

AGENDA ITEM MEMO

BOARD MEETING DATE: July 25, 2023

TO: Board Members

THROUGH: Jeff Walker, Executive Administrator
Ashley Harden, General Counsel

FROM: Kendal Kowal, Assistant General Counsel

SUBJECT: 31 TAC Chapter 354 Rule Adoption

ACTION REQUESTED

Consider authorizing (1) the publication of a notice of adoption of rule review for 31 TAC Chapter 354; (2) the publication of proposed adopted amendments to 31 TAC § 354.6; and (3) the publication of proposed adopted repeals to 31 TAC §§ 354.1, 354.2, 354.4, 354.6, 354.7, 354.8, 354.9, 354.11, 354.13, 354.14, 354.15, 354.16, and 354.17.

BACKGROUND

On January 19, 2023, the Board authorized the publication of a notice of intent to review Texas Water Development Board (TWDB) rules contained in 31 TAC Chapter 354, as well as proposed amendments to 31 TAC § 354.6 and the proposed repeal of 31 TAC §§ 354.1, 354.2, 354.4, 354.6, 354.9, and 354.15. This action requests authorization to publish notice adopting the Agency's rule review and adoption of proposed amendments and repeals following notice and comment in the *Texas Register*.

Following the publication of the rule proposal for Chapter 354, the 88th Texas Legislature passed House Bill (HB) 2388. HB 2388, with changes now codified to Texas Water Code § 6.104, removed the requirement that the TWDB adopt all Memoranda of Understanding (MOUs) with other state agencies in rule. The TWDB is still required to adopt MOUs with the Texas Commission on Environmental Quality (TCEQ) in rule.

KEY ISSUES

Texas Government Code (Tex. Gov't Code) § 2001.039 requires the TWDB to review all existing rules every four years. After review, the agency must either re-adopt, re-adopt with amendments, or repeal existing rules.

Our Mission

Leading the state's efforts in
ensuring a secure water future
for Texas and its citizens

Board Members

Brooke T. Paup, Chairwoman | George B. Peyton V, Board Member | L'Oreal Stepney, P.E., Board Member
Jeff Walker, Executive Administrator

A notice of intent to review rules in 31 TAC Chapter 354 was filed with the *Texas Register*, including an amendment to § 354.6 and the repeal of §§ 354.1, 354.2, 354.4, 354.6, 354.9, and 354.15. These notices were published on February 2, 2023. The public comment period ended on March 6, 2023, and no comments were received.

After review of Chapter 354, the TWDB proposes to re-adopt without amendments 31 TAC §§ 354.3, 354.5, 354.10, and 354.12. The TWDB proposes to adopt an amendment to 31 TAC § 354.6. The TWDB proposes to adopt the repeal of 31 TAC §§ 354.1, 354.2, 354.4, 354.6, 354.9, and 354.15. Additionally, with the passage of HB 2388 removing the requirement to adopt MOUs into rule, the TWDB also proposes to adopt the repeal of 31 TAC §§ 354.7, 354.8, 354.11, 354.13, 354.14, 354.16, and 354.17. These changes retain all MOUs with the TCEQ in TWDB rule but remove MOUs with other agencies (in accordance with HB 2388).

The amendment to Chapter 354 adds a new § 354.6, Memorandum of Understanding between the Texas Water Development Board and the Texas Commission on Environmental Quality Related to Expedited Permit Review for Interregional Water Supply Projects. On November 17, 2022, the Board authorized the Executive Administrator to execute this MOU with the TCEQ.

The effective date of the rules will be September 1, 2023, to account for the effective date of HB 2388.

RECOMMENDATION

The Executive Administrator recommends the publication of a notice in the *Texas Register* adopting the rule review of 31 TAC Chapter 354, including an amendment to 31 TAC § 354.6 and the repeal of 31 TAC §§ 354.1, 354.2, 354.4, 354.6, 354.7, 354.8, 354.9, 354.11, 354.13, 354.14, 354.15, 354.16, and 354.17.

