

AGENDA ITEM MEMO

BOARD MEETING DATE: February 2, 2023

TO: Board Members

THROUGH: Jeff Walker, Executive Administrator
Ashley Harden, General Counsel
Jessica Peña, Deputy Executive Administrator, Water Supply & Infrastructure

FROM: Clay Schultz, Director, Regional Water Project Development
Jessica Taylor, Program Specialist
Joe Reynolds, Assistant General Counsel

SUBJECT: Alternative Project Delivery Rulemaking

ACTION REQUESTED

Consider adopting and authorizing publication of additions and amendments to 31 Texas Administrative Code (TAC) Chapters 363, 371, and 375 relating to the use of alternative project delivery methods for construction projects financed by the Texas Water Development Board (TWDB).

BACKGROUND

The TWDB authorized publication of proposed additions and amendments to 31 TAC Chapters 363, related to Financial Assistance Programs, 371, related to the Drinking Water State Revolving Fund program, and 375, related to the Clean Water State Revolving Fund program, on November 17, 2022. The proposed changes were published in the *Texas Register* on December 2, 2022, with a comment period that ended on January 2, 2023.

No comments were received and no changes were made to the rulemaking as proposed.

The purpose of the rulemaking is to incorporate by reference the Alternative Delivery Guidance document to accommodate the efficient use of alternative project delivery methods such as Construction Manager-at-Risk and Design-Build with projects financed by the TWDB.

KEY ISSUES

The new rules add a definition of Alternative Delivery Guidance to each chapter to identify the document that provides for the alternative methods of delivery.

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 new section also is added to each chapter to describe the process by which an applicant will use an alternative delivery method and direct the applicant to the guidance document.

RECOMMENDATION

The Executive Administrator recommends adopting and authorizing the publication of revisions to 31 Texas Administrative Code Chapters 363, 371, and 375 to implement changes in program management.

Attachments:

1. Adoption of Addition and Amendment to 31 TAC ch. 363 for publication in the *Texas Register*
2. Adoption of Addition and Amendment to 31 TAC ch. 371 for publication in the *Texas Register*
3. Adoption of Addition and Amendment to 31 TAC ch. 375 for publication in the *Texas Register*

The Texas Water Development Board (TWDB) adopts 31 Texas Administrative Code (TAC) §363.45 and amends 31 TAC §363.2 relating to the use of Alternative Delivery Guidance. The proposal is adopted without changes as published in the December 2, 2022, issue of the Texas Register (Texas Register 47 TexReg 8033)

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE AMENDMENT.

The Texas Legislature amended Texas Government Code Chapter 2269 to allow the use of alternative project delivery methods for the construction of public works projects, including water and wastewater projects, financed by the TWDB. Regardless of the project delivery method employed, all applicants for TWDB program funding must meet program requirements.

To accommodate methods such as Construction Manager-at-Risk (CMAR) and Design-Build (D-B) in addition to the more common Design-Bid-Build, the TWDB has prepared guidance for the use of CMAR and DB delivery methods. In conjunction with these amendments, the guidance will provide further detail and explanation. The additions and amendments to TWDB rules incorporate this document to provide the guidance necessary for efficient use of these delivery methods with projects financed by the TWDB.

SECTION BY SECTION DISCUSSION OF THE AMENDMENTS.

31 TAC §363.2(2) Definitions of Terms

Section 363.2 is amended by adding paragraph (26) "Alternative Delivery Guidance" to identify the Guidance for Use of Construction-Manager-at-Risk and Design-Build Project Delivery Methods that provides for the alternative methods of delivery.

31 TAC §363.45 Use of Alternative Delivery Guidance

Section 363.45 is added to describe the process by which an applicant will use an alternative delivery method rather than Design-Bid-Build project delivery.

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

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

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for state and local governments. Any savings will relate to local project costs. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these

rules. While these rules do not directly result in changes in costs for state or local governments, the use of alternative delivery methods in general may provide cost savings to local governments who utilize those methods. These rules clarify that local governments may use these statutorily-authorized alternative delivery methods for TWDB-financed projects.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code, §2001.0045 to repeal a rule does not apply. Furthermore, the requirement in §2001.0045 does not apply because these rules are amended to reduce the burden or responsibilities imposed on regulated persons by the rule; are necessary to protect water resources of this state as authorized by the Texas Water Code; and are necessary to protect the health, safety, and welfare of the residents of this state.

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

LOCAL EMPLOYMENT IMPACT STATEMENT (Texas Government Code §2001.022)

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

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 clarify requirements for TWDB borrowers.

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 proposed solely under the general powers of the agency, but rather under Texas Water Code §§15.001, 15.6041, and 15.605. 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 clarify requirements for TWDB borrowers. The rule would substantially advance this stated purpose by ensuring consistency with current law and improving the effectiveness of the financing programs.

