of Approval. The specific provisions being amended and the reasons for the amendments are addressed in more detail below.

The board proposes amendments to 31 TAC §363.731 of Subchapter G relating to Small Community Emergency Loan Program Division 4, Construction and Post-Construction Phase, to ensure consistency with recent statutory amendments to Chapter 17, Texas Water Code, relating to Construction Contract Requirements, Inspection of Projects, and Certificates of Approval. The specific provisions being amended and the reasons are addressed in more detail below.

The board proposes amendments to 31 TAC §§363.951, 363.953, and 363.955, of Subchapter I, relating to Pilot Program for Water and Wastewater Loans to Rural Communities Division 4, Construction and Post-Construction, to ensure consistency with recent statutory amendments to Chapter 17, Texas Water Code, relating to Construction Contract Requirements, Inspection of Projects, and Certificates of Approval. The specific provisions being amended and the reasons are addressed in more detail below.

The board proposes to add new Subchapter M, §§363.1301 – 363.1312, relating to the SWIFT and the SWIRFT, to implement certain recent statutory amendments to Chapter 15, Texas Water Code, Subchapters G and H relating to the SWIFT and the SWIRFT. These new rules are addressed in more detail below.

### BACKGROUND AND SUMMARY OF THE FACUTAL BASIS FOR THE PROPOSED AMENDMENTS.

The Legislature created the SWIFT and SWIRFT to ensure financial assistance is available to provide an adequate water supply for the future of this state. The SWIFT was created by the Legislature to serve as a water infrastructure bank in order to enhance the financing capabilities of the TWDB under constitutionally created programs and revenue bond programs. No financial assistance is provided from the SWIFT directly to political subdivisions. Instead, SWIFT provides a source of revenue or security for board financial programs and provides a cash flow mechanism under which money used in board programs flows back to the SWIFT to provide protection for the



SWIFT corpus. Money in the SWIFT will be available to provide support for low-interest loans, longer repayment terms for loans, incremental repurchase terms for projects in which the state owns an interest and deferral of loan payments. The financial assistance cannot be in the form of a grant. The SWIRFT was created by the Legislature for use in managing revenue bonds issued by the board that are supported by the SWIFT. In the preamble and rule, reference is often made to the “SWIFT and SWIRFT,” because the financial assistance to political subdivisions is provided from SWIRFT with support from SWIFT, or SWIFT may be used to support other board programs. Use of the phrase “SWIFT and SWIRFT” or “SWIFT or SWIRFT” in the preamble and rules is intended to only describe the programs and is not intended to describe the movement of monies between the two funds for any purpose. The SWIFT and SWIRFT programs are solely for the purpose of supporting projects in the state water plan.

The board is proposing the present rules to implement the SWIFT and the SWIRFT by creating a new Subchapter in Chapter 363, relating to Financial Assistance Programs. By placing the SWIFT and SWIRFT into this chapter, the provisions of Chapter 363, Subchapter A, relating to General Provisions will apply to the SWIFT and SWIRFT programs unless those provisions conflict with Subchapter M, relating to the SWIFT and the SWIRFT. This allows the board to use the procedures and practices common to many of the board’s existing financial programs rather than to recreate them separately in the SWIFT and SWIRFT rules. Applicants will find the utilization of existing and understood practices more convenient and efficient, as opposed to having to navigate and understand a totally new rule and process. Because we are placing the SWIFT and SWIRFT program as a new subchapter in existing rules, to read and understand all of the rules that will apply to the program, Chapter 363, Subchapter M, relating to SWIFT and SWIRFT, must be read together with Subchapter A, relating to General Provisions. The board is currently examining its processes and procedures for all of its financial programs looking for efficiencies and process improvements. The board intends to continually seek to enhance our processes to be as efficient as possible, consistent with our statutory duties and fiduciary responsibilities.

The executive administrator envisions that the application process for SWIFT and SWIRFT loans will function similar to the process for the existing Water Infrastructure Fund program, as modified by any process improvements. On a semiannual schedule specified by the board and not more frequently than twice in any state fiscal year, the TWDB will announce that they will be taking applications for SWIRFT/SWIRFT loans. As it is currently structured in the Water Infrastructure Fund program, the executive administrator anticipates receiving an initial abridged application and longer application at the appropriate time. The executive administrator will recommend a prioritized list of applications based on the criteria specified in proposed rule §363.1304. The prioritized list of projects, as recommended by the executive administrator, will go to the board for deliberation and preliminary decision. Those projects that are selected

by the board for funding may be required to submit additional information as part of the due diligence process. The financial application will then be subject to the executive administrator's traditional analysis for project viability and ability to repay the loan.

The executive administrator envisions that once the staff analysis is complete, based on the application and due diligence process, the application will go to the board for their deliberation and decision. If the board has made a commitment to fund the project, similar to the current process, the applicant will execute a financing agreement that allows the board to include the applicant's requested amount in the TWDB's bond issue and that specifies when the applicant must close on the loan with the board. The board may require that the applicant must close within a very short time of the board obtaining the proceeds from its bond issue that it will use to fund the loan with the applicant. A discussion regarding the timing between commitment and closing is discussed in further detail in the section by section analysis. Interest rates and the terms and conditions of the loans and any repurchase agreements will be developed on a case-by-case basis and will depend on what is necessary to meet the immediate and long-term needs for water as contained in the state water plan existing at that time, what is necessary to preserve the long-term viability of the SWIFT and SWIRFT program, and current market conditions.

The executive administrator anticipates, prior to the first round of SWIFT and SWIRFT funding, developing an instructional and Frequently Asked Questions document that will further detail the application and due diligence process.

Prior to proposing these rules, the board engaged in an extensive effort of outreach and solicitation of input and suggestions from the public on the implementation of House Bill 4, 83rd Legislature, 2013, (HB 4). Individual board members traveled across the state talking to regional water planning groups, civic organizations, the public, and representatives of various interest groups on how best to implement HB 4. The board also held work sessions on February 11, 2014, in Conroe, on February 24, 2014, in Lubbock, on March 24, 2014, in Harlingen, and on May 29, 2014, in El Paso. As an agenda item in each of these work sessions, the board took comments on what should be contained in these rules. The executive administrator also held three staff-led stakeholder meetings on January 31, February 19, and March 6, 2014, in Austin to have a dialogue with any interested parties and members of the public on the suggested content of these rules. The board also received over 35 written comments on implementation of HB 4 via e-mail or through the board's web site.

The board wishes to sincerely thank all of the individuals and organizations that provided comments on the development of these proposed rules. The board acknowledges that public participation in this process has led to the improvement of these proposed rules. For those organizations and individuals that do not see all of their

comments incorporated into these proposed rules, the board sincerely encourages you to continue to participate and use this opportunity to make formal comments on these proposed rules. The process for making comment on these proposed rules is explained toward the close of this preamble.

In addition to the comments that the board receives from members of the public through the comment process, the board will consider comments from the State Water Implementation Fund for Texas Advisory Committee in accordance with Texas Water Code §15.438(g).

During the board's solicitation of early comments for development of these proposed rules, the board received comments and suggestions on a number of issues that are not covered in the proposed rule. The board will consider similar comments if received during the official comment period of this rule.

Among those early comments were some suggestions on application processing by the executive administrator, as well as suggestions for changes to the board's oversight of political subdivisions in their bidding process and construction oversight on board-funded projects. The board appreciates those comments. The board tentatively decided not to include those suggestions in these proposed rules. In some cases those suggestions can be made without a rule change. In many cases the suggestions were made, or could be made, to all the board's financial programs, not just the SWIFT and SWIRFT. Those suggestions have been passed on to the executive administrator for his consideration. The executive administrator is actively looking for ways to improve all board financial programs and those suggestions will be carefully considered.

In a similar vein, the board received several suggestions related to the structure and the terms of financing that should be offered under SWIFT and SWIRFT financing. As will be seen, very few decisions on the structure and terms of financing, beyond what is set out in HB 4, are made in these proposed rules. Some of the suggestions the board considers valid and may be adopted by the board. The board has tentatively decided to not place those suggestions in the proposed rule. The board's current opinion is that the terms and structure of SWIFT and SWIRFT will of necessity need to change over time. In order to preserve the ability of the board to respond as quickly as events dictate, such as changing market conditions and varying demands for funding, the board is opting to keep as much flexibility as possible with the board by keeping the rules on structure and terms of the SWIFT and SWIRFT to a minimum. However, the board solicits comments on this approach as well as comments on how the SWIFT and SWIRFT financing might best be structured.