Attachment(s):

1. Proposed notice of adoption of rule review to be filed with the *Texas Register*
2. Proposed adoption of rulemaking amendments to be filed with the *Texas Register*
3. Proposed adoption of rulemaking repeals to be filed with the *Texas Register*

Texas Water Development Board

Title 31, Part 10, Chapter 354

The Texas Water Development Board (TWDB) files the adoption of its review of rules in 31 Texas Administrative Code, Title 31, Part 10, Chapter 354.

This review is being conducted in accordance with the requirements of the Texas Government Code §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years.

Notice of the review of the aforementioned chapter was published in the February 3, 2023, issue of the *Texas Register* (48 TexReg 471). TWDB received no comments during the comment period.

TWDB conducted its review in accordance with the requirements of the Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The TWDB considered whether the initial factual, legal, and policy reasons for adopting each rule in these subchapters continued to exist and determined that the original reasons for adopting these rules continue to exist and readopts this chapter. This concludes TWDB's review of 31 TAC, Title 31, Part 10, Chapter 354. Amendments and repeals related to this chapter are published elsewhere in this issue of the *Texas Register*.

The Texas Water Development Board (TWDB) adopts 31 Texas Administrative Code §354.6. The proposal is adopted without changes as published in the February 3, 2023, issue of the *Texas Register* (Texas Register 48 TexReg 472).

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

The TWDB adopts new §354.6 related to a new Memorandum of Understanding (MOU) between the Texas Water Development Board and the Texas Commission on Environmental Quality (TCEQ). The current §354.6 is repealed elsewhere in this same issue of the *Texas Register*.

EFFECTIVE DATE.

These rules will become effective on September 1, 2023.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

§354.6. Memorandum of Understanding Between the Texas Water Development Board and the Texas Commission on Environmental Quality Related to Expedited Permit Review for Interregional Water Supply Projects.

This proposed rule would replace an outdated MOU, repealed elsewhere in this issue of the *Texas Register*, with a new MOU entered into between the TWDB and TCEQ. House Bill (HB) 1052, passed during the 86th Texas Legislative Session, required the TWDB and TCEQ to enter into an MOU related to the expedited permit review for interregional water supply projects funded by the TWDB's State Participation Program. This bill was codified as Texas Water Code §16.145. Texas Water Code §5.104 requires the TWDB to adopt by rule any MOU between the TWDB and TCEQ.

REGULATORY IMPACT ANALYSIS DETERMINATION (Texas Government Code §2001.0225)

The TWDB reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the rulemaking is not subject to Texas Government Code §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to delineate the responsibilities of the TWDB and TCEQ related to expedited permit reviews for interregional water supply projects funded through the State Participation Program.

Even if the rule were a major environmental rule, Texas Government Code §2001.0225 still would not apply to this rulemaking because Texas Government Code §2001.0225 only applies to

a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) is not adopted solely under the general powers of the agency, but rather Texas Water Code §§ 5.104 and 6.104. Therefore, this rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

TAKINGS IMPACT ASSESSMENT (Texas Government Code §2007.043)

The TWDB evaluated this rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to comply with the statutory requirement to enter into this MOU outlined in Texas Water Code §16.145. The rule would substantially advance this stated purpose by delineating the responsibilities of the TWDB and TCEQ related to expedited permit reviews for interregional water supply projects funded through the State Participation Program.

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

Nevertheless, the TWDB further evaluated this rule and performed an assessment of whether it constitutes a taking under Texas Government Code Chapter 2007. Promulgation and enforcement of this rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject regulation does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. This rule simply delineates the TWDB's and TCEQ's responsibilities related to expedited permit reviews for interregional water supply projects funded through the State Participation Program and establishes compliance with the TWDB's requirement to publish all MOUs with TCEQ in rule. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

PUBLIC COMMENTS (Texas Government Code §2001.033(a)(1))

The comment period ended March 6, 2023. No comments were received.