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 reviews contract documents, including those using alternative delivery methods.

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. In other words, this rule requires compliance with state law regarding construction of public works projects financed by the TWDB without burdening or restricting or limiting the owner's right to property and reducing its value by 25% or more. Therefore, the 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 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 rule would be in effect, the rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations

to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy.

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

No public comments were received during the public comment period.

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

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 Texas Water Code §§15.439, 15.537, 17.183, and 17.186.

This rulemaking affects Water Code, Chapters 15 and 17.

<rule>

SUBCHAPTER A GENERAL PROVISIONS

§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) Applicant--The entity applying for financial assistance, including the entity that receives the financial assistance, the entity that owns the project funded under this chapter, or an entity authorized to act on behalf of the applicant.

(2) Alternative Delivery Guidance—A document prepared by the Board after public review and comment and reviewed periodically that identifies alternative methods of project delivery available to applicants for financial assistance and the requirements for utilizing an alternative delivery method.

(3) Board--Texas Water Development Board.

(4) Building--Erecting, building, acquiring, altering, remodeling, improving, or extending a water supply project, treatment works, or flood control measures.

(5) Certification of trust--An instrument executed by a home-rule municipality pursuant to Chapter 104, Local Government Code, governing the management of the loan proceeds in accordance with §114.086, Texas Property Code.

(6) Closing--The time at which the requirements for loan closing have been completed under §363.42 of this title (relating to Loan Closing) and an exchange of debt for delivery of funds to either the applicant, an escrow agent bank, or a trust agent has occurred.

(7) Commission--Texas Commission on Environmental Quality.

(8) Commitment--An offer by the board to provide financial assistance to an applicant who timely fulfills the conditions required in a board resolution.

(9) Construction account--A separate account created and maintained for the deposit of loan funds and utilized by the applicant to pay eligible expenses of the project.

(10) Corporation--A nonprofit water supply corporation created and operating under Texas Water Code, Chapter 67.

(11) Debt--All bonds, notes, certificates, book-entry obligations, and other obligations authorized to be issued by any political subdivision.

(12) Department--Texas Department of State Health Services.

(13) Escrow account--A separate account maintained by an escrow agent for the board's deposit of escrowed funds until such funds are eligible for release to the construction account.

(14) Escrow agent--Any of the following:

(A) a state or national bank designated by the comptroller as a state depository institution in accordance with Texas Government Code, Chapter 404, Subchapter C;

(B) a custodian of collateral as designated in accordance with Texas Government Code, Chapter 404, Subchapter D; or

(C) a municipal official responsible for managing the fiscal affairs of a home-rule municipality in accordance with Local Government Code, Chapter 104.

(15) Executive administrator--The executive administrator of the board or a designated representative.

(16) Financial assistance--Loans, grants, or state acquisition of facilities by the board pursuant to the Texas Water Code, Chapters 15, Subchapters B, C, E, G, H, O, P, and Q; Chapter 16, Subchapters E, and F; Chapter 17, Subchapters D, F, G, I, K, and L; and Chapter 36, Subchapter L.

(17) Grants--Financial assistance provided by the board for which repayment is not required.

(18) Innovative technology--Nonconventional methods of treatment such as rock reed, root zone, ponding, irrigation or other technologies which represent a significant advance in the state of the art.

(19) Legislative Designation--A designation made by the legislature in accordance with §16.051(f) and (g), Texas Water Code.

(20) Municipal use in gallons per capita per day--The total average daily amount of water diverted or pumped for treatment for potable use by a public water supply system. The calculation is made by dividing the water diverted or pumped for treatment for potable use by population served. Indirect reuse volumes shall be credited against total diversion volumes for the purpose of calculating gallons per capita per day for targets and goals developed pursuant to a water conservation plan.

(21) Pre-design commitment--A commitment by the board prior to completion of planning or design pursuant to §363.16 of this title (relating to Pre-design Funding Option).

(22) Private placement memorandum--A document functionally similar to an official statement used in connection with an offering of municipal securities in a private placement.

(23) Release--The time at which funds are made available to the loan or grant recipient or to a state participation recipient pursuant to a master agreement.

(24) SWIFT--The state water implementation fund for Texas.

(25) SWIRFT--The state water implementation revenue fund for Texas.

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

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

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 Texas Water Code §§15.439, 15.537, 17.183, and 17.186.

This rulemaking affects Water Code, Chapters 15 and 17.

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SUBCHAPTER A GENERAL PROVISIONS

§363.45. Use of Alternative Delivery Guidance.