The proposed rules do not contain a rule related to the uniform standards and the prioritization of projects by the regional water planning groups set forth in Texas Water Code §15.436. Prior to the effective date of HB 4, the board created a statutorily

mandated stakeholder committee of the regional water planning groups to develop uniform standards to be used by the regional water planning groups in prioritizing their projects in their regional water plans. The stakeholder committee commenced working with a webinar on September 17, 2013. The committee then worked at developing the uniform standards at three two-day meetings and held two conference calls. The stakeholder committee submitted its Uniform Standards to the board on November 25, 2013. As required by Texas Water Code §15.436(c), the board approved the stakeholder committee's recommended uniform standards at its board meeting on December 5, 2013. The current set of uniform standards can be found on the agency's web site. If and when the stakeholder committee makes recommendations to the board to amend the uniform standards, the board intends to take up those recommendations for consideration, and if appropriate, approve amendments to the uniform standards. It may be appropriate, at some point in the future, once general consensus is reached that the regional planning group standards are appropriate and tested to propose rulemaking. However, the board solicits comments on its approach to approve the uniform standards by board item action instead of by rule. The board also solicits comments on the current uniform standards for regional water planning group prioritization of projects as approved by the board on December 5, 2013.

The board has tentatively decided to not propose a rule related to a requirement that iron and steel products and manufactured goods used in board-financed projects be produced in the United States, under certain circumstances. The board believes that the statute is self-executing and that a rule is unnecessary. The executive administrator has prepared a guidance document related to this requirement that is available on the agency's web site. The board invites comments on this approach and further invites comments as to specific language that a board rule, if pursued, related to United States-produced iron, steel and manufactured goods should contain.

During the public input into the development of these rules the board received comments on Property Assessed Clean Energy (PACE) legislation (Chapter 376, Local Government Code) and how SWIFT and SWIRFT might work together with a local PACE project. The board has tentatively decided to not propose a specific rule related to PACE and the SWIFT and SWIRFT program. The board understands that in a PACE project a local government establishes designated districts where officials and certain property owners can enter into contracts to assess properties for water and energy efficiency improvements. Lenders provide the funding for water conservation and energy efficiency devices and measures, and the lenders are paid back from the property assessments. The board does not believe that the proposed rule prohibits the use of SWIFT and SWIRFT funding for PACE projects; however, the PACE project would have to meet the statutory requirements of HB 4. The board would have to take an application from a political subdivision that would become the local lender for the PACE project. The board could not directly loan money to the businesses that participated in

the local PACE project. The project would have to be included in the state water plan. The financial assistance would be in the form of a loan to the local political subdivision and the board could only loan money for the water conservation component of the PACE project. Energy efficiency measures would have to be funded through other means.

#### SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

##### *Proposed Amendments to 31 TAC Chapter 363, Subchapter A (relating to General Provisions).*

The proposed amendment to §363.1 (relating to Scope of Subchapter) adds the State Water Implementation Fund for Texas and the State Water Implementation Revenue Fund for Texas to the list of financial assistance programs covered by Chapter 363. The change is required because the board is proposing to implement these new financial assistance programs by adding a Subchapter M to Chapter 363.

The proposed amendment to §363.2 (relating to Definitions of Terms) adds the acronym SWIFT for the state water implementation fund for Texas and the acronym SWIRFT for the state water implementation revenue fund for Texas to the definitions used in Chapter 363 in order to have a convenient way to refer to these programs through the Chapter. The board notes that it is leaving the definition for the word “grants” intact for use in other board financial programs. However, no financial assistance in the form of grants will be given by either SWIFT or SWIRFT funds.

The proposed amendment to §363.33 (relating to Interest Rates for Loans and Purchase of Board’s Interest in State Participation Projects) adds loans from the SWIFT and SWIRFT to the list of loan financial programs for which the board will establish lending rate scales, in order to cover the new financial program established by HB 4.

The proposed amendments to §363.51 (relating to Inspection during Construction) adds the phrase “provisions for environmental mitigative measures,” in order to be consistent with §363.731. The requirement that the project engineer give assurance that the project is constructed in accordance with engineering principles is deleted for consistency with Texas Water Code §§17.183(a)(5)(C), 17.185(a), and 17.187. The amendment also adds that the project is constructed in accordance with sound construction principles for consistency with Texas Water Code §17.183(a)(2)(A). The proposed section also adds the requirement that the political subdivision must take corrective action on a project as necessary to complete the project in accordance with the approved plans and specifications, in order to be consistent with §363.731, (relating to Inspection During Construction).

The proposed amendments to §363.731 (relating to Inspection During Construction) deletes the requirement that the project engineer give assurance that the project is

constructed in accordance with engineering principles for consistency with Texas Water Code §§17.183(a)(5)(C), 17.185(a), and 17.187. The amendment also adds that the project is constructed in accordance with sound construction principles, in order to provide oversight that the contractor is meeting the obligations of its performance bond and for consistency with Texas Water Code §17.183(a)(2)(A).

The proposed amendment to §363.951 (relating to Construction Contract Requirements) adds the requirement that the executive administrator certifies that work on construction of a project has been completed in accordance with the approved plans and specifications, as well as deleting the requirement that the certification include that the work was done in accordance with sound engineering principles and practices, in order to implement Texas Water Code §17.183(a)(5)(C).

The proposed amendment to §363.953 (relating to Inspection of Projects) deletes the requirement that the project engineer give assurance that the project is constructed in accordance with engineering principles for consistency with Texas Water Code §§17.183(a)(5)(C), 17.185(a), and 17.187. The amendment also adds that the project is constructed in accordance with sound construction principles in order to provide oversight that the contractor is meeting the obligations of its performance bond and for consistency with Texas Water Code §17.183(a)(2)(A). The rest of that section is reworded for consistency with §§363.51 and 363.731.

The proposed amendments to §363.955 (relating to Certificate of Approval) adds the words, “and specifications,” and deletes, “sound engineering principles,” in order to implement Texas Water Code §17.187.

*Proposed Amendment to 31 TAC Chapter 363 by addition of a New Subchapter M (relating to State Water Implementation Fund for Texas and State Water Implementation Revenue Fund for Texas).*

The new §363.1301 (relating to Scope of Subchapter M) is proposed to specify the scope and coverage of the Subchapter M. Subchapter M governs the board’s new financial program to provide loans to political subdivision to finance water management strategies in the state water plan. Subchapter A of Chapter 363 will also apply to the program except to the extent there is a conflict with Subchapter M, in which case Subchapter M will apply.

The new proposed §363.1302 (relating to Definition of Terms) is proposed to provide definitions of terms used throughout Subchapter M.

The proposed definition of “Agricultural water conservation” is defined by referring to the board’s existing Agricultural Water Conservation Program. Those types of projects covered by the Agricultural Water Conservation Program would also be eligible for

funding under the SWIFT and SWIRFT loan program if it were otherwise qualified, e.g. the project was a water management strategy in the state water plan. In keeping with that definition and Texas Water Code §17.898(a)(5), preparation and maintenance of land to be used for brush control activities in areas of the state where those activities in the board's judgment are effective would also be eligible for SWIFT and SWIRFT loan funding.

The proposed definition of "Agricultural irrigation project" includes projects on agricultural lands that improve water delivery or application efficiency. The proposed definition would allow for new water sources such as a new well, as part of an agricultural irrigation project. Also included in the proposed definition are projects for new irrigation systems. Finally, the proposed definition would also cover meters within the definition of an agricultural irrigation project.

The proposed rules define "Alternative facility," "Excess capacity," and "Existing needs," consistent with the use of those terms for the board's existing state participation program, 31 TAC §§363.1001- 363.1017.

The rule proposes to define "Historically Underutilized Business" consistent with the definition in Texas Water Code §15.431, which references Section 2161.001, Government Code, and the implementing regulations of that section. Information on the State's Historically Underutilized Business program is available on the Comptroller's web site: <http://www.window.state.tx.us/procurement/prog/hub/>

The proposed rule would define "Reuse" as the use of groundwater or surface water that has already been beneficially used because this is the definition used in the state water plan. See: *Water for Texas 2012*, pages 170 and 249. This definition would include both direct reuse, where water that has been used once is treated and then reused, and indirect reuse where the once used water is treated, discharged to a surface water body or injected into an aquifer, and then retrieved at a later time.

The proposed rule would define "Rural" as required by Texas Water Code §15.434(b)(1)(A), which is to use the definition of "rural political subdivisions" found in Texas Water Code §15.992. The proposed rule uses that definition but further specifies that the board will use the most current data available from the U.S. Bureau of the Census or board-approved projections for the population figures.

The proposed rule would define "Water conservation" consistent with the definition in the state's best management practices guide for water conservation, first developed by the Water Conservation Implementation Task Force in 2004 and since updated and maintained by the Water Conservation Advisory Council established pursuant to Texas Water Code Chapter 10. The board notes that Texas Water Code §15.434(b)(2) seems to draw a distinction between "water conservation" and "reuse." In light of this statutory

language, the board specifically invites comments on whether the phrase “or increase the recycling and reuse of water” should be deleted from the final definition of “water conservation.” The board notes that if this deletion was made, reuse projects would still count toward satisfying the requirement of the 20% of funds for water conservation and reuse.

The proposed rule would define “Water plan project” in a manner consistent with the use of the term in the state water plan and common usage among water professionals dealing with water resources planning in Texas.

The proposed rule would define “Water supply need” in a manner consistent with the use of the term in the state water plan and common usage among water professionals dealing with water resources planning in Texas and consistent with the use of the concept in Texas Water Code, Chapter 16, Subchapter C (relating to Planning).