STATUTORY AUTHORITY (Texas Government Code §2001.033(a)(2))

The amendment is adopted under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Water Code §§ 5.104 and 6.104, which requires the TWDB to adopt by rule all MOUs with the TCEQ.

This rulemaking affects Texas Water Code, Chapters 6, 16, and 17.

<rule>

Title 31. Natural Resources and Conservation.

Part 10. Texas Water Development Board.

Chapter 354. Memoranda of Understanding.

§354.6. Memorandum of Understanding Between the Texas Water Development Board and the Texas Commission on Environmental Quality Related to Expedited Permit Review for Interregional Water Supply Projects.

- (a) This Memorandum of Understanding (“Agreement”) is between the Texas Water Development Board (“TWDB”) and the Texas Commission on Environmental Quality (“TCEQ”), each an agency of the State of Texas.
- (b) Whereas, the TWDB provides financial assistance for the construction, acquisition, or improvements of water supply projects, including through the State Participation Program,
- (c) Whereas, the TCEQ conducts reviews and issues permits for certain aspects of the construction, acquisitions, or improvements for water supply projects,
- (d) Whereas, the 86th Legislature, R.S. passed and the governor signed House Bill 1052, which was effective September 1, 2019,
- (e) Whereas, House Bill 1052 added certain interregional water supply projects as projects eligible for State Participation funding from the TWDB,
- (f) Whereas, House Bill 1052 required the TWDB and TCEQ to enter into a memorandum of understanding for the expedited approval of permits for such interregional water supply projects funded by TWDB through the State Participation Program,
- (g) Now, therefore, in consideration of the benefits to the State of Texas, the TWDB and TCEQ hereby agree as follows:

(1) The TCEQ will, to the extent allowed by law, provide expedited review of permit applications for interregional water supply projects as provided by Texas Water Code, Section 16.145.

(2) The TWDB will, to the extent allowed by law, provide information to the TCEQ related to interregional water supply projects identified under Texas Water Code, Section 16.145 to ensure that TCEQ's review of permit applications associated with such projects can be conducted on an expedited basis.

(3) General conditions:

(A) This Agreement may be amended by mutual agreement of the TWDB and TCEQ in accordance with applicable law.

(B) This Agreement may be terminated by either party upon written notice to the other party and in accordance with applicable law.

(C) Any written notices required by this Agreement shall be addressed to the respective party as follows:

(i) Executive Director, TCEQ, P.O. Box 13087, Austin, Texas 78711-3231;

(ii) Executive Administrator, TWDB, P.O. Box 13231, Austin, Texas 78711-3231.

The Texas Water Development Board (TWDB) adopts the repeal of 31 Texas Administrative Code §§354.1, 354.2, 354.4, 354.6, 354.7, 354.8, 354.9, 354.11, 354.13, 354.14, 354.15, 354.16, and 354.17. The proposal is adopted with changes as published in the February 3, 2023, issue of the *Texas Register* (*Texas Register* 48 TexReg 470).

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

The TWDB determined through a review of its rules in Chapter 354 that the aforementioned rules for repeal are either expired, were adopted to facilitate the administration of Agency directives that are no longer necessary, or are instead interagency contracts effective pursuant to Chapter 771, Texas Government Code. Additionally, the 88th Texas Legislature passed House Bill (HB) 2388. HB 2388 removed the requirement that the TWDB adopt all Memoranda of Understanding (MOUs) with other state agencies in rule. The TWDB is still required to adopt MOUs with the Texas Commission on Environmental Quality (TCEQ) in rule. Therefore, the TWDB adopts the repeal of all MOUs entered into with state agencies other than the TCEQ.

EFFECTIVE DATE.

These rules will become effective on September 1, 2023.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

Section 354.1 is repealed as the manner of compliance between the Texas Historical Commission and the TWDB has changed since the promulgation of the rule.

Section 354.2 is repealed because the term of the contract expired August 31, 2017.

Section 354.4 is repealed because the term of the contract expired August 31, 2017, and the General Appropriations Act rider relating to the contract has not been renewed.