An applicant choosing to follow an alternative delivery method must elect to do so, and notify the Board, prior to commitment of TWDB funds. Once a funding request is approved by the Board, release of funds for project-specific tasks is governed by the provisions of the Alternative Delivery Guidance rather than the rules and procedures generally applied to Design-Bid-Build project delivery as set out in Subchapter A, Divisions 4 and 5 of this Chapter.

The Texas Water Development Board (TWDB) adopts new 31 Texas Administrative Code (TAC) §371.64 and amends 31 TAC §371.1 relating to the use of Alternative Delivery Guidance. The proposal is adopted without changes as published in the December 2, 2022 issue of the Texas Register (Texas Register 47 TexReg 8035).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE AMENDMENT.

The Texas Legislature amended Texas Government Code Chapter 2269 to allow the use of alternative project delivery methods for the construction of public works projects, including water and wastewater projects, financed by the TWDB. Regardless of the project delivery method employed, all applicants for TWDB program funding must meet program requirements.

To accommodate methods such as Construction Manager-at-Risk (CMAR) and Design-Build (D-B) in addition to the more common Design-Bid-Build, the TWDB has prepared guidance for the use of CMAR and DB delivery methods. In conjunction with these amendments, the guidance will provide further detail and explanation. The additions and amendments to TWDB rules incorporate this document to provide the guidance necessary for efficient use of these delivery methods with projects financed by the TWDB.

SECTION BY SECTION DISCUSSION OF AMENDMENTS.

31 TAC §371.1(68) Definitions of Terms

Section 371.1 is amended by adding subsection (3) “Alternative Delivery Guidance” to identify the Guidance for Use of Construction-Manager-at-Risk and Design-Build Project Delivery Methods that provides for the alternative methods of delivery.

31 TAC §371.64 Use of Alternative Delivery Guidance

Section 371.64 is added to describe the process by which an applicant will use an alternative delivery method rather than Design-Bid-Build project delivery.

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

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

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for state and local governments. Any savings will relate to local project costs. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable

implications relating to state or local governments' costs or revenue resulting from these rules. While these rules do not directly result in changes in costs for state or local governments, the use of alternative delivery methods in general may provide cost savings to local governments who utilize those methods. These rules clarify that local governments may use these statutorily-authorized alternative delivery methods for TWDB-financed projects.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code, §2001.0045 to repeal a rule does not apply. Furthermore, the requirement in §2001.0045 does not apply because these rules are amended to reduce the burden or responsibilities imposed on regulated persons by the rule; are necessary to protect water resources of this state as authorized by the Texas Water Code; and are necessary to protect the health, safety, and welfare of the residents of this state.

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

LOCAL EMPLOYMENT IMPACT STATEMENT (Texas Government Code §2001.022)

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

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 clarify requirements for TWDB borrowers.

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 proposed solely under the general powers of the agency, but rather under Texas Water Code §§15.001, 15.6041, and 15.605. 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 clarify requirements for TWDB borrowers. The rule would substantially advance this stated purpose by ensuring consistency with current law and improving the effectiveness of the financing programs.

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 reviews contract documents, including those using alternative delivery methods.

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. In other words, this rule requires compliance with state law regarding construction of public works projects financed by the TWDB without burdening or restricting or limiting the owner's right to property and reducing its value by 25% or more. Therefore, the 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 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 rule would be in effect, the rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy.

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

No public comments were received during the public comment period.

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

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 Texas Water Code §§15.001, 15.6041, and 15.605.

This rulemaking affects Water Code, Chapter 15.

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SUBCHAPTER A GENERAL PROVISIONS

§371.1. 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) Acquisition--The Applicant obtaining interests in land for the purposes of locating eligible project components.

(2) Act--The Federal Safe Drinking Water Act, 42 U.S.C. §300f et seq.

(3) Alternative Delivery Guidance—a document prepared by the Board after public review and comment and reviewed periodically that identifies alternative methods of project delivery available to applicants for financial assistance and the requirements for utilizing an alternative delivery method.

(4) Applicant--The entity applying for financial assistance from the DWSRF including:

(A) the entity that receives the financial assistance; and

(B) the entity legally responsible to repay the debt.

(5) Application--The information and supporting documentation submitted by or on behalf of the Applicant that may be used for commitment for financial assistance from the DWSRF or that the executive administrator determines must be completed for consideration for financial assistance from the DWSRF.

(6) Authorized representative--The signatory agent authorized and directed by the Applicant's governing body to file the application and to sign documents relating to the project, on behalf of the Applicant.

(7) Board--The Texas Water Development Board.

(8) Bonds--All bonds, notes, certificates of obligation, and book-entry obligations authorized to be issued by any political subdivision.