Proposed §363.1303 (relating to the Prioritization System) provides a prioritization system required by Texas Water Code §15.437. The processing of applications and the steps in the proposed prioritization system is similar to the functioning of the prioritization system for the current Water Infrastructure Fund of §363.1207, but dates and timing of SWIFT and SWIRFT applications will not be fixed by rule to give the board additional flexibility in the timing of when it will make funds available. The actual factors to be evaluated in the prioritization are as required by HB 4. The proposed rule indicates that the board will identify the amount of funds available from SWIFT and SWIRFT for new applications by category. Categories may include: state participation; water infrastructure; deferred water infrastructure; rural political subdivisions or agricultural water conservation; and agricultural irrigation projects, water conservation, or reuse.

Proposed §363.1304 (relating to Prioritization Criteria) incorporates a priority criteria into the SWIFT and SWIRFT rules required by Texas Water Code §15.437. The proposed criteria provide for consideration of the various statutorily required factors, giving the most weight to those factors required by statute to receive the highest consideration. The proposed rules would implement the criteria for the local contribution to finance the project and the criteria related to federal funding for the project being used or sought by combining those two criteria into one category for obtaining points. In keeping with Texas Water Code §15.437(d)(6), the proposed rule has a proposed criteria relative to water conservation. For municipal projects, the applicant can score points by demonstrating that they have already achieved significant water conservation savings or that significant water conservation savings will be achieved by implementing the proposed project. Municipal projects can also score points for achieving the water loss threshold that will be set by board rules in another board rulemaking proceeding roughly simultaneous with this rulemaking. While the



proposed priority system does not have criteria for projects that serve rural political subdivisions, the board is of the opinion that many rural political subdivisions will be able to obtain points for the project meeting the needs of a high percentage of the water supply needs of the water users to be served. In addition, projects that serve rural populations may also be able to receive points in the diverse urban and rural category, or the regionalization category. As an example, a rural project that provides 100 percent of the water supply needs of the water users and that links five separate rural political subdivisions together in a regionalization project would receive 30 points for the high percentage of need category and 20 points for the regionalization criteria, for the maximum of 50 points for those factors receiving the highest consideration. That rural project would receive more points than an “urban” project that served a large population but only met 50 percent of the water supply needs and did not provide for regionalization or serve a diverse urban and rural population. Actual scoring of a specific application will be based upon all relevant facts that weigh into a project’s scoring.

The rule the board proposes today does not award additional project prioritization points specifically for rural, agricultural irrigation projects or reuse projects, per se. The board solicits comments on whether additional criteria should be added to the proposed criteria to award points for rural, agricultural irrigation or reuse projects.

Proposed §363.1305 (relating to Use of Funds) incorporates restrictions on the use of funds provided by Texas Water Code §15.474. The board expects that the terms of the financial assistance provided to applicants will be tailored to best fit the needs of the applicants and to benefit the long-term viability of the fund. The board expects that the terms of the financial assistance will change based on each round of applications. Interest rates on the loans provided to applicants under this program will depend in part on the board’s cost of funds as the board issues bonds. Because the interest rate that the bond market charges to the board will vary over time, the interest rate that the board offers political subdivisions will also vary over time. In addition the amounts and types of funding provided to political subdivisions in preceding fundings affect the amounts and types of funding that can be provided to subsequent applicants while still protecting the corpus of the fund and the board’s ability to offer financing on attractive terms.

Proposed §363.1306 (relating to Interest Rates on Loans) identifies the timing and general method that the board would use to set the interest rates for SWIFT and SWIRFT project funding and payment deferrals. The proposed provision is similar to the method for setting interest rates for the Water Infrastructure Fund, see 31 TAC §363.1205 (relating to Interest Rates for Loans) modified as necessary to fit the requirements of HB 4.

Proposed §363.1307 (relating to Pre-design Funding Option) sets out the requirements for projects under this Subchapter to utilize the pre-design funding option. The proposed provision is similar to how this option is handled in the Water Infrastructure Fund, see 31 TAC §363.1206 (relating to Pre-design Funding Option).

Proposed §363.1308 (relating to Board Participation Program) sets out the requirements for projects where the applicant desires the board to acquire an ownership interest in the project that the applicant will buy back over time. The requirements and terms are similar to the board's existing state participation program.

Proposed §363.1309 (related to Findings Required) states the findings by the board that are required prior to approval of an application for financial assistance under the SWIFT and SWIRFT program.

Proposed §363.1310 (related to Action of the Board on Application) sets out the board's range of options in acting on an application. The proposed rule states that the commitment will include a date after which the financial assistance will no longer be available. The board did not set a specific date by rule in order to retain some flexibility in adjusting the time period. The board is of the opinion that the proposed rule would allow the board to make commitments over multiple years with specific take down amounts each year, with the interest rate for each take down determined by the debt service schedule in effect at the time. The board is of the opinion that multi-year take downs will be a beneficial option for funding larger projects with high capital costs and longer construction schedules. The board solicits comments on whether the proposed rule would allow for multiple year commitments and any improvements to this suggested procedure. Once the board has made a commitment, the applicant will execute a financing agreement that will specify when the loan must close. The board anticipates that the applicant must close within a very short time of the board obtaining the proceeds that it will use to fund the loan. The board recognizes that any undue delay between the board's obtaining funds through a sale of its bonds and closing loans with political subdivisions for their water projects has a negative impact on the overall capacity of the fund and is committed to minimizing those negative impacts.

Proposed §363.1311 (relating to Rural and Water Conservation Reporting) sets out how the board intends to report and account for the project funds: (1) 10% of which support projects for rural political subdivisions and agricultural water conservation, and (2) 20% of which support projects for water conservation and reuse, including agricultural irrigation projects. This proposed section is in part to implement Texas Water Code §15.434(b). The board understands that the percentages given in the statute are intended as a floor and not a ceiling, meaning that the board is not limited to funding only 10% of total project funds for rural and agricultural water conservation, or only funding 20% of total project funds for water conservation and reuse. If applicants

submit sufficient eligible rural projects, the board could fund more than 10% rural projects, for example. The same is true for water conservation and reuse projects. The board intends to undertake to apply funding to these percentages by a very aggressive marketing and outreach program to ensure that potential applicants for all of these special classes of projects know the requirements and benefits of the programs. The board also intends to work with the regional water planning groups to ensure that they know about the programs and the requirements for either amending the regional water plan to include such projects or to include these types of projects in the next round of regional planning. The board does acknowledge that the SWIFT and SWIRFT program is a voluntary program for loaning money to political subdivisions.

The proposed rule would require the executive administrator to assign costs to the specified categories, e.g. rural political subdivisions, etc. Any costs that are shared would be proportionally allocated. For example, for a project that served a diverse urban and rural area, the executive administrator would first decide which costs are associated with the urban area and which costs are associated with the rural area. For the remaining costs that are shared by both areas, the percentage allocated to rural would be the ratio of rural costs to the total of direct urban and rural costs. The board considered proposing a rule with a more detailed description of how it would allocate costs. In the end the board decided that no one method could cover every possible situation. Therefore, the board decided to propose a rule that provides the executive administrator with some discretion in that calculation, coupled with the report to the Legislature as required by statute. The board also intends to report the amount of funds used to support rural, agricultural water conservation, water conservation, agricultural irrigation projects, and reuse projects on the board website along with the other information required by Texas Water Code §15.440. The board has not proposed a more specific rule related to its duty to report to the Legislature and post on the Board's website information on the use of the SWIFT and SWIRFT because the board considers the provisions of Texas Water Code §15.440 to be self-executing.

Proposed §363.1312 (relating to Reporting Requirements Regarding Historically Underutilized Businesses) sets out a proposed requirement that political subdivisions report the use of historically underutilized businesses that worked on the SWIFT or SWIRFT funded project. This reporting is intended to allow the executive administrator to then be able to report this information to the State Water Implementation Fund for Texas Advisory Committee as required by Texas Water Code §15.438(n)(2).

#### **FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS**

Ms. Amanda Landry, Chief Financial Officer, has determined that for the first five-year period the proposal is in effect, there will be fiscal implications on state government as a result of administering the proposal. The costs to the state are expected to be: Fiscal

Year (FY) 2014 - \$511,300; FY 2015 - \$1,402,084; FY 2016 - \$1,422,399; FY 2017 - \$1,380,384; FY 2018 - \$1,380,384. There are no fiscal implications to local governments in general as a result of enforcing or administering the rules, since no local government is required to apply for assistance under these programs. For local governments that choose to apply for funding under these programs, there will be costs associated with applying for and receiving funding, but those costs are anticipated to be more than offset by savings to the local government in financing costs for the projects. However, at this time, no reliable estimates may be made in the amount of costs to local governments and cost savings to local governments. There are no estimated losses or increases in revenue to the state or local governments as a result of enforcing or administering these rules.

## **PUBLIC BENEFITS AND COSTS**

Ms. Amanda Landry, Chief Financial Officer, has also determined that for the first five-year period the proposal is in effect, the public benefit anticipated as a result of the proposed rules is the ability of local governments to receive savings in financing costs for projects that implement the state water plan. However, at this time no reliable estimates may be made on the quantified benefits and reductions in costs.

