

**From:** [Darren McDivitt](#)  
**To:** [Emily Johnson](#); [Senaída San Miguel](#); [Sarah Gruen](#); [Ashley Thomas](#)  
**Cc:** [Sunset Advisory Commission](#); [Trisha Linebarger](#)  
**Subject:** FW: TWDB comments  
**Date:** Thursday, April 14, 2022 8:50:13 AM  
**Attachments:** [image001.png](#)  
[TWDB Sunset Staff Report Comments 4.13.22.pdf](#)

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See attached letter.

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**From:** Amanda Fuller <FullerA@nwf.org>  
**Sent:** Wednesday, April 13, 2022 4:37 PM  
**To:** Jennifer Jones <Jennifer.Jones@sunset.texas.gov>; Darren McDivitt <Darren.McDivitt@sunset.texas.gov>  
**Subject:** TWDB comments

Dear Ms. Jones and Mr. McDivitt:

Thank you and your teams for the opportunity to provide comments on the staff report on the Texas Water Development Board; we appreciate your detailed work during the agency review.

On behalf of the organizations listed in the attached letter, I am submitting our comments on the report, which include comments on the staff issues raised and a number of new issues and recommendations for SAC's consideration. Please let us know if you have questions, and we look forward to working with you and the Sunset Commission throughout the rest of the process.

Thank you,



**Amanda Fuller**  
**Director, Texas Coast and Water Program**  
**Acting Regional Executive Director, South Central Region**  
**she | her | hers**  
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*Uniting all Americans to ensure wildlife thrive in a rapidly changing world*

April 13, 2022

Ms. Jennifer Jones  
Mr. Darren McDivitt  
Sunset Advisory Commission  
P.O. Box 13066  
Austin, Texas 78711

Re: Comments on the Sunset Staff Report on the Texas Water Development Board

Dear Ms. Jones and Mr. McDivitt:

Thank you for the opportunity to provide comments on the Sunset staff review of the Texas Water Development Board (TWDB). We appreciate the time and effort undertaken by both Sunset and TWDB staff to comprehensively evaluate the agency's responsibilities and operations.

The non-profit organizations listed below are collectively aligned in working toward an equitable, sustainable and resilient water future for Texas – for the environments, people, communities and economies that all depend on this critical resource. We respectfully submit comments on the staff report and additional recommendations to consider as the Sunset process moves forward.

Texas' water future is not secure. TWDB plays a critical role in helping Texas toward a sustainable water future and has done an admirable job fulfilling these responsibilities with the resources available to it. As the Sunset staff report identifies, the Board has also undergone immense growth in policy and financial responsibilities over the last decade. This trend will continue with the \$2.9 Billion in new federal funds for the Clean Water and Drinking Water State Revolving Funds (CWSRF and DWSRF, or SRFs) slated to come to Texas via the Bipartisan Infrastructure Law (BIL, formally the Infrastructure Investment and Jobs Act) through TWDB over the next five years. This is a critical time and opportunity to ensure that TWDB has the tools and direction it needs to achieve a sustainable water future for all Texans.

### **Comments on Sunset Staff Issues 1, 2 and 3**

We support staff recommendations 1.1, 1.2, and 1.3. With respect to recommendation 1.2 authorizing a risk-based project review approach, we understand that the recommendation is intended to address the engineering review of technical components of the overall project review process, which is what the discussion addresses. The review process includes other components, such as environmental review, that raise very different issues and require independent assessment. The supporting rationale for the recommendation highlights the engineering review and, while we agree that there could be unnecessary duplication in this area with respect to project design submitted and sealed by a licensed engineer, that is not the case for the environmental review. The environmental review is an important component to project

review, and while we agree that a risk-based approach for engineering review may yield certain efficiencies, we want to ensure that the agency's implementation of this recommendation would not compromise other aspects of project review and urge that the recommendation be clarified to avoid potential confusion.

We support staff recommendations 3.1 through 3.6, and believe that instituting many of these good government recommendations can make TWDB a more effective and transparent state agency.