(9) Bypass--To pass over a higher ranked project in favor of a lower ranked project to ensure that funds available are utilized in a timely manner, to select an interrelated project, or to meet statutory and capitalization grant requirements as delineated in the applicable IUP.

(10) Capitalization grant--The federal grant funds awarded annually by the EPA to the State for capitalization of the DWSRF.

(11) Certification of Trust--An instrument executed by a home-rule municipality pursuant to Chapter 104, Local Government Code, governing the management of the financial assistance proceeds in accordance with §114.086, Texas Property Code.

(12) Closing--The exchange of the Applicant's approved debt instruments for DWSRF financial assistance.

(13) Commission--The Texas Commission on Environmental Quality.

(14) Commitment--An offer by the Board to provide financial assistance to an Applicant as evidenced by a Board resolution.

(15) Community water system--A public water system that:

(A) serves at least 15 service connections used by year-round residents of the area served by the system; or

(B) regularly serves at least 25 year-round residents.

(16) Consolidation--Any one of the following activities:

(A) a public water system acquiring another public water system;

(B) a public water system providing retail service to another public water system; or

(C) a public water system providing wholesale service, which may include operation of the system, to another public water system.

(17) Construction account--A separate account created and maintained for the deposit of financial assistance and utilized by the Applicant to pay eligible expenses for the project.

(18) Construction phase--The erection, acquisition, alteration, remodeling, rehabilitation, improvement, extension, or other man-made change necessary for an eligible project or activity.

(19) Contaminant--Any physical, chemical, biological, or radiological substance present in water.

(20) Contract documents--The engineering documentation relating to the project including engineering drawings, maps, technical specifications, design reports, instructions, and other contract conditions and forms that are in sufficient detail to allow contractors to bid on the work.

(21) Davis-Bacon Act--The federal statute at 40 U.S.C. §3141 et seq. and in conformance with the U.S. Department of Labor regulations at 29 CFR Part 5 (Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction) and 29 CFR Part 3 (Contractors and Subcontractors on Public Building or Work Financed in Whole or in Part by Loans or Grants from the United States).

(22) Debt--All bonds or other documents issued or to be issued by any political subdivision or eligible Applicant pledging repayment of the Board's financial assistance.

(23) Design--The project phase during which the project design documents are prepared by the Applicant. Documents may include design surveys, plans, working drawings, specifications, and any procedures and protocols to be used during the construction of the project.

(24) Disadvantaged community--A community that meets the affordability criteria based on income, unemployment rates, and population trends. Specifically, the service area of an eligible applicant, the service area of a community that is located outside the entity's service area, or a portion within the entity's service area if the proposed project is providing new service to existing residents in unserved areas; and meets the following affordability criteria: (a) has an annual median household income that is no more than 75 percent of the state median household income using an acceptable source of socioeconomic data, and (b) the household cost factor that considers income, unemployment rates, and population trends must be greater than or equal to one percent if only water or sewer service is provided or greater than or equal to two percent if both water and sewer service

are provided. The required data and calculations of the household cost factor are specified in the IUP under which the project would receive funding.

(25) Disaster--The occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, extreme heat, other public calamity requiring emergency action, or energy emergency as defined in Texas Government Code §418.004.

(26) Drinking Water State Revolving Fund (DWSRF)--The financial assistance program authorized by Texas Water Code, Chapter 15, Subchapter J in accordance with the Act.

(27) Eligible Applicant--Any of the following entities:

(A) a nonprofit noncommunity water system;

(B) a nonprofit community water system;

(C) a political subdivision that is a municipality, intermunicipal, interstate or state agency, or a nonprofit water supply corporation created and operating under Chapter 67 of the Texas Water Code;

(D) privately-owned community water system; or

(E) any other entity eligible under federal law to receive funds from the DWSRF.

(28) Engineering feasibility report--Those necessary plans and studies that directly relate to the project and that are needed in order to assure compliance with the enforceable requirements of the Act and state statutes.

(29) EPA--The United States Environmental Protection Agency or a designated representative.

(30) Equivalency projects--Those funded projects that must follow all federal cross-cutter requirements.

(31) Escrow account--A separate account maintained by an escrow agent until such funds are eligible for release to the construction account.

(32) Escrow agent--Any of the following:

(A) a state or national bank designated by the comptroller as a state depository institution in accordance with Texas Government Code Chapter 404, Subchapter C;

(B) a custodian of collateral as designated in accordance with Texas Government Code Chapter 404, Subchapter D; or

(C) a municipal official responsible for managing the fiscal affairs of a home-rule municipality in accordance with Texas Local Government Code Chapter 104.

(33) Executive administrator--The executive administrator of the Board or a designated representative.

(34) Expiration date--The date on which the Board's offer of financial assistance is no longer open or valid and by which a Closing must occur.