## **LOCAL EMPLOYMENT IMPACT STATEMENT**

The board 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 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.

## **REGULATORY ANALYSIS**

The board has determined that the proposed rulemaking is not subject to Government Code §2001.0225 because it is not a major environmental rule under that section.

## **TAKINGS IMPACT ASSESSMENT**

The board has determined that the promulgation and enforcement of this proposed rule constitutes neither a statutory nor a constitutional taking of private real property. The proposed rule does not adversely affect a landowner's rights in private real property, in whole or in part, because the proposed rule does not burden or restrict or limit the

owner's right to or use of property. Therefore, the proposed rulemaking does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

#### ANNOUNCEMENT OF HEARINGS

The board will hold public hearings on this proposal on July 24, 2014, at Texas A&M University – San Antonio, One University Way, San Antonio, Texas 78224 at 1:00 p.m.; on August 13, 2014, at the McNease Convention Center, 500 Rio Concho Drive, San Angelo, Texas 76903 at 10:00 a.m.; on August 21, 2014, at [Metroplex address TBD at [time TBD]]. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon. Open discussion and questions to the board will not be permitted during the hearings.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Merry Klonower at (512) 463-8165 as far in advance as possible, and no later than five (5) work days prior to the hearing so that appropriate arrangements can be made.

#### SUBMISSION OF COMMENTS

Comments on the proposed rulemaking will be accepted until September 1, 2014, and may be submitted to the Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by e-mail to [rulescomments@twdb.texas.gov](mailto:rulescomments@twdb.texas.gov), via entering comments on our web page: <http://www.twdb.state.tx.us/swift/involved/index.asp>, or by fax at (512) 475-2053.

#### STATUTORY AUTHORITY

The amendments are proposed under the authority of Texas Water Code §6.101, which authorizes the TWDB to adopt rules necessary to carry out the powers and duties of the TWDB.

The amendments affect Texas Water Code, Chapters 15 and 17.

#### **§ 363.1. Scope of Subchapter**

This subchapter shall govern the board's programs of financial assistance under the following programs established by the Texas Water Code:

- (1) in Chapter 15:

(A) Water Assistance Fund under Subchapter B;

~~(A)~~ ~~(B)~~ ~~water loan assistance fund~~ Water Loan Assistance Fund under Subchapter C;

~~(B)~~ ~~(C)~~ Storage Acquisition Program authorized under Subchapter E;

~~(C)~~ ~~(D)~~ Colonia Self-Help Program authorized under Subchapter P;

~~(D)~~ ~~(E)~~ ~~Pilot Program for Water and Wastewater Loans to Rural Communities~~ Program for Water and Wastewater Financial Assistance for Disadvantaged Rural Communities authorized under Subchapter O; ~~and~~

~~(E)~~ ~~(F)~~ Water Infrastructure Fund under Subchapter Q; and

(G) State Water Implementation Fund for Texas and State Water Implementation Revenue Fund for Texas under Subchapter M.

(2) in Chapter 16, state participation in the purchase or acquisition of facilities under Subchapters E and F;

(3) in Chapter 17:

(A) the programs of assistance under the Texas water development funds; and

(B) the programs of assistance under the water financial assistance bond program (Development Fund II, Subchapter L), including:

(i) financing of water supply projects under Subchapter D;

(ii) water quality enhancement projects including municipal solid waste facilities under Subchapter F;

(iii) flood control projects under Subchapter G; and

(iv) economically distressed areas projects under Subchapter K.

(4) in Chapter 17, Revenue Bond Program under Subchapter I; and

(5) in Chapter 36, Groundwater District Loan Program, under Subchapter L.

### **§ 363.2. Definitions of Terms**

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in the Texas Water Code, Chapter

15, 16 or 17, and not defined here shall have the meanings provided by the appropriate Texas Water Code chapter.

(1) to (22) No change.

(23) SWIFT—the state water implementation fund for Texas.

(24) SWIRFT—the state water implementation revenue fund for Texas.

~~(23)~~ (25) Water Plan--The current state water plan prepared and adopted in accordance with Texas Water Code, § 16.051.

### **§ 363.33. Interest Rates for Loans and Purchase of Board's Interest in State Participation Projects**

(a) Procedure and method for setting ~~fixed~~ interest rates.

(1) The executive administrator will set ~~fixed~~ interest rates under this section for purchase of the board's interest in state participation projects or 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 or drawdown of state participation funds and not more than 45 days before the anticipated closing of the loan or state participation project 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 Texas Water Development Fund II or for rates for the purchase of the board's interest in state participation projects, the executive administrator will set the interest rate at:

(A) the rates established by the board under subsection (b) of this section;

(B) for loans funded by the board with proceeds of bonds, the interest of 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 bond; and

(C) the board may establish different interest rates for loans under this paragraph in order to facilitate a restructuring of an existing board loan that is in imminent risk of default as determined by the board.

(3) Interest rates for loans from the Water Loan Assistance Fund, or from funds from the board's sale of political subdivision bonds to the Texas Water Resources Finance Authority will be set according to the Municipal Market Data A scale. The board may establish different interest rates for loans under this paragraph if it finds such rates are legislatively directed or are necessary to promote major water initiatives designed to provide significant regional benefit.

(b) Lending and interest rate scale. After each bond sale, or as necessary to meet changing market conditions, the board will set the lending rate scale for loans and the interest rate scale for the purchase of the board's interest in state participation projects based upon cost of funds to the board, risk factors of managing the board's loan portfolio, and market rate scales. To calculate the cost of funds, the board will add new bond proceeds to those remaining bond funds that are not currently assigned to schedule loan closings, weighting the funds by dollars and true interest costs of each source. The rate scale shall include the program subsidy, if any. The board will establish separate lending rate scales for tax-exempt and taxable projects from each of the following:

(1) loans from the Texas Water Development Fund II;

(2) loans from the Water Infrastructure Fund;

(3) purchase of the board's interest in state participation projects from the State Participation Account;

(4) loans from the Economically Distressed Area Program Account; ~~and~~

(5) if revenue bonds constitute the consideration for the purchase of the board's interest in a state participation project by a political subdivision, the revenue bonds shall bear interest at:

(A) the prevailing state participation lending rate, as set in subsection (b)(3) of this section;

(B) if there is outstanding board indebtedness related to the purchase of its state participation interest, then at the rate then in effect at the time the board provided funds, through the issuance of bonds, to participate in the project; or

(C) a different rate as established by the board, where no schedule for the purchase of the board's interest in the project was fixed at the time the board provided funds to participate in the project: ~~and~~;

(6) loans from the SWIRFT.

### § 363.51. Inspection During ~~during~~ Construction

After the construction contract is awarded, the political subdivision shall provide for adequate inspection of the project under the supervision of a registered professional engineer and require the engineer's assurance that the work is being performed in a satisfactory manner in accordance with the approved plans and specifications, other engineering design or permit documents, approved alterations, provisions for environmental mitigative measures, and in accordance with sound ~~engineering principles and~~ construction principles and practices. The executive administrator is authorized to inspect the construction and materials of any project at any time,



but such inspection shall never subject the State of Texas to any action for damages. The political subdivision shall take corrective action necessary to complete the project in accordance with approved plans and specifications.

### **§ 363.731. Inspection During Construction**

After the construction contract is awarded, the political subdivision shall provide for adequate inspection of the project by a registered professional engineer and require the engineer's assurance that the work is being performed in a satisfactory manner in accordance with the approved plans and specifications, other engineering design or permit documents, approved alterations, provisions for environmental mitigative measures, and in accordance with sound ~~engineering principles and construction~~ principles and practices. The executive administrator is authorized to inspect the construction and materials of any project at any time, but such inspection shall never subject the State of Texas to any action for damages. The political subdivision shall take corrective action as necessary to complete the project in accordance with approved plans and specifications.

### **§ 363.951. Construction Contract Requirements**

The rural community shall require in all project construction contracts that:

- (1) each bidder furnish a bid guarantee equivalent to five percent of the bid price;
- (2) each contractor awarded a construction contract furnish performance and payment bonds as follows:
  - (A) the performance bond must include guarantees that work done under the contract will be completed and performed according to approved plans and specifications in accordance with sound construction principles and practices; and
  - (B) the performance and payment bonds must be in a penal sum of not less than 100 percent of the contract price and remain in effect for one year after the date of approval by the engineer of the rural community;
- (3) payment will be made in partial payments as the work progresses;
- (4) each partial payment shall not exceed 95 percent of the amount due at the time of the payment, as shown by the engineer of the project, but if the project is substantially complete, a partial release of the five percent retainage may be made by the rural community with the approval of the executive administrator;
- (5) payment of the retainage remaining due on completion of the contract shall be made only after:

- (A) approval by the engineer for the rural community;
  - (B) approval by the rural community by resolution or other formal action of the governing body; and
  - (C) certification by the executive administrator that the work to be done under the contract has been completed and performed in a satisfactory manner and in accordance with approved plans and specifications; sound engineering principles and practices;
- (6) no valid approval shall be granted unless the work done under the contract has been completed and performed in a satisfactory manner according to approved plans and specifications ~~specification~~; and
- (7) labor from inside the rural community has been used to the extent possible.

