

AGENDA ITEM MEMO

BOARD MEETING DATE: September 14, 2023

TO: Board Members

THROUGH: Jeff Walker, Executive Administrator
John T. Dupnik, P.G., Deputy Executive Administrator, Water Science and Conservation
Ashley Harden, General Counsel
As to certain fiscal elements: Rebecca Trevino, Chief Financial Officer

FROM: Erika Mancha, Director, Conservation and Innovative Water Technologies
John Sutton, Manager, Conservation

SUBJECT: Proposed rulemaking to Chapter 358 on water loss technical assistance, prioritization, and data reporting

ACTION REQUESTED

Consider authorizing the publication of proposed amendments to 31 Texas Administrative Code (TAC) § 358.6 relating to water loss audits to implement Senate Bill 28 (88th Regular Session).

BACKGROUND

In 2023, the 88th Texas Legislature passed Senate Bill 28 (SB 28), effective September 1, 2023, which addressed financial assistance and other water programs administered by the Texas Water Development Board (TWDB). Among the provisions of the bill, Section 8 directs the TWDB to adopt rules establishing a program to provide technical assistance to qualifying retail public utilities to (1) conduct water loss audits required by Chapter 16 of the Texas Water Code and (2) apply for financial assistance from the TWDB to mitigate the utility system's water loss. The TWDB is also required to prioritize technical assistance offered to qualifying retail public utilities based on submitted water loss audits, the population served by the utility, and the integrity of the utility's system.

SB28 also requires the TWDB to publish on the official website of the agency (1) water loss data according to category of retail public utility and to regional water planning area, (2) measures taken by retail public utilities to reduce water loss, and (3) a list of those retail public utilities who received technical and financial assistance to mitigate a retail public utility's water loss. The TWDB can contract with or partner with other entities to help

Our Mission

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

Board Members

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

implement any aspect of the program as established by these proposed rules. The TWDB is required to adopt rules no later than January 1, 2024.

KEY ISSUES

Retail public water utilities have been submitting water loss audits and the TWDB has informally assisted in completing the audits since 2003. Additionally, TWDB has been providing training required for individuals submitting water loss audits since 2017. Most recently, the TWDB approved amendments to Chapter 358 to promulgate new water loss audit validation requirements for certain utilities beginning in January 2025. Pursuant to the rules, TWDB will provide assistance by working with utilities one-on-one to conduct water loss data validation to improve the accuracy of their water loss data.

The proposed rulemaking largely codifies and enhances the TWDB's existing water loss program. The Executive Administrator proposes to amend § 358.6 relating to water loss audits by adding three new subsections (§§ 358.6(g), (h), and (i)). These new subsections follow the legislative directive of SB 28 closely while also providing the agency flexibility to implement the program internally.

The assessment of water loss and the technical assistance and data validation services provided by the TWDB have evolved and expanded over time and will be further enhanced with the implementation of these rules to implement the Section 8 provisions of SB 28.

The resulting water loss technical assistance program will help to:

- yield more accurate water loss data;
- guide water utilities on how to best address and fund water loss mitigation;
- promote more affordable water service for utility customers;
- ensure that state financial resources are expended effectively; and ultimately,
- conserve state water resources.

RECOMMENDATION

The Executive Administrator recommends the publication of proposed amendments to 31 Texas Administrative Code (TAC) § 358.6 relating to water loss audits to implement SB 28 (88th Regular Session).

Attachment:

1. Proposed rulemaking to be filed with *Texas Register*

The Texas Water Development Board (TWDB) proposes an amendment to 31 Texas Administrative Code (TAC) §358.6 to provide technical assistance in water loss control for qualifying retail public utilities that submit water loss audits and related data to the TWDB.

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

This proposed rulemaking is to implement Senate Bill Number 28 (S.B. 28), Section 8, passed by the 88th Texas Legislature, effective September 1, 2023. S.B. 28 directs the TWDB to establish a program providing technical assistance to retail public utilities conducting water loss audits required by Chapter 16 of the Texas Water Code. The TWDB is required to prioritize technical assistance to retail public utilities required to submit water loss audits to the TWDB based on submitted water loss audits, the population served by the utility, and the integrity of the utility's system. S.B. 28 also requires the TWDB to publish certain water loss data submitted to the TWDB on its official website in addition to information related to entities receiving technical assistance established by these proposed rules.