We support staff recommendations 2.1 and 2.2, and believe it will now be more important than ever to ensure the Board is identifying and reaching out to communities that need assistance in developing and funding sustainable water supply (both surface water and groundwater), wastewater and flood projects. We appreciate and support the Board's outreach efforts and its willingness to explore ways to identify and assist communities that are not currently accessing its financial programs, and believe that an opportunity exists to increase its reach. While neither we nor the agency may have all the answers at this beginning stage of BIL implementation, we look forward to partnering with TWDB to meet this moment of historic investment in our water infrastructure. Given this context, and the immense amount of new federal SRF funds through the BIL and [federal guidance](#) on the use of those funds, and continued struggles to identify and fund rural, conservation and reuse projects in the SWIFT program, we offer a number of additions to the recommendations in Issue 2 below.

- Direct TWDB to evaluate its use of technical assistance set-asides in the CWSRF and DWSRF programs, and to identify ways to increase technical assistance to small, rural and disadvantaged communities.

The BIL extended the allowable two percent in both SRFs to help “enhance or build programs that proactively identify, reach out to, and provide assistance to rural, small, and tribal publicly owned treatment works and water systems, particularly in disadvantaged communities.” In the past, under the DWSRF, TWDB has passed through this set-aside to the Texas Commission on Environmental Quality (TCEQ), which helps support financial, management and technical assistance to water and wastewater systems. While this support is important, gaps continue to exist in identifying and helping communities – especially smaller and under-resourced ones – successfully navigate all stages of the project development and application process. The increase of federal funds for technical assistance means that Texas will have access to additional funds for these efforts, including supporting TCEQ's efforts and potentially increasing TWDB's. TWDB, either through agency operations or contracts, can play an important role in providing this assistance, and should continue to work with communities and stakeholders to increase understanding of these gaps and developing initiatives to address them. TWDB's current Asset Management Program for Small Systems and CFO-to-Go programs are innovative and important initiatives by TWDB, but more can be done to help identify and address barriers to access for communities to apply for and receive funding.

- Direct TWDB to evaluate the proportion of loans and grants/loan forgiveness in the CWSRF and DWSRF programs, and to implement some portion of available funds to 100% loan forgiveness within one project.

The BIL mandates states to use 49% of the new CWSRF and DWSRF funds to provide grants and loan forgiveness. This is critical to help smaller, rural, and disadvantaged communities – with limited revenue bases – be able to access these funds without taking on additional debt. In the past, TWDB has offered some combination of loan and loan forgiveness within one project, but this can still be problematic for communities that are not able to take on even a portion of a project’s cost in loans. While it will be important that TWDB is able to revolve some of these funds over time from interest payments, given the federal 49% mandate and the flexibility TWDB has in these programs to design how to achieve that benchmark, we believe providing some of these funds in the form of 100% grants or loan forgiveness will increase the reach of the SRFs to communities most in need.

- Direct TWDB to evaluate its definition of Disadvantaged Community and Affordability Criteria in the DWSRF and CWSRF, and amend as necessary to ensure these funds are reaching communities most in need.

The BIL puts much emphasis on directing new SRF dollars to disadvantaged communities. Currently, TWDB adopts these definitions as part of the Intended Use Plans. While the current definitions may identify more need for disadvantaged communities than available funds, this does not necessarily mean that they are identifying the right communities that are most in need. Further, as states implement the new SRF funds and the Environmental Protection Agency (EPA) continues to hone its guidance on the definitions of Disadvantaged Community and Affordability Criteria, TWDB has the opportunity to learn from other states and stakeholders, such as the Water Equity and Climate Resilience Caucus, as they explore which criteria is most effective to achieve the programs’ goals.

- Direct TWDB to report on its implementation of the BIL SRF funds in its Biennial Legislative Priorities Report.

The next few years will be critical to ensure that TWDB is implementing the requirements, guidance and priorities of the BIL and increased federal funding to Texas for water and wastewater projects. This is particularly true given the flexibility the BIL provides states in implementing the funds, and the fact that decisions TWDB makes today will have lasting impact into the future and require new ways of working and partnering with other agencies, communities and stakeholders. The BIL requires EPA to report to Congress by November 15, 2023 on its analysis of the fund distribution of CWSRF and DWSRF, and we believe that the state should also play a close oversight role in how the programs are working in Texas.