### **§ 363.953. Inspection of Projects**

~~(a)~~ After a construction contract is awarded, the rural community shall provide for adequate inspection of the project by a registered professional engineer and require the engineer's assurance that the work is being performed in a satisfactory manner in accordance with the approved plans and specifications, other engineering design or permit documents, approved alterations, provisions for environmental mitigative measures, and in accordance with sound ~~engineering principles and construction principles and practices.~~ The executive administrator is authorized to inspect the construction and materials of any project at any time, but such inspection shall never subject the State of Texas to any action for damages. The political subdivision shall take corrective action as necessary to complete the project in accordance with approved plans and specifications.

~~(b) The board may inspect the construction of a project at any time to assure that:~~

~~(1) ——— the contractor is substantially complying with the approved engineering plans of the project; and~~

~~(2) the contractor is constructing the project in accordance with sound engineering principles.~~

~~(c) Inspection of a project by the board does not subject the state to any civil liability.~~

### **§ 363.955. Certificate of Approval**

The executive administrator may consider the following as grounds for refusal to give a certificate of approval for any construction contract:

- (1) failure to construct the project according to the approved plans and specifications; or

- ~~(2) failure to construct the works in accordance with sound engineering principles; or~~
- (3) (2) failure to comply with any term of the contract.

## **SUBCHAPTER M STATE WATER IMPLEMENTATION FUND FOR TEXAS AND STATE WATER IMPLEMENTATION REVENUE FUND FOR TEXAS**

### **§ 363.1301. Scope of Subchapter M**

This subchapter shall govern the board's programs of financial assistance under the following programs established by the Texas Water Code, Chapter 15, Subchapters G and H. Unless in conflict with the provisions of this subchapter, the provisions of Subchapter A of this chapter (relating to General Provisions) shall apply to projects under this subchapter.

### **§ 363.1302. Definition of Terms**

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Agricultural water conservation -- those practices, techniques or technologies used in agriculture, as defined in Texas Agriculture Code, which will improve the efficiency of the use of water and further water conservation or reuse in the state, including but not limited to those programs or projects defined in Texas Water Code §§17.871 – 17.912.
- (2) Agricultural irrigation project -- those projects which improve water delivery or application efficiency on agricultural lands, or involve purchase and installation on agricultural public or private property of new water sources, new irrigation systems, or devices designed to indicate the amount of water withdrawn for agricultural irrigation purposes.
- (3) Alternate facility--A construction project that would be necessary to serve the excess capacity of the area to be served by the facility in the event that the facility was not initially constructed to meet the excess capacity.
- (4) Commission--the Texas Commission on Environmental Quality or its successor.
- (5) Entity -- a political subdivision or nonprofit water supply or sewer service corporation.
- (6) Excess capacity--The difference between the foreseeable needs of the area to be served by the useful life of the facility and the existing needs for the area to be served by the facility.

- (7) Executive administrator --The executive administrator of the board or a designated representative.
- (8) Existing needs--Maximum capacity necessary for service to the area receiving service from the facility for current population and including the service necessary to serve the estimated population in the area ten years from the date of the application.
- (9) Facility--A regional facility for which an application has been submitted requesting board participation and that includes sufficient capacity to serve the existing needs of the applicant and excess capacity.
- (10) Historically Underutilized Business -- the meaning assigned by Section 2161.001, Government Code, and the regulations adopted pursuant thereto.
- (11) Household Cost Factor -- the average annual cost of service per household divided by the median household income.
- (12) Nonprofit water supply or sewer service corporation -- A water or sewer service corporation operating under Texas Water Code, Chapter 67.
- (13) Political subdivision -- includes a city, county, district or authority created under the Texas Constitution Article III, Section 52, or Article XVI, Section 59, any other political subdivision of the state, any interstate compact commission to which the state is a party, and any nonprofit water supply corporation created and operating under Texas Water Code, Chapter 67.
- (14) Reuse -- the use of groundwater or surface water that has already been beneficially used.
- (15) Rural political subdivision -- a nonprofit water supply or sewer service corporation, district, or municipality with a service area of 10,000 or less in population based upon the most current data available from the U.S. Bureau of the Census or board-approved projections, or that otherwise qualifies for financing from a federal agency; or a county in which no urban political subdivision exceeds 50,000 in population based upon the most current data available from the U.S. Bureau of the Census or board-approved projections.
- (16) Rural population -- residents of a rural political subdivision.
- (17) Urban population -- residents of a political subdivision with a population of more than 10,000 individuals based upon the most current data available from the U.S. Bureau of the Census or board-approved projections.
- (18) Water conservation -- those practices, techniques, programs, and technologies that will protect water resources, reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling

and reuse of water so that a water supply is made available for future or alternative uses.

- (19) Water plan project -- A project that is a recommended water management strategy in the current board-adopted state water plan.
- (20) Water supply need -- Projected water demands in excess of existing supply as identified in the state water plan.

### **363.1303. Prioritization System**

- (a) The board will establish deadlines for application submittals. The executive administrator will provide the prioritization of those applications to the board for approval as soon thereafter as practicable. To be considered for prioritization, an applicant must provide adequate information to establish that the applicant qualifies for funding, to describe the project comprehensively, and to establish the cost of the project, as well as any other information requested by the executive administrator. The executive administrator will develop and provide an abridged application to gather information necessary for prioritization. If an applicant submits an abridged application for prioritization purposes, the applicant must submit a complete application to the board within 30 days after the board meeting at which the applicant's project received priority for funding, or the project will lose its priority ranking and the board may commit to other projects consistent with the prioritization.
- (b) For each application that the executive administrator has determined has adequate information for prioritization purposes and prior to each board meeting at which applications may be considered for prioritization, the executive administrator shall:
  - (1) prioritize the applications by the criteria identified in §363.1304 of this title (relating to Prioritization Criteria); and
  - (2) provide to the board a prioritized list of all complete applications as recommended by the executive administrator, the amount of funds requested and the priority of each application received.
- (c) The board will identify the amount of funds available from SWIFT and SWIRFT for new applications by category, establish the structure of financing and the terms of any subsidy, and will consider applications according to §363.1304, regarding Prioritization Criteria. The board reserves the right to limit the amount of funding available to an individual entity.

### 363.1304. Prioritization Criteria

The executive administrator will prioritize applications based on the following point system:

- (a) Projects will be evaluated on the criteria provided in subsections (b) through (e) below. The points for subsections (b) through (e) will be summed up to a maximum score for these criteria of 50 points.
- (b) Projects that either directly, or in conjunction with other recommended water management strategies in accordance with §357.10 of this title (relating to Regional Water Planning), will serve, in total, when the project water supply volume is fully operational:
  - (1) at least 10,000 population, 6 points; or
  - (2) at least 250,000 population, 12 points; or
  - (3) at least 500,000 population, 18 points; or
  - (4) at least 750,000 population, 24 points; or
  - (5) at least 1,000,000 population, 30 points; or
  - (6) less than 10,000 population, zero points.
- (c) Projects that will serve a diverse urban and rural population:
  - (1) serves one or more urban populations and one rural population, 10 points, and
  - (2) for each additional rural population served, 4 points up to a maximum of 30 points; or
  - (3) serves only an urban population, or only a rural population, zero points.
- (d) As specified in the application, projects which provide regionalization:
  - (1) serves additional entities other than the applicant, 5 point per each political subdivision served for a maximum of 30 points; or
  - (2) serves only applicant, zero points.
- (e) Projects that meet a high percentage of the water supply needs of the water users to be served calculated from those served and needs that will be met during the first decade the project becomes operational, based on state water plan data:
  - (1) at least 50 percent of needs met, 10 points; or
  - (2) at least 75 percent of needs met, 20 points; or
  - (3) at least 100 percent of needs met, 30 points; or
  - (4) less than 50 percent of needs met, zero points.
- (f) Projects will receive additional points of the project's score on each of the criteria of subsections (g) through (j) below.