The TWDB proposes providing technical assistance by amending § 358.6 and adding new Sections 358.6(g), (h), and (i).

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

In 31 TAC §358.6, new §358.6(g) is proposed to provide technical assistance in water loss control and outlining the circumstances of the technical assistance offered by the TWDB.

In 31 TAC §358.6, new §358.6(h) is proposed to describe how the agency will prioritize the technical assistance offered by the TWDB to retail public utilities based on water loss audits submitted, the population served by the retail public utility, and the system integrity of the retail public utility.

In 31 TAC §358.6, new §358.6(i) is proposed to establish how the TWDB will publish on its official website certain information related to the retail public utilities receiving technical assistance in addition to other information and data related to water loss audits that the TWDB currently collects.

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

Rebecca Trevino, Chief Financial Officer, has determined that there will be a fiscal impact to state government; however there are no anticipated additional estimated costs or foreseeable implications (including administrative costs) relating to a local governments' costs or revenue resulting from these rules for local governments.

For the first five years these rules are in effect for state government, the TWDB anticipates implementation of these rules will be an increase in cost because the rules require an expansion of TWDB's current practices related to reviewing and compiling statewide water loss data to comply with the requirements of S.B. 28. To administer the proposed rules, the TWDB intends

to increase its staff by three professional positions funded from existing operational funds. In addition, professional consultant services will be required to develop program materials and the information technology system used to track program information. Program costs are estimated to be paid from existing operational funds and to be \$690,000 in the first year and \$660,000 each year thereafter.

Though these proposed rules impose a cost on state government that will be provided for as previously described, these rules will not impose a cost on regulated persons, which includes another state agency, a special district, or a local government. Therefore, the requirement in Texas Government Code, §2001.0045 for the TWDB to repeal a rule does not apply. Notwithstanding the foregoing, an exception to the requirement in §2001.0045 to repeal a rule applies to these proposed rules because these rules are necessary to implement legislation enacted by S.B. 28 and to protect water resources of this state as authorized by the Texas Water Code with an effective program designed to aid the state in the collection and monitoring of statewide water loss data.

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

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

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking. This proposed rulemaking is expressly designed to establish a program to provide technical assistance to qualifying retail public utilities in that are otherwise required by law to conduct and submit water loss audits to the TWDB. In addition, the proposed rules will assist those qualifying retail public utilities to apply for financial assistance from the TWDB to mitigate the utility system's water loss. Ms. Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the rules will not impose an economic cost on persons required to comply with the rule as the TWDB will be providing the proposed technical assistance to the retail public utilities.

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

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

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

The TWDB reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the rulemaking is not subject to Texas Government Code §2001.0225, because it does not meet the definition of a “major environmental rule” as defined in the Administrative Procedure Act. A “major environmental rule” is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is establish a program to provide technical assistance to retail public water utilities in conducting required water loss audits and in applying for financial assistance from the TWDB to mitigate the utility system's water loss.

Even if the proposed rule were a major environmental rule, Texas Government Code §2001.0225 still would not apply to this rulemaking because Texas Government Code §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) is not proposed solely under the general powers of the agency. This rule is proposed under the authority of Texas Water Code §16.0121, as amended by S.B. 28, 88th Texas Legislative Session. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

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

TAKINGS IMPACT ASSESSMENT (Texas Government Code §2007.043)

The TWDB evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to establish a program to provide technical assistance to retail public water utilities in conducting required water loss audits and in applying for financial assistance from the board to mitigate the utility system's water loss as well as to prioritize the technical assistance based on three factors. The proposed rule also directs the TWDB to publish certain information related to its collection of water loss data and the use of this program on its official website. The proposed rule would

substantially advance this stated purpose by codifying and expanding TWDB's water loss program to better assist retail public utilities in mitigating their water loss.

The TWDB's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action, including an action of a political subdivision, 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 requires retail public utilities to conduct and submit water loss audits.

Nevertheless, the TWDB further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, the specific purpose of this rule is to implement Section 8 of S.B. 28 and expand the TWDB's water loss program to better assist retail public utilities in mitigating their water loss. The creation of this program as proposed and collection of better water loss data by the TWDB is not a statutory or constitutional taking of private real property. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT (Texas Government Code §2001.0221)

The TWDB reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rule would be in effect, the proposed rule (1) creates a government program; and (2) requires the creation of new employee positions. The TWDB intends to use existing operational funds for the program which will include increasing its staff by three professional positions. In addition, professional consultant services will be required to develop program materials and the information technology system used to track program information. Program costs are estimated to be \$690,000 in the first year and \$660,000 each year thereafter.