- Direct TWDB to provide additional outreach, and technical support for Nonpoint Source (NPS) and innovative projects for both surface water and groundwater.
- Create a program to increase opportunities for NPS projects, such as a sponsorship program that allows a traditional applicant to apply for a loan and sponsor a third party that specializes in NPS projects, such as a land trust.

## **New Issues and Recommendations**

In addition to the recommendations identified in the staff report, TWDB's effectiveness could be increased in several areas. Below, please find a brief discussion of the issues we are raising and additional recommendations for the Sunset Commission's consideration.

### *State Water Planning*

While TWDB administers the State's Regional Water Planning process effectively in many ways, it has limited oversight and does not provide clear guidance on some aspects of the planning process. This can lead to inconsistent planning across regions and a lack of a clear approach on important issues such as how to address water supply changes due to climate change driven impacts, and how to approach water conservation and drought management as a water supply strategy. While the Board recently made an important first step in amending its rules to allow RWPGs to consider droughts beyond the drought of record in planning, right-sizing TWDB's responsibilities could make the process more meaningful.

- Require TWDB to provide the conservation, drought and water loss data it collects to Regional Water Planning Groups (RWPGs), and provide guidance and assistance to those groups in how to incorporate the data into their plans and management strategies.
- Require TWDB to provide guidance to RWPGs on issues related to climate science and its effects on water availability and management strategies; how to incorporate climate-driven uncertainty into the planning process; how to incorporate innovative water strategies such as One Water into plans; coordination with the Flood Planning process; and the resiliency of water supplies and management strategies to extreme weather events.
- Require TWDB to incorporate climate science and projections in the State Water Plan.
- Require TWDB to evaluate management supply factors that are greater than 1.1, to curb planning in excess of demonstrated needs.
- Require TWDB to ensure that, for consideration of droughts worse than the drought of record, consistent assumptions also are used for evaluations of impacts on water quality and of long-term consistency with protection of water resources, agricultural resources, and natural resources.

In addition, while the Texas Water Code directs that TWDB may only approve a regional water plan upon an explicit determination that the plan is consistent with long-term protection of the state's water resources, agricultural resources, and natural resources, a meaningful review of that consistency is lacking in the planning process, particularly for protection of water resources

and natural resources. In SB 2 in 2001, which was an omnibus water bill, the Legislature amended the Water Code to add paragraph (C) to Subsection 16.053 (h)(7). That change requires the Board, as a prerequisite to approving a regional water plan as part of the state's water planning process, to determine that "the plan is consistent with long-term protection of the state's water resources, agricultural resources, and natural resources as embodied in the guidance principles adopted under Section 16.051(d)." Although signaling legislative intent for a major change in the factors considered in approving, and developing, regional water plans, that clear directive, instead, has resulted primarily in perfunctory reviews of critically important issues. Plans that are not consistent with long-term protection for both surface water and groundwater resources are not realistic roadmaps for action or for meeting the state's water needs. Regional plans do sometimes include comparisons of alternate predictions of future flow levels—usually comparing a future scenario with implementation of the plan to a future scenario without implementation of the plan—but without meaningful evaluation or consideration of the extent to which water resources or natural resources will be protected with either of those future flow levels. There is somewhat more consideration of protection of agricultural resources in the planning process, but primarily because water needs for irrigation and for livestock watering are separately recognized water use categories that must be planned for.