- (g) Local contribution to be made to implement the project, including federal funding, and including up-front capital, such as funds already invested in the project or cash on hand and/or in-kind services to be invested in the project, provided that points will not be given for a prior loan through the Board that included a loan forgiveness component:
- (1) other funding at least 10 percent of total project cost, 1 point; or
  - (2) other funding at least 20 percent of total project cost, 2 points; or
  - (3) other funding at least 30 percent of total project cost, 3 points; or
  - (4) other funding at least 40 percent of total project cost, 4 points; or
  - (5) other funding at least 50 percent of total project cost, 5 points; or
  - (6) other funding less than 10 percent of total project cost, zero points.
- (h) Financial capacity of the applicant to repay the financial assistance provided:
- (1) applicant's household cost factor is less than or equal to 1 percent, 2 points; or
  - (2) applicant's household cost factor is greater than 1 percent but not more than 2 percent, 1 point; or
  - (3) applicant's household cost factor is greater than 2 percent, zero points.
- (i) Projects which address an emergency need:
- (1) applicant, or entity to be served by the project, is included on the list maintained by the Commission of local public water systems that have a water supply that will last less than 180 days without additional rainfall, or is otherwise affected by a Commission emergency order, and drought contingency plan has been implemented by the applicant or entity to be served, 3 points; plus
  - (2) water supply need is anticipated to occur in an earlier decade than identified in the most recent state water plan, 1 point; plus
  - (3) applicant has used or applied for federal funding for emergency, 1 point; or
  - (4) none of the above, zero points.
- (j) Projects which are ready to proceed:
- (1) preliminary planning and/or design work (30 percent of project total) has been completed or is not required for the project, 3 points; plus
  - (2) applicant is able to begin implementing or constructing the project within 18 months of application deadline, 3 points; plus
  - (3) applicant has acquired all water rights associated with the project or no water rights are required for the project, 1 point; plus
  - (4) applicant has secured funding for the project from other sources, 1 point; or
  - (5) none of the above, zero points.
- (k) Entities that have demonstrated water conservation or projects which will achieve water conservation, including preventing the loss of water:

(1) for municipal projects, applicant has already demonstrated significant water conservation savings, as determined by comparing the highest rolling four-year average total gallons per capita per day within the last thirty years to the average total gallons per capita per day for the most recent 4-year period based on board water use data; or significant water conservation savings will be achieved by implementing the proposed project, as determined by comparing the conservation to be achieved by the project with the average total gallons per capita per day for most recent four-year period:

- (A) 2 to 5.9 percent total gallons per capita per day reduction, 2 points; or
- (B) 6 to 9.9 percent total gallons per capita per day reduction, 4 points; or
- (C) 10 to 13.9 percent total gallons per capita per day reduction, 6 points; or
- (D) 14 to 17.9 percent total gallons per capita per day reduction, 8 points; or
- (E) 18 percent or greater total gallons per capita per day reduction, 10 points;
- or
- (F) Less than 2 percent total gallons per capita per day reduction, zero points.

(2) for municipal projects, applicant has achieved the water loss threshold established by 31 TAC §358.6, as demonstrated by most recently submitted water loss audit:

- (A) less than the threshold, 5 points; or
- (B) at or above the threshold, zero points.

(3) for agricultural projects, significant water efficiency improvements will be achieved by implementing the proposed project, as determined by the projected percent improvement:

- (A) 1 to 1.9 percent increase in water use efficiency, 1 point; or
- (B) 2 to 5.9 percent increase in water use efficiency, 3 points; or
- (C) 6 to 9.9 percent increase in water use efficiency, 6 points; or
- (D) 10 to 13.9 percent increase in water use efficiency, 9 points; or
- (E) 14 to 17.9 percent increase in water use efficiency, 12 points; or
- (F) 18 percent or greater increase in water use efficiency, 15 points; or
- (G) less than 1 percent increase in water use efficiency, zero points.

(l) Priority assigned by the applicable regional water planning group within the project sponsor's primary planning region:

- (A) top 80 percent of regional project ranking, 3 points; or
- (B) top 60 percent of regional project ranking, 6 points; or
- (C) top 40 percent of regional project ranking, 9 points; or
- (D) top 20 percent of regional project ranking, 12 points; or
- (E) top 10 percent of regional project ranking, 15 points; or
- (F) less than 80 percent of regional project ranking, zero points.

(m) If two or more projects receive the same priority ranking, priority will be assigned based on the relative score(s) from §363.1304(k) of this title. If after considering the



relative scores of the projects based on the criteria of §363.1304(k) of this title, then priority will be assigned based on the relative score(s) from §363.1304(i) of this title.

### **§363.1305. Use of Funds**

- (a) The board may use the funds for financial assistance to political subdivisions as follows:
  - (1) to make loans at or below market interest rates, but not lower than 50 percent of the board's market rate.
  - (2) to make loans with terms not to exceed the lesser of:
    - (A) the expected useful life of the facility; or
    - (B) 30 years.
  - (3) to defer loan repayments, including deferral of principal and interest or accrued interest under criteria developed by the board;
  - (4) to make loans with incremental repurchase terms for an acquired facility, including terms for no initial repurchase payment followed by progressively increasing incremental levels of interest payment, repurchase of principal and interest, and ultimate repurchase of the entire state interest in the facility using simple interest calculations; or
  - (5) a combination of the financing outlined in subsections (1)-(4).
- (b) The board may make funding available under subsection (a) of this section only for implementation of water plan projects.

### **§363.1306. Interest Rates for Loans**

- (a) For loans from the SWIFT and SWIRFT, the following procedures will be used to set interest rates.
  - (1) The executive administrator will set interest rates under this section for loans on a date that is at least five business days prior to the political subdivision's anticipated 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 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, 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).
    - (B) The loan interest rate will be determined based on a debt service schedule acceptable to the executive administrator. The executive administrator will identify the appropriate scale for the borrower and identify the market rate for the maturity due in each year. The executive administrator will reduce the market rate by a subsidy to be determined by the board and thereby identify a proposed loan interest rate for each maturity. The proposed loan interest rate will be applied

to the proposed principal repayment schedule. In no instance shall the subsidy determined by the board exceed 50 percent of the market rate.

(C) For loans made under §363.1305(a)(4) of this title (relating to Use of Funds), which receive deferred principal and interest payments, the executive administrator will identify the appropriate scale for the borrower and identify the market rate for the maturity due in each year. The executive administrator will reduce the market rate by a subsidy to be determined by the board and thereby identify a proposed loan interest rate for each maturity. The proposed loan interest rate will be applied to the proposed principal repayment schedule.

### **§363.1307. 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 construction costs associated with funding of a project under §363.1305 of this title (relating to Use of Funds). 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 construction 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 shall use the escrowed funds to redeem bonds purchased by the board in inverse order of maturity.
- (b) Reservoir projects are eligible for a board commitment to fund planning, permitting, acquisition, and design costs under this option. Applicants for reservoir construction funds must complete planning, permitting, acquisition, and design before receiving a commitment to fund reservoir construction costs.
- (c) 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, 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.
- (d) Applications for pre-design funding must include the following information:
  - (1) for loans including construction cost, preliminary engineering feasibility data 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; 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;
  - (3) evidence that an approved water conservation plan will be adopted prior to the release of loan funds;
  - (4) all information required in §363.12 of this title (relating to General, Legal and Fiscal Information); and

- (5) any additional information the executive administrator may request to complete evaluation of the application.
- (e) After board commitment and completion of all closing and release prerequisites as specified in §363.42 of this title (relating to Loan Closing) and §363.43 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 acquisition and 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 Preliminary Engineering Feasibility Data) and compliance with §363.14 of this title (relating to Environmental Assessment); and
  - (3) for construction costs, after issuance of any applicable permits, and after bid documents are approved and executed construction documents are contingently awarded.
- (f) The executive administrator 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.
- (g) 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.

### **§363.1308. Board Participation Program**

#### **(a) Board Participation**

Unless otherwise directed by legislation, the board will only use the SWIFT or SWIRFT to provide financial assistance for all or a part of the cost to construct the excess capacity of a water plan project where:

- (1) at least 20 percent of the total facility capacity of the proposed project will serve existing need, or
- (2) the applicant will finance at least 20 percent of the total project cost from sources other than Board Participation from the SWIFT and SWIRFT.

#### **(b) Application for Assistance**

In addition to the information required in §363.12 and §363.1307 and any other information that may be required by the executive administrator or the board, the applicant shall provide:

- (1) a proposed schedule for purchase of the board's interest in the project;
- (2) information to demonstrate the findings required in §363.1310(b);
- (3) if payment under the master agreement is based either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts under which applicant's gross income is expected to accrue. Prior to release of funds, an

applicant shall submit executed copies of such contracts to the executive administrator; and

- (4) if an election is required by law to authorize participation in the project, the executive administrator may require applicant to provide the election date and election results as to each proposition necessary for the participation of the applicant as part of the application.

(c) Determination

The board may provide funding for board participation from SWIFT and SWIRFT when the information available to the board is sufficient for the board to determine that:

- (1) it is reasonable to expect that the state will recover its investment in the facility based upon a determination that the revenue to be generated by the projected number of customers served by the facility will be sufficient to purchase the excess capacity owned by the state;
- (2) the estimated cost of the facility as set forth in the application exceeds the current financing capabilities of the area to be served by the facility based on a determination that the existing rates of the applicant available for payment of the facility collected from the number of connections at the end of construction and other revenues available for payment of the facility;
- (3) the optimum regional development cannot be reasonably financed by local interests based on an assessment of the estimated cost to construct the alternate facility and the revenue to be generated by the projected number of customers of the facility;
- (4) the public interest will be served by acquisition of the facility based on a determination that the cost of the facility to the public is reduced by the state's participation in the facility; and
- (5) the facility to be constructed or reconstructed contemplates the optimum regional development which is reasonably required under all existing circumstances of the site based on a determination that design capacity of the components of the facility are sufficient to meet the foreseeable needs of the area over the useful life of the facility.