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

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov, or by fax to (512) 475-2053. Comments will be accepted until 5:00 p.m. of the 31st day following publication the *Texas Register*. Include "Chapter Number 358" and "Technical Assistance in Water Loss Control" in the subject line of any comments submitted.

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

The amendment is proposed under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and under the authority of Texas Water Code Section 16.0121(k) and Section 16.0121(l), as enacted by S.B. 28, passed during the 88th Texas Legislative Session, effective September 1, 2023.

This rulemaking affects Water Code, Chapter 16, Subchapter B. §358.6 Water Loss Audits.

TEXAS ADMINISTRATIVE CODE

TITLE 31 NATURAL RESOURCES AND CONSERVATION

PART 10 TEXAS WATER DEVELOPMENT BOARD

CHAPTER 358 STATE WATER PLANNING GUIDELINES

SUBCHAPTER B DATA COLLECTION

§358.6 Water Loss Audits

(a) Definitions. Unless otherwise indicated, in this section the following terms shall have the meanings assigned.

(1) Allowed apparent loss--A unique number for allowable apparent loss calculated for each utility.

(2) Annual real loss--A unique number calculated for each utility based on the utility's real loss on an annualized basis.

(3) Apparent loss--Unauthorized consumption, meter inaccuracy, billing adjustments, and waivers.

(4) Average system operating pressure--System operating pressure in pounds per square inch calculated using a weighted average approach as identified in the American Water Works Association M36 Manual.

(5) Validation - The process of examining water loss audit inputs to identify and correct inaccuracies in water loss audit data and the application of methodology to evaluate and communicate the uncertainty inherent in water loss audit data.

(6) Executive Administrator--The executive administrator of the Board.

(7) Mitigation--An action or actions taken by a retail public utility to reduce the amount of total water loss in a system. Mitigation may include a detailed water loss assessment, pipe or meter

replacement, or addition or improvement of monitoring devices to detect water loss.

(8) Real loss--Loss from main breaks and leaks, storage tank overflows, customer service line breaks, and line leaks.

(9) Retail public utility or utility--A retail public utility as defined by Texas Water Code §13.002.

(10) Service connection density--The number of a retail public utility's connections on a per mile basis.

(11) Total water loss--The sum of a utility's real loss and apparent loss.

(b) A retail public utility that provides potable water shall perform a water loss audit and file with the executive administrator a water loss audit computing the utility's system water loss during the preceding calendar year, unless a different 12-month period is allowed by the executive administrator. The water loss audit may be submitted electronically.

(1) Audit required annually. The utility must file the water loss audit with the executive administrator annually by May 1st if the utility:

(A) has more than 3,300 connections; or

(B) is receiving financial assistance from the board, regardless of the number of connections. A retail public utility is receiving financial assistance from the board if it has an outstanding loan, loan forgiveness agreement, or grant agreement from the board.

(2) Audit required every five years. The utility must file the water loss audit with the executive administrator by May 1, 2016, and every five years thereafter by May 1st if the utility has 3,300 or fewer connections and is not receiving financial assistance from the board.

(3) The water loss audit must be performed in accordance with methodologies developed by the executive administrator based on the population served by the utility and taking into consideration the financial feasibility of performing the water loss audit, population density in the service area, the retail public utility's source of water supply, the mean income of the service population, and any other factors determined by the executive administrator. The executive administrator will provide the necessary forms and methodologies to the retail public utility.

(4) A water loss audit must be performed by a person who has completed water loss audit training developed by the executive administrator. The executive administrator will make such training available without charge on the agency website and may also provide such training in person or by video.

(5) Effective January 1, 2025, a utility required to submit a water loss audit annually as described in paragraph (1)(B) of this subsection or that is applying for financial assistance will

be required to have its most current water loss audit validated within three months of submittal or prior to consideration of a request for financial assistance from the board. The executive administrator will validate the submitted water loss audit in conference with the retail public utility. Alternatively, the utility may elect to have the water loss audit validated by a person other than the executive administrator. Should a water loss audit be validated by a person other than the executive administrator's staff, validation must follow TWDB's validation guidelines and be performed by a person other than the person submitting the water loss audit, who has completed water loss audit validation training and is certified to conduct such validation.