In response to that 2001 legislative mandate, the Board revised its guidance principles but only by incorporating the legislative language without providing actual guidance on what constitutes consistency with long-term protection or what level of evaluation is needed to ensure the Board can satisfy the legislative directive. As a result, regional water plans often only include very general language about impacts to natural resources and to flows, usually in the context of future flows with and without implementation of the plan. Many of the regional water plans include a comparison of two hypothetical future flow levels: predicted flow levels at the end of the planning period with implementation of the plan compared to predicted flow levels at the end of the planning period with full exercise of existing water rights without implementation of the plan. However, neither predicted flow level is accompanied by a comparison to a known value, such as current flow levels, or by analyses of the adequacy of those flows to achieve long-term protection of the state's water resources, agricultural resources, and natural resources. Instead, the general assumption seems to be that if the "with implementation of the plan" analysis is better or only slightly worse than the "full exercise" scenario, that is sufficient to satisfy the long-term protection criterion without actual consideration of the implications of the flow levels predicted. That approach deprives Section 16.053 (h)(7)(C) of meaningful effect and fails to guide the development of regional water plans that represent realistic approaches for meeting the full suite of water needs.

- Require TWDB to revise its directives to planning groups to ensure that each regional plan includes a reasonable, quantitative evaluation of predicted flow levels and their adequacy to support:
  - agricultural activities that are not included as a water use category,
  - water-based recreation,

- businesses reliant on water-based activities that are not included in a water use category, and
- fish and wildlife resources, including those not directly acknowledged as supporting recreation or business activities.
- Require TWDB to include environmental flows and natural resource protection – including for both surface water and groundwater resources – as water use categories in the planning process.

### *Conservation and Water Loss*

Conservation is integral to Texas’ water future, but goals and strategies need updating. Effective water planning requires the integration of meaningful conservation data and strategies; 29 percent of our future water supply will come from conservation, according to the 2022 State Water Plan. Water planning, water conservation plans and annual water conservation reports largely rely on benchmarks and guidance put forth by TWDB. The goal for total gallons per capita per day (GPCD) was adopted in 2004 and is widely used in regional water planning and other processes. This metric is out of date and needs to be updated to reflect per capita water use in Texas.

The Water Conservation Best Management Practices (BMPs) are an important piece of the puzzle for utilities to achieve their water conservation goals. The BMPs provide a roadmap for how to implement water conservation strategies. A tremendous amount of effort goes into the development of the BMPs. They are used in the development of Water Conservation Plans, Regional Water Plans and Annual Water Conservation Reports. The process to get the BMPs approved at the agency level is slow and is detrimental to the advancement of water conservation and planning in the state.

- Require the Water Conservation Advisory Council (WCAC) to provide updated guidance on a more appropriate gallons per capita per day target for use by RWPGs.
- Require the WCAC to periodically review the GPCD target every 10 years.
- Direct TWDB to prioritize the adoption of water conservation best management practices.
- Direct TWDB to include information on BMP’s available to RWPGs with guidance on how to incorporate them into Water Conservation water management strategies as expeditiously as possible.

Addressing water loss in Texas is needed in order to ensure efficient use of our water resources. However, water loss continues to be a problem in Texas – despite often being a cost-effective water supply strategy. In order for TWDB to use its public financial resources responsibly, water loss must be addressed. While [HB 3605](#) (83R) provides one tool for addressing water loss, the TWDB can strengthen its role in establishing acceptable water loss thresholds and through supporting water loss audit data validation in order to ensure water loss is being properly addressed in Texas. TWDB can strengthen its role in reducing water loss, which represents a significant and efficient water supply strategy.

- Direct TWDB to update water loss thresholds that are used to determine compliance with HB 3605 every five years using data from water loss audits submitted every five years rather than using a static threshold.
- Direct TWDB to update rules to describe how “allowed apparent loss” is calculated.
- Require TWDB to report on the dollar amount and projected water savings resulting from funds that are granted or lended as a result of the implementation of HB 3605 (83R).
- Require third-party validation of water loss audits to improve the accuracy of those audits in order to provide utilities and the state with the information needed to pinpoint and address water loss problems. Require validations to include source meter verification, customer meter accuracy, and leakage component analysis.

### *Flood Planning and Financing*

TWDB’s current implementation of [SB7](#) and [SB8](#) (86R) can be made more equitable and provide greater incentives for nature-based projects, where appropriate. The 2020 Flood Intended Use Plan (FIUP) missed an opportunity to prioritize projects in economically distressed and underserved populations. While rural applicants receive 12 priority points, the social vulnerability of communities is only considered as a tiebreaker between projects. There were also three additional points given for watershed flood protection planning in counties where Annual Median Household Income (AMHI) is less than or equal to 85% of the state-wide AMHI, however no significant socioeconomic factors were considered in the prioritization for projects across the board.