(d) Master Agreement

The board and the political subdivision shall enter into and execute a master agreement the text of which shall include, but not be limited to, the responsibilities, duties, and liabilities of each party, including the responsibility of a designated political subdivision to assure that proper procedures are observed in advertising for bids and selecting a bidder to construct the project; the board's cost of acquisition; procedures for disbursement of board funds for the project; recognition of a political subdivision's right of first refusal prior to any sale of the board's interest in the project; a non-competitive clause; a schedule for purchase of the board's interest in the project by the political subdivision; and any other provisions deemed appropriate and necessary by the board.

(e) Construction

On projects to be constructed or enlarged by a political subdivision or subdivisions, one political subdivision may be designated under an agreement with the board to act as manager for the project and perform the functions customarily performed by a manager-owner.

(f) Disbursement of State Funds

State funds expended for the acquisition and/or development of facilities in a project shall be disbursed in accordance with the provisions of the master agreement and any other contracts by the board pursuant thereto.

(g) Acquisition of Board's Ownership Interest

- (1) A prospective political subdivision purchaser of the board's ownership interest in a facility or of the use of such board interest other than under terms specified in the master agreement shall submit an application in the form and number prescribed by the executive administrator. The executive administrator may request any additional information needed to evaluate the application, and may return any incomplete application.
- (2) Upon receipt of an application by a prospective purchaser of the board's ownership interest in a facility or use of the facility, the board will send notice of its receipt by regular United States mail to all co-owners of the facility, and any users of the facility or water from the facility.
- (3) The application shall be scheduled on the board's agenda, and representatives of the prospective purchaser and other interested parties shall be notified of the time of the meeting. At the conclusion of the meeting to consider the project, the board may resolve to approve, disapprove, approve with conditions, or continue consideration of the application. A commitment will include a date after which the financial assistance will no longer be available. That date shall be the end of that month which is twelve months from the month of board commitment.

- (4) If the board approves the application, a transfer resolution will be adopted which shall prescribe the terms and conditions necessary for the sale, transfer, or lease, if such terms have not been specified in the master agreement between the board and political subdivision.
- (5) Before the board's adoption of the transfer resolution, the executive administrator shall negotiate a transfer agreement with the prospective purchaser regarding the sale, transfer, or lease of board-owned interests. The transfer agreement shall include the interest transferred, the character of the interest transferred, the formula used to compute the price to be paid for the facilities to be acquired, provisions governing lease or rental of facilities, a hold harmless clause, recognition of the right of first refusal of any of the participating political subdivisions, a clause stating the conditions under which the contract may be terminated, and other provisions appropriate to the subject of the transfer agreement including provisions setting standards for operation and maintenance of the project. The attorney general of Texas shall approve as to legality any contract authorized under this subchapter.

(h) Administrative Cost Recovery for Board Participation Program

- (1) General. The board will assess fees for the purpose of recovering administrative costs from all political subdivisions with which the board agrees to participate under this section.
- (2) Payment Method. Payment of one-third of the fee is due at closing. The balance of the fee may be paid in a limited number of annual installments with the consent of the executive administrator. The fee may not be included in the total amount of financial assistance provided by the board.

**§ 363.1309. Findings Required**

- (a) The executive administrator shall submit the application for financing under subchapter M (relating to state water implementation fund for Texas and state water implementation revenue fund for Texas) to the board with comments concerning financial assistance. The application will be scheduled on the agenda for board consideration at the earliest practical date. The applicant and other interested parties known to the board shall be notified on the time and place of such meeting.
- (b) The board shall grant the application only if the board finds that at the time the application for financial assistance was made that:
  - (1) the applicant has submitted and implemented a water conservation plan in accordance with Texas Water Code Section 11.1271;
  - (2) the applicant satisfactorily completed a request by the executive administrator or a regional water planning group for information relevant to the project for which the financial assistance is sought, including a water infrastructure financing survey under Texas Water Code Section 16.053(q); and

- (3) the applicant has acknowledged its legal obligation to comply with any applicable requirements of federal law relating to contracting with disadvantaged business enterprises, and any applicable state law relating to contracting with historically underutilized businesses.

### **§ 363.1310. Action of the Board on Application**

At the conclusion of the meeting to consider the project for financing under subchapter M (relating to state water implementation fund for Texas and state water implementation revenue fund for Texas), the board may resolve to approve, disapprove, approve with conditions, including requiring the applicant to retain professional project management assistance, or continue consideration of the application. A commitment will include a date after which the financial assistance will no longer be available.

### **§363.1311 Rural and Water Conservation Reporting**

- (a) After the loan closing of a project and release of funds to the political subdivision, the executive administrator shall determine what portion of the project funds, if any, qualify as funding for:
  - (1) rural political subdivisions;
  - (2) agricultural water conservation;
  - (3) water conservation, including agricultural irrigation projects; or
  - (4) reuse.
- (b) For project costs that cannot be assigned to either a qualifying category and non-qualifying portions of the project, the executive administrator will allocate costs proportionately.
- (c) The executive administrator will include in the biennial report to the Legislature required by Texas Water Code §15.440, the percentage of SWIFT and SWIRFT funds used to support rural political subdivisions and agricultural water conservation, and the percentage of SWIFT and SWIRFT funds used to support water conservation, including agricultural irrigation projects, or reuse projects.

### **§ 363.1312 Reporting Requirements Regarding Historically Underutilized Businesses**

The political subdivision receiving financial assistance from the board shall report to the executive administrator the amounts of project funds, if any, which were used to compensate historically underutilized businesses that worked on the project. The executive administrator shall not issue a certificate of approval on a project until this report has been received.

## CHAPTER 353. INTRODUCTORY PROVISIONS

The Texas Water Development Board (TWDB) proposes an amendment to 31 TAC §353.3 of Subchapter A, relating to General Provisions, to ensure consistency with recent statutory amendments made to Chapter 6, Texas Water Code, relating to the TWDB. The specific provision being amended and the reason for the amendment are addressed in more detail below.

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

The amendment is necessary because the 83<sup>rd</sup> Legislature passed House Bill 4 which made numerous amendments to Texas Water Code. The first article of that bill made changes to the administration of the TWDB. More specifically Section 1.06 of the bill amended Texas Water Code Section 6.060 (relating to Board Meetings) to delete the requirement that the board meet at least once every other month and provide that the board shall hold regular meetings and special meetings at times and places that the board decides are appropriate. The statute also deleted the office of the vice-chairman of the board and provided that the chairman may designate another board member to act for the chairman in the chairman's absence.

### SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENT.

*Proposed Amendment to 31 TAC Chapter 353, Subchapter A (relating to General Provisions).*

The proposed amendment to §353.3 (relating to Board Meetings) if adopted, would: delete the requirement that the board meet at least once every other month; provide that the board may hold special meetings at the times and places that the board decides are appropriate; provide that the chairman or the board member acting for the chairman shall give the other members reasonable notice of the special board meeting; and provide that the chairman may designate another board member to act for the chairman in the chairman's absence.

### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Amanda Landry, Chief Financial Officer, has determined that for the first five year period the proposal is in effect, there will be no fiscal implications on state or local governments as a result of the proposal. There are no fiscal benefits to local governments as a result of the proposal.

### PUBLIC BENEFITS AND COSTS



Amanda Landry has also determined that for the first five years the proposed rule is in effect, the public benefit anticipated as a result of the proposal will be the agency's rules will conform to applicable legislation. Ms. Landry has determined that there will be no economic costs to small businesses or individuals as a result of the proposed rule.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

The board 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 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.

#### REGULATORY ANALYSIS

The board has determined that the proposed rulemaking is not subject to Government Code §2001.0225 because it is not a major environmental rule under that section.

#### TAKINGS IMPACT ASSESSMENT

The board has determined that the promulgation and enforcement of this proposed rule constitute neither a statutory nor a constitutional taking of private real property. The proposed rule does not adversely affect a landowner's rights in private real property, in whole or in part, because the proposed rule does not burden or restrict or limit the owner's right to or use of property. Therefore, the proposed rulemaking does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

#### ANNOUNCEMENT OF HEARINGS

The board will hold public hearings on this proposal on July 24, 2014, at Texas A&M University – San Antonio, One University Way, San Antonio, Texas 78224 at 1:00 p.m.; on August 13, 2014, at the McNease Convention Center, 500 Rio Concho Drive, San Angelo, Texas 76903 at 10:00 a.m.; on August 21, 2014, at [Metroplex address TBD at [time TBD]]. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon. Open discussion and questions to the board will not be permitted during the hearings.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Merry Klonower at (512) 463-8165 as far

in advance as possible, and no later than five (5) work days prior to the hearing so that appropriate arrangements can be made.

## SUBMISSION OF COMMENTS

Comments on the proposed rulemaking will be accepted until September 1, 2014, and may be submitted to the Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by e-mail to [rulescomments@twdb.texas.gov](mailto:rulescomments@twdb.texas.gov), via entering comments on our web page:

<http://www.twdb.state.tx.us/swift/involved/index.asp>, or by fax at (512) 475-2053.