(c) The executive administrator shall determine if the water loss audit is administratively complete. A water loss audit is administratively complete if all required responses are provided, the audit is completed by a person who has been trained to conduct water loss auditing as described in subsection (b)(4) of this section, and the audit has been validated as described in subsection (b)(5) of this section. In the event the executive administrator determines that a retail public utility's water loss audit is incomplete, the executive administrator shall notify the utility.

(d) A retail public utility that provides potable water that fails to submit a water loss audit or that fails to correct a water loss audit that is not administratively complete within the timeframe provided by the executive administrator is ineligible for financial assistance for water supply projects under Texas Water Code, Chapter 15, Subchapters C, D, E, F, G, H, J, O, Q, and R; Chapter 16, Subchapters E and F; and Chapter 17, Subchapters D, I, K, and L. The retail public utility will remain ineligible for financial assistance until a complete water loss audit has been filed with and accepted by the executive administrator.

(e) The following thresholds shall apply to certain retail public utilities:

(1) For a retail public utility with a service connection density more than or equal to 32 connections per mile:

(A) Apparent loss expressed as gallons per connection per day must be less than the utility's allowed apparent loss.

(B) Real loss expressed as gallons per connection per day must be less than 30 gallons per connection per day.

(2) For a retail public utility with a service connection density less than 32 connections per mile:

(A) Apparent loss expressed as gallons per connection per day must be less than the utility's allowed apparent loss.

(B) Real loss expressed as gallons per connection per day must be less than 57 gallons per connection per day.

(3) For a utility that has a volume of wholesale water sales that flow through the retail water distribution system:

(A) Apparent loss expressed as gallons per connection per day must be less than the utility's allowed apparent loss.

(B) Real loss, expressed as gallons per connection per day and including a wholesale factor that takes into account the wholesale water volume, must be less than the applicable real loss threshold described in subsections (e)(1)(B) or (e)(2)(B) of this section.

(f) If a retail public utility's total water loss meets or exceeds the threshold for that utility, the retail public utility must use a portion of any financial assistance received from the board for a water supply project to mitigate the utility's water loss. Mitigation will be in a manner determined by the retail public utility and the executive administrator in conjunction with the project proposed by the utility and funded by the board. On the request of a retail public utility, the board may waive the requirements of this subsection if the board finds that the utility is satisfactorily mitigating the utility's system water loss. The request for waiver should be addressed to the executive administrator and include information about the utility's current or planned activities to mitigate their water loss and their source of funding for that mitigation.

(g) The Board will provide technical assistance to retail public utilities to conduct water loss audits required to be submitted to the Board and to apply for financial assistance from the Board to mitigate a retail public utility's water loss.

(1) A retail public utility required to conduct and submit to the executive administrator a water loss audit in accordance with the provisions of this subchapter may request from the Board assistance to:

(A) conduct a water loss audit as required by this subchapter; or

(B) apply for financial assistance from the Board to mitigate a retail public utility system's total water loss, as determined by a recent water loss audit.

(2) In complying with the requirements in paragraph (1), the Board may contract with or partner with other entities as permitted by law to conduct the water loss audit of a retail public utility or contract with or partner with other entities to assist with an eligible retail public water utility's application to the Board for financial assistance to mitigate a system's total water loss, as determined by a recent water loss audit.

(h) The executive administrator shall prioritize technical assistance offered by the Board according to the criteria identified in Texas Water Code §16.0121(k) including:

(1) the water loss audits submitted to the Board;

(2) the population served by the retail public utility;

(3) the system integrity of the retail public utility as evidenced by the quality of data submitted in its water loss audit; and

(4) other relevant factors as determined by the Executive Administrator.

(i) The executive administrator shall publicly post on the Board's official website a summary of:

(1) the information included in the water audits required by Texas Water Code §16.0121(b) and §16.0121(b-1) according to category of retail public utility and according to regional water planning area;

(2) the measures taken by retail public utilities to reduce water loss; and

(3) a list of those retail public utilities receiving technical assistance as established under §358.6(g) including details related to use of the Board's financial assistance to mitigate a retail public utility's total water loss.