(35) Financial assistance--Funding made available to eligible Applicants as authorized in 40 CFR §35.3525, including principal forgiveness.

(36) Force majeure--Acts of god, strikes, lockouts, or other industrial disturbances, acts of the public enemy, war, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, droughts, tornadoes, hurricanes, arrests and restraints of government and people, explosions, breakage or damage to machinery, pipelines or canals, and any other incapacities of either party, whether similar to those enumerated or otherwise, and not within the control of the party claiming such inability, which by the exercise of due diligence and care such party could not have avoided.

(37) Green project--A project or components of a project that, when implemented, will result in energy efficiency, water efficiency, green infrastructure, or environmental innovation that is characterized as a green project either categorically or by utilizing a business case as approved by the executive administrator.

(38) Green project reserve--A federal directive requiring a specified portion of the capitalization grant to be used for green projects.

(39) Initial Invited Projects List--That portion of the Project Priority List listing the eligible projects ranked according to their rating that will initially be invited to submit applications in accordance with procedures and deadlines as detailed in the applicable IUP.

(40) Intended Use Plan (IUP)--A document prepared annually by the Board, after public review and comment, which identifies the intended uses of all DWSRF program funds and describes how those uses support the overall goals of the DWSRF program.

(41) Lending rate--The rate of interest applicable to financial assistance that must be repaid.

(42) Market interest rates--Interest rates comparable to those attained for securities in an open market offering.

(43) Municipality--A city, town, or other public body created by or pursuant to state law.

(44) Non-equivalency projects--All projects other than Equivalency projects.

(45) Nonprofit organization--Any legal entity that is recognized as a tax-exempt organization by the Texas Comptroller of Public Accounts pursuant to 34 Texas Administrative Code, Part 1, Chapter 3, Subchapter O (relating to State and Local Sales and Use Taxes).

(46) Nonprofit noncommunity (NPNC) water system--A public water system that is not operated for profit, is owned by a political subdivision or nonprofit entity, and is not a community water system.

(47) Outlay report--The Board's form used to report costs incurred on the project.

(48) Permit--Any permit, license, registration, or other legal document required from any local, regional, state, or federal government for construction of the project.

(49) Person--An individual, corporation, partnership, association, State, municipality, commission, or political subdivision of the State, or any interstate body, as defined by 33 U.S.C. §1362, including a political subdivision as defined by Chapter 15, Subchapter J, of the Texas Water Code, if the person is eligible for financial assistance under the Act.

(50) Planning--The project phase during which the Applicant identifies and evaluates potential alternatives to meet the needs of the proposed project. It includes the environmental review described in Subchapter E of this Chapter and preparation of the engineering feasibility report as described in Subchapter F of this Chapter.

(51) Political subdivision--A municipality, intermunicipal, interstate, or state agency, any other public entity eligible for assistance, or a nonprofit water supply corporation created and operating under Texas Water Code Chapter 67.

(52) Population--The number of people who reside within the territorial boundaries of or receive wholesale or retail water service from the Applicant based upon data that is acceptable to the executive administrator and which includes the following:

(A) acceptable demographic projections or other information in the engineering feasibility report or the latest official data available from the U.S. Census Bureau for an incorporated city; or

(B) information on the population for which the project is designed, where the Applicant is not an incorporated city or town.

(53) Primary drinking water regulation--Regulations promulgated by EPA which:

(A) apply to public and private water systems;

(B) specify contaminants which, in the judgment of the EPA, may have any adverse effect on the health of persons;

(C) specify for each such contaminant either:

(i) a maximum contaminant level if, in the judgment of the EPA, it is economically and technologically feasible to ascertain the level of such contaminant in water in public water systems; or

(ii) if, in the judgment of the EPA, it is not economically or technologically feasible to ascertain the level of such contaminant, each treatment technique known to the EPA which leads to a reduction in the level of such contaminant sufficient to satisfy the requirements of the Act; and

(D) contain criteria and procedures to assure a supply of drinking water which dependably complies with such maximum contaminant levels including quality control and testing procedures to ensure compliance with such levels and to ensure the proper operation and maintenance of the system, and requirements as to:

(i) the minimum quality of water which may be taken into the system; and

(ii) the siting of new facilities for public water systems.

(54) Principal forgiveness--A type of additional subsidization authorized by 42 U.S.C. §300j-12(d) or federal appropriations acts, as detailed in the Intended Use Plan and principal forgiveness agreement or bond transcript applicable to the project.

(55) Private Placement Memorandum (PPM)--A document functionally similar to an "official statement" used in connection with an offering of municipal securities in a private placement.

(56) Project--The planning, acquisition, environmental review, design, construction, and other activities designed to accomplish the objectives, goals, and policies of the Act.