## STATUTORY AUTHORITY

The amendment is proposed under authority of Texas Water Code §6.101, which authorizes the TWDB to adopt rules necessary to carry out the powers and duties of the TWDB.

The amendment affects Texas Water Code, Chapter 6.

### § 353.3. Board Meetings

The board shall hold regular meetings and all hearings at times specified by a board order and entered in its minutes. ~~meet at least once every other month on a day and a place within the state selected by it subject to recesses at the discretion of the board.~~ The board may hold special meetings at the times and places in this state that the board decides are appropriate for the performance of its duties. The chairman of the board or the board member acting for the chairman shall give the other members reasonable notice before holding a special meeting. ~~The chair or two board members may call a special meeting at any time by giving notice to the other members and other parties required by law to be notified of the meeting.~~ All meetings are subject to the Texas Open Meetings Act, Government Code, Chapter 551. The chairman, or the designated board member acting in the absence of the chairman, ~~chair or in the chair's absence, the vice chair,~~ shall preside at all meetings of the board.

## CHAPTER 356. GROUNDWATER MANAGEMENT

The Texas Water Development Board (TWDB) proposes an amendment to 31 TAC §356.10 of Subchapter A, relating to General Provisions, to ensure consistency with recent statutory amendments made to Chapter 6, Texas Water Code, relating to the TWDB. The specific provision being amended and the reason for the amendment are addressed in more detail below.

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

The amendment is necessary because the 83<sup>rd</sup> Legislature passed House Bill 4 which made numerous amendments to Texas Water Code. The first article of that bill made changes to the administration of the TWDB. More specifically Section 1.1 of the bill amended Texas Water Code Section 6.052 (relating to Members of the Board; Appointment) to change the composition of the governing body of the agency from six members to three members. The current rule, which would be amended by this proposed rule, refers to the governing body of the TWDB as having six members.

### SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENT.

*Proposed Amendment to 31 TAC Chapter 356, Subchapter A (relating to General Provisions).*

The proposed amendment to §356.10 (relating to Definitions) if adopted, would amend the definition of “Board,” for purposes of 31 TAC Chapter 356, (relating to Groundwater Management) by deleting any reference to the number of board members serving as the governing body of the state agency, the Texas Water Development Board. The amendment is necessary because the 83<sup>rd</sup> Legislature passed House Bill 4 which amended Texas Water Code Section 6.052 (relating to Members of the Board; Appointment) to change the composition of the board from six members to three members. The proposed amendment would implement this legislative change.

### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Amanda Landry, Chief Financial Officer, has determined that for the first five year period the proposal is in effect, there will be no fiscal implications on state or local governments as a result of the proposal. There are no fiscal benefits to local governments as a result of the proposal.

### PUBLIC BENEFITS AND COSTS

Amanda Landry has also determined that for the first five years the proposed rule is in effect, the public benefit anticipated as a result of the proposal will be the agency’s rules

will conform to applicable legislation. Ms. Landry has determined that there will be no economic costs to small businesses or individuals as a result of the proposed rule.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

The board 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 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.

#### REGULATORY ANALYSIS

The board has determined that the proposed rulemaking is not subject to Government Code §2001.0225 because it is not a major environmental rule under that section.

#### TAKINGS IMPACT ASSESSMENT

The board has determined that the promulgation and enforcement of this proposed rule constitute neither a statutory nor a constitutional taking of private real property. The proposed rule does not adversely affect a landowner's rights in private real property, in whole or in part, because the proposed rule does not burden or restrict or limit the owner's right to or use of property. Therefore, the proposed rulemaking does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

#### ANNOUNCEMENT OF HEARINGS

The board will hold public hearings on this proposal on July 24, 2014, at Texas A&M University – San Antonio, One University Way, San Antonio, Texas 78224 at 1:00 p.m.; on August 13, 2014, at the McNease Convention Center, 500 Rio Concho Drive, San Angelo, Texas 76903 at 10:00 a.m.; on August 21, 2014, at [Metroplex address TBD at [time TBD]]. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon. Open discussion and questions to the board will not be permitted during the hearings.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Merry Klonower at (512) 463-8165 as far in advance as possible, and no later than five (5) work days prior to the hearing so that appropriate arrangements can be made.

## SUBMISSION OF COMMENTS

Written comments on the proposed rules will be accepted until September 1, 2014, and may be submitted to the Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, or by e-mail to [rulescomments@twdb.texas.gov](mailto:rulescomments@twdb.texas.gov), or by fax at (512) 475-2053.

## STATUTORY AUTHORITY

The amendment is proposed under authority of Texas Water Code §6.101, which authorizes the TWDB to adopt rules necessary to carry out the powers and duties of the TWDB.

The amendment affects Texas Water Code, Chapter 36.

### **§ 356.10. 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 Texas Water Code Chapter 36, Groundwater Conservation Districts, that are not defined here shall have the meanings provided in Chapter 36.

(1) Agency--The Texas Water Development Board.

(2) Amount of groundwater being used on an annual basis--An estimate of the quantity of groundwater annually withdrawn or flowing from wells in an aquifer for at least the most recent five years that information is available. It may include an estimate of exempt uses.

(3) Board--The ~~six member~~ governing body of the Texas Water Development Board.

(4) through (24) No change

## CHAPTER 367. AGRICULTURAL WATER CONSERVATION PROGRAM

The Texas Water Development Board (TWDB) proposes an amendment to 31 TAC §367.2, relating to Definitions, to ensure consistency with recent statutory amendments made to Chapter 6, Texas Water Code, relating to the TWDB. The specific provisions being amended and the reason for the amendment is addressed in more detail below.

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

The amendment is necessary because the 83<sup>rd</sup> Legislature passed House Bill 4 which made numerous amendments to Texas Water Code. The first article of that bill made changes to the administration of the TWDB. More specifically Section 1.1 of the bill amended Texas Water Code Section 6.052 (relating to Members of the Board; Appointment) to change the composition of the board from six members to three members. The current rule, which would be amended by this proposed rule, refers to the governing body of the TWDB as having six members.

### SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENT.

#### *Proposed Amendments to 31 TAC Chapter 367.2, (relating to Definitions).*

The proposed amendment to §367.2 (relating to Definitions) if adopted, would amend the definition of “Board,” for purposes of 31 TAC Chapter 367, (relating to Agricultural Water Conservation Program) by deleting any reference to the number of board members serving as the governing body of the state agency, the Texas Water Development Board. The amendment is necessary because the 83<sup>rd</sup> Legislature passed House Bill 4 which amended Texas Water Code Section 6.052 (relating to Members of the Board; Appointment) to change the composition of the governing body of the agency from six members to three members. The proposed amendment would implement this legislative change.

### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Amanda Landry, Chief Financial Officer, has determined that for the first five year period the proposal is in effect, there will be no fiscal implications on state or local governments as a result of the proposal. There are no fiscal benefits to local governments as a result of the proposal.

### PUBLIC BENEFITS AND COSTS

Amanda Landry has also determined that for the first five years the proposed rule is in effect, the public benefit anticipated as a result of the proposal will be the agency’s rules will conform to applicable legislation. Ms. Landry has determined that there will be no economic costs to small businesses or individuals as a result of the proposed rule.

## LOCAL EMPLOYMENT IMPACT STATEMENT

The board 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 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.

## REGULATORY ANALYSIS

The board has determined that the proposed rulemaking is not subject to Government Code §2001.0225 because it is not a major environmental rule under that section.

## TAKINGS IMPACT ASSESSMENT

The board has determined that the promulgation and enforcement of this proposed rule constitute neither a statutory nor a constitutional taking of private real property. The proposed rule does not adversely affect a landowner's rights in private real property, in whole or in part, because the proposed rule does not burden or restrict or limit the owner's right to or use of property. Therefore, the proposed rulemaking does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution

## ANNOUNCEMENT OF HEARINGS

The board will hold public hearings on this proposal on July 24, 2014, at Texas A&M University – San Antonio, One University Way, San Antonio, Texas 78224 at 1:00 p.m.; on August 13, 2014, at the McNease Convention Center, 500 Rio Concho Drive, San Angelo, Texas 76903 at 10:00 a.m.; on August 21, 2014, at [Metroplex address TBD at [time TBD]]. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon. Open discussion and questions to the board will not be permitted during the hearings.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Merry Klonower at (512) 463-8165 as far in advance as possible and no later than five (5) work days prior to the hearing so that appropriate arrangements can be made.

## SUBMISSION OF COMMENTS

Written comments on the proposed rules will be accepted until September 1, 2014, and may be submitted to the Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, or by e-mail to [rulescomments@twdb.texas.gov](mailto:rulescomments@twdb.texas.gov), or by fax at (512) 475-2053.

#### STATUTORY AUTHORITY

The amendment is proposed under authority of Texas Water Code §6.101, which authorizes the TWDB to adopt rules necessary to carry out the powers and duties of the TWDB.

The amendment affects Texas Water Code, Chapter 17, Subchapter J.

#### § 367.2. Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Board--The ~~six-member~~ governing body of the Texas Water Development Board.
- (2) through (13) No changes