Section 354.6 is repealed and the contract will not be readopted into rule as a memorandum of understanding because the contract is an interagency contract between the named agencies under Chapter 771, Texas Government Code.

Section 354.7 is repealed pursuant to HB 2388 (88th Regular Legislative Session).

Section 354.8 is repealed pursuant to HB 2388 (88th Regular Legislative Session).

Section 354.9 is repealed because the term of the contract expired August 31, 2017.

Section 354.11 is repealed pursuant to HB 2388 (88th Regular Legislative Session).

Section 354.13 is repealed pursuant to HB 2388 (88th Regular Legislative Session).

Section 354.14 is repealed pursuant to HB 2388 (88th Regular Legislative Session).

Section 354.15 is repealed because the initiative between the Comptroller of Public Accounts and the Agency is no longer necessary to facilitate TWDB directives.

Section 354.16 is repealed pursuant to HB 2388 (88th Regular Legislative Session).

Section 354.17 is repealed pursuant to HB 2388 (88th Regular Legislative Session).

REGULATORY IMPACT ANALYSIS DETERMINATION (Texas Government Code §2001.0225)

The TWDB reviewed the repeal in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the repeal is not subject to Texas Government Code §2001.0225, because it does not meet the definition of a “major environmental rule” as defined in the Administrative Procedure Act. A “major environmental rule” is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the repeal is to conduct a review and reorganization of the TWDB’s rules as required by state law.

Even if the rule were a major environmental rule, Texas Government Code §2001.0225 still would not apply to this rulemaking because Texas Government Code §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) is not adopted solely under the general powers of the agency, but rather under Texas Water Code §§5,104, 6.101, and 6.104. Therefore, this rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

TAKINGS IMPACT ASSESSMENT (Texas Government Code §2007.043)

The TWDB evaluated this repeal and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this repeal is conducted pursuant to TWDB review and reorganization of its existing Memoranda of Understanding between it and various other state governmental agencies and in order to implement recent legislation. The repeal substantially advances this stated purpose.

The TWDB’s analysis also indicates that Texas Government Code, Chapter 2007 does not apply to this repeal because this is an action that is reasonably taken to fulfill an obligation imposed by

state statute which is exempt under Texas Government Code §2007.003(b)(4). The TWDB as an agency is required by law to promulgate into its rules all memoranda of understanding it enters into with the TCEQ.

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

PUBLIC COMMENTS (Texas Government Code §2001.033(a)(1))

The comment period ended March 6, 2023. No comments were received.

STATUTORY AUTHORITY (Texas Government Code §2001.033(a)(2))

The amendment is adopted under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Water Code §§5.104 and 6.104, which require the TWDB to adopt by rule any MOU with the TCEQ.

This rulemaking affects Texas Water Code, Chapters 6, Subchapter D.

<rule>

§354.1. Memorandum of Understanding with Texas Historical Commission

§354.2. Memorandum of Understanding Between the Office of the Governor and the Texas Water Development Board

§354.4. Memorandum of Understanding Between the Texas Department of Agriculture and the Texas Water Development Board

§354.6. Interagency Cooperation Contract between the Texas Water Development Board, the Texas Commission on Environmental Quality and Department of State Health Services

§354.7. Letter of Agreement Between the Railroad Commission of Texas and the Texas Water Development Board

§354.8. Memorandum of Understanding for Inclusion in DIR's WCAG2.0 Web Accessibility Scanning Program

§354.9. Memorandum of Understanding Between the Public Utility Commission of Texas and the Texas Water Development Board

§354.11. Memorandum of Agreement Between the General Land Office and the Texas Water Development Board

§354.14. Agreement for Right of Entry and Temporary Use of Highway Right of Way

§354.15. Agreement in Furtherance of Transparency Initiative

§354.16. Memorandum of Understanding Between the Texas Division of Emergency Management (TDEM) and the TWDB related to the Federal Public Assistance Grant Program

§354.17. Memorandum of Understanding Between the Texas Division of Emergency Management (TDEM) and the TWDB related to the Federal Hazard Mitigation Grant Program