(57) Project engineer--The engineer retained by the Applicant to provide professional engineering services during any phase of a project.

(58) Project Information Form (PIF)--The form that the executive administrator determines must be submitted by Applicants for rating and ranking on an IUP.

(59) Project Priority List--A listing found in the IUP of projects eligible for funding, ranked according to their rating criteria score and that may be further prioritized as described in the applicable IUP.

(60) Public water system--

(A) In General. A system that provides water to the public for human consumption through pipes or other constructed conveyances, if such system has at least 15 service connections or regularly serves at least 25 individuals. Such term includes:

(i) any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system; and

(ii) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.

(B) Connections. A connection to a system that delivers water by a constructed conveyance other than a pipe shall not be considered a connection, if:

(i) the water is used exclusively for purposes other than residential use (consisting of drinking, bathing, cooking, or other similar uses);

(ii) the EPA or the Commission determines that alternative water to achieve the equivalent level of public health protection provided by the applicable national primary drinking water regulation is provided for residential or similar uses for drinking and cooking; or

(iii) the EPA or the Commission determines that the water provided for residential or similar uses for drinking, cooking, and bathing is centrally treated or treated at the point of entry by the provider, a pass-through entity, or the user to achieve the equivalent level of protection provided by the applicable national primary drinking water regulations.

(C) Irrigation districts. An irrigation district in existence prior to May 18, 1994, that provides primarily agricultural service through a piped water system with only incidental residential or similar uses shall not be considered to be a public water system if the system or the residential or similar users of the system comply with subparagraph (B)(ii) and (iii) of this paragraph.

(D) Transition period. A water supplier that would be a public water system only as a result of modifications made shall not be considered a public water system until two years after August 6, 1996. If a water supplier does not serve 15 service connections or 25 people at any time after the conclusion of the two-year period, the water supplier shall not be considered a public water system.

(61) Ready to proceed--A project for which available information indicates that there are no significant permitting, land acquisition, social, contractual, environmental, engineering, or financial issues that would keep the project from proceeding in a timely manner to the construction phase of the project.

(62) Release of funds--The sequence and timing for Applicant's release of financial assistance funds from the escrow account to the construction account.

(63) Secondary drinking water regulation--Regulations promulgated by EPA which apply to public water systems and which specify the maximum contaminant levels which, in the judgment of the EPA, are necessary to protect the public welfare. Such regulations may vary according to geographic and other circumstances and may apply to any contaminant in drinking water:

(A) which may adversely affect the odor or appearance of such water and consequently may cause a substantial number of the persons served by the public water system providing such water to discontinue its use; or

(B) which may otherwise adversely affect the public welfare

(64) Small water system--A system that serves ten thousand persons or fewer

(65) State--The State of Texas

(66) Subsidy--A reduction in the interest rate from the market interest rate

(67) Utility Commission--The Public Utility Commission of Texas

(68) Water conservation plan--A plan that complies with the requirements of Texas Water Code §16.4021.

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

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 Texas Water Code §§15.001, 15.6041, and 15.605.

This rulemaking affects Water Code, Chapter 15.

<rule>

SUBCHAPTER F ENGINEERING REVIEW AND APPROVAL

§371.64. Use of Alternative Delivery Guidance.

An applicant choosing to follow an alternative delivery method must elect to do so, and notify the Board, prior to commitment of TWDB funds. Once a funding request is approved by the Board, release of funds for project-specific tasks is governed by the provisions of the Alternative Delivery Guidance rather than the rules and procedures generally applied to Design-Bid-Build project delivery as set out in Subchapters F, G, and H of this Chapter.

The Texas Water Development Board (TWDB) adopts 31 Texas Administrative Code (TAC) §375.84 and amends 31 TAC §375.1 relating to the use of Alternative Delivery Guidance. The proposal is adopted without changes as published in the December 2, 2022 issue of the Texas Register (Texas Register 47 TexReg 8038)

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE AMENDMENT.

The Texas Legislature amended Texas Government Code Chapter 2269 to allow the use of alternative project delivery methods for the construction of public works projects, including water and wastewater projects, financed by the TWDB. Regardless of the project delivery method employed, all applicants for TWDB program funding must meet program requirements.

To accommodate methods such as Construction Manager-at-Risk (CMAR) and Design-Build (D-B) in addition to the more common Design-Bid-Build, the TWDB has prepared guidance for the use of CMAR and DB delivery methods. In conjunction with these amendments, the guidance will provide further detail and explanation. The additions and amendments to TWDB rules incorporate this document to provide the guidance necessary for efficient use of these delivery methods with projects financed by the TWDB.