Further, the Legislature encouraged use of FIF funds for both structural and nonstructural flood projects. The definition of “flood projects” includes “projects that use nature-based features to protect, mitigate, or reduce flood risk”. However, very few projects under FIF received points for green/nature-based components. Under the FIUP, 5 points were available for nonstructural projects if at least 20% of costs were considered nature-based – one of the smallest overall point categories. Only 25 out of 285 project applications received points for nonstructural projects – showing that additional incentives are required to prioritize nature-based projects. Further, only 5% additional grants were available for green/nature-based projects. Therefore, any additional appropriations before the State Flood Plan is adopted should prioritize investments in economically distressed and underserved populations and should better encourage nature-based projects, where appropriate.

In early 2021, the Regional Flood Planning Groups (RFPG) embarked on their first Regional Flood Planning (RFP) cycle – using a process modeled after the State Water Planning process. TWDB has an opportunity to play a bigger role in educating the public on the new planning process in order to get communities involved. Further, additional meetings where the regions solicit feedback from the public, in addition to regular public meetings, would likely improve public participation. The Texas Water Code § 16.062 requires the RFPGs to “hold public meetings as provided by board rule to gather from interested persons, including members of the public and

other political subdivisions located in that county, suggestions and recommendations as to issues, provisions, projects, and strategies that should be considered for inclusion in a regional flood plan.” However, the TWDB only requires at least two of these public meetings in addition to the RFPGs regular meetings.

- Require TWDB to give priority points for economically distressed areas under FIF.
- Require TWDB to give additional priority points and increase grant amounts for nonstructural projects and provide education and technical expertise to FIF applicants on how to incorporate nature-based features into their projects.
- Provide additional outreach and education to impacted communities on the regional flood planning process and how to get involved.
- Direct TWDB to increase the number of public meetings per year to increase transparency and public participation in the regional flood plans.

### *Groundwater Management*

Enhancements to TWDB’s role in groundwater management and planning are needed to ensure sustainable use of groundwater for the future. TWDB provides much needed scientific, modeling, water planning and funding to meet the needs of Texas. While the agency serves as a model to the nation, there are areas where needed enhancements would increase the agency’s ability to meet the various charges placed on it by the Legislature, in particular related to the state water planning process. The Texas Water Code has established a data driven, science-based framework for both local groundwater management and long-term groundwater planning, which are critical to state water planning in Texas. Despite the significance that groundwater management and joint planning play in the state water planning process, TWDB’s role is rather limited.

- Require that acceptance of the explanatory reports under Tex. Water Code §36.108 to include an independent TWDB-led technical review of the technical assumptions that contribute to the report.
- Direct TWDB to clarify the appropriate level of meaningful review that should be carried out by groundwater conservation districts (GCDs) in developing desired future conditions (DFCs) as per Texas Water Code §36.108.
- Require TWDB to provide GCDs with “modeled sustained pumping” volumes – the amount of groundwater that can be pumped in perpetuity from an aquifer – to address the impracticality of Total Estimated Recoverable Storage (TERS).
- Allow TWDB to identify, or for the legislature to appropriate additional funding to support the joint planning process in a manner similar to the regional water planning and flood planning process.
- Allow TWDB to identify or for the legislature to appropriate additional funding to support GCD required actions that directly impact state water planning and ultimately funding considerations, such as the need to develop local data and refined models to enhance planning.

- Clarify and augment TWDB’s responsibility and ability to review groundwater management plans beyond an administrative complete process.
- Require that acceptance of the management plans include an independent TWDB-led technical review of the assumptions that contribute to the plan and its ability to meet the DFCs.

We very much appreciate the work of staff in their review of TWDB and the opportunity to submit additional recommendations for consideration. We look forward to working with the Sunset Advisory Commission and the Legislature on TWDB’s Sunset bill, and continuing to partner with TWDB to help support its critical work. Please reach out to any of the organizations below for more information on these issues.

Sincerely,

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