SECTION BY SECTION DISCUSSION OF THE AMENDMENTS.

31 TAC §375.1(71) Definitions of Terms

Section 375.1 is amended by adding subsection (3) “Alternative Delivery Guidance” to identify the Guidance for Use of Construction-Manager-at-Risk and Design-Build Project Delivery Methods that provides for the alternative methods of delivery.

31 TAC §375.84 Use of Alternative Delivery Guidance

Section 375.84 is added to describe the process by which an applicant will use an alternative delivery method rather than Design-Bid-Build project delivery.

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

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

These rules are not expected to result in reductions in costs to either state or local governments. There is no change in costs for state and local governments. Any savings will relate to local project costs. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments’ costs or revenue resulting from these

rules. While these rules do not directly result in changes in costs for state or local governments, the use of alternative delivery methods in general may provide cost savings to local governments who utilize those methods. These rules clarify that local governments may use these statutorily-authorized alternative delivery methods for TWDB-financed projects.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code, §2001.0045 to repeal a rule does not apply. Furthermore, the requirement in §2001.0045 does not apply because these rules are amended to reduce the burden or responsibilities imposed on regulated persons by the rule; are necessary to protect water resources of this state as authorized by the Texas Water Code; and are necessary to protect the health, safety, and welfare of the residents of this state.

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

LOCAL EMPLOYMENT IMPACT STATEMENT (Texas Government Code §2001.022)

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

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 clarify requirements for TWDB borrowers.

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 proposed solely under the general powers of the agency, but rather under Texas Water Code §§15.001, 15.6041, and 15.605. 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 clarify requirements for TWDB borrowers. The rule would substantially advance this stated purpose by ensuring consistency with current law and improving the effectiveness of the financing programs.

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 reviews contract documents, including those using alternative delivery methods.

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. In other words, this rule requires compliance with state law regarding construction of public works projects financed by the TWDB without burdening or restricting or limiting the owner's right to property and reducing its value by 25% or more. Therefore, the 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 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 rule would be in effect, the rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations

to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand, limit, or repeal an existing regulation; (7) increase or decrease the number of individuals subject to the rule's applicability; or (8) positively or adversely affect this state's economy.

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

No public comments were received during the public comment period.

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

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 Texas Water Code §§15.001, 15.601, 15.603, and 15.605.

This rulemaking affects Water Code, Chapter 15.

<rule>

SUBCHAPTER A GENERAL PROGRAM REQUIREMENTS

§375.1. Definitions.

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

(1) Acquisition--The Applicant obtaining interests in land that are necessary for construction or land that will be an integral part of the treatment process (including land use for the storage of treated wastewater in land treatment systems prior to land application) or will be used for ultimate disposal of residues resulting from such treatment and acquisition of other land.

(2) Act--The Federal Water Pollution Control Act, 33 U.S.C. §§1251 et seq.

(3) Alternative Delivery Guidance—A document prepared by the Board after public review and comment and reviewed periodically that identifies alternative methods of project delivery available to applicants for financial assistance and the requirements for utilizing an alternative delivery method.

(4) Applicant--The entity applying for financial assistance from the CWSRF including:

(A) the entity that receives the financial assistance, and

(B) the entity legally responsible to repay the debt.

(5) Application--The information and supporting documentation submitted by or on behalf of the Applicant that may be used in consideration for financial assistance from the CWSRF or that the executive administrator determines must be completed for consideration for financial assistance from the CWSRF.

(6) Authorized representative--The signatory agent authorized and directed by the Applicant's governing body to file the application and to sign documents relating to the project, on behalf of the Applicant.

(7) Board--The Texas Water Development Board.

(8) Bonds--All bonds, notes, certificates of obligation, and book-entry obligations authorized to be issued by any political subdivision.

(9) Bypass--To pass over a higher ranked project in favor of a lower ranked project to ensure that funds available are utilized in a timely manner, to select an interrelated project, or to meet statutory and capitalization grant requirements as delineated in the applicable IUP.

(10) Capitalization grant--The federal grant funds awarded annually by the EPA to the State for capitalization of the CWSRF.

(11) Certification of Trust--An instrument executed by a home rule municipality pursuant to Chapter 104, Local Government Code, governing the management of the financial assistance proceeds in accordance with §114.086, Texas Property Code.

(12) Clean Water State Revolving Fund (CWSRF)--The financial assistance program authorized by Texas Water Code, Chapter 15, Subchapter J in accordance with the Act.

(13) Closing--The exchange of the Applicant's approved debt instruments for CWSRF financial assistance.

(14) Commission--The Texas Commission on Environmental Quality.

(15) Commitment--An offer by the Board to provide financial assistance to an Applicant as evidenced by a Board resolution.

(16) Construction--Any one or more of the following: preliminary planning to determine the feasibility of treatment works, engineering, architectural, legal, fiscal, or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures, field testing of innovative or alternative wastewater treatment processes and techniques meeting guidelines promulgated under 33 U.S.C. §1314(d)(3), or other necessary actions, erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works or the inspection or supervision of any of the foregoing items.

(17) Construction account--A separate account created and maintained for the deposit of financial assistance and utilized by the Applicant to pay eligible expenses of the project.

(18) Construction phase--The erection, acquisition, alteration, remodel, rehabilitation, improvement, extension, or other man-made change necessary for an eligible project or activity.

(19) Contract documents--The engineering documentation relating to the project including engineering drawings, maps, technical specifications, design reports, instructions, and other contract conditions and forms that are in sufficient detail to allow contractors to bid on the work.

(20) Cost and Effectiveness Analysis--The study and evaluation of the cost and effectiveness of the processes, materials, techniques, and technologies for carrying out the proposed project or activity; and the selection, to the maximum extent practicable, of a project or activity that maximizes the potential for efficient water use, reuse, recapture, and conservation, and energy conservation; taking into account (i) the cost of constructing the project or activity, (ii) the cost of operating and maintaining the project or activity over the life of the project or activity, and (iii) the cost of replacing the project or activity.

(21) Davis Bacon Act--The federal statute at 40 U.S.C. §§3141 et seq. and in conformance with the U.S. Department of Labor regulations at 29 CFR Part 5 (Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction) and 29 CFR Part 3 (Contractors and Subcontractors on Public Work Financed in Whole or in Part by Loans or Grants from the United States).

(22) Debt--All bonds or other documents issued or to be issued by any political subdivision or eligible Applicant pledging repayment of the Board's financial assistance.

(23) Design--The project phase during which the project design documents are prepared by the Applicant. Documents may include design surveys, plans, working drawings, specifications and any procedures and protocols to be used during the construction phase of the project.

(24) Disadvantaged community--A community that meets the affordability criteria based on income, unemployment rates, and population trends. Specifically, the service area of an eligible applicant, the service area of a community that is located outside the entity's service area, or a portion within the entity's service area if the proposed project is providing new service to existing residents in unserved areas; and meets the following affordability criteria: (a) has an annual median household income that is no more than 75 percent of the state median household income using an acceptable source of socioeconomic data, and (b) the household cost factor that considers income, unemployment rates, and population trends must be greater than or equal to one percent if only water or sewer service is provided or greater than or equal to two percent if both water and sewer service are provided. The required data and calculations of the household cost factor are specified in the Intended Use Plan under which the project would receive funding.

(25) Disaster--The occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire,

flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, extreme heat, other public calamity requiring emergency action, or energy emergency as defined in Texas Government Code, §418.004.

(26) Eligible Applicant--Any of the following entities:

(A) a waste treatment management agency including any interstate agencies, or any city, commission, county, district, river authority, or other public body created by or pursuant to state law that has authority to dispose of sewage, industrial wastes, or other waste, or a special purpose district that finances, on behalf of its members, waste disposal projects;

(B) an authorized Indian tribal organization;

(C) any person applying for financial assistance to build a nonpoint source pollution control project pursuant to 33 U.S.C. §1329;

(D) any person applying for financial assistance for an estuary management project pursuant to 33 U.S.C. §1330;

(E) any entity or person applying for financial assistance as authorized under 33 U.S.C. §1383(c); or

(F) any other entity eligible under federal law to receive funds from the CWSRF.

(27) Engineering feasibility report--Those necessary plans and studies that directly relate to the project and that are needed in order to assure compliance with the enforceable requirements of the Act and state statutes.

(28) EPA--The United States Environmental Protection Agency or a designated representative.

(29) Equivalency projects--Those projects funded that must follow all federal cross cutter requirements.

(30) Escrow account--A separate account maintained by an escrow agent until such funds are eligible for release to the construction account.

(31) Escrow agent--Any of the following:

(A) a state or national bank designated by the comptroller as a state depository institution in accordance with Texas Government Code, Chapter 404, Subchapter C;

(B) a custodian of collateral in accordance with the Texas Government Code, Chapter 404, Subchapter D; or

(C) a municipal official responsible for managing the fiscal affairs of a home-rule municipality in accordance with Local Government Code, Chapter 104.

(32) Estuary management plan--A plan for the conservation and management of an estuary of national significance as described in 33 U.S.C. §1330.

(33) Estuary management project--A project to develop or implement an estuary management plan.

(34) Executive administrator--The executive administrator of the Board or a designated representative.

(35) Expiration date--The date on which the Board's offer of financial assistance is no longer open or valid and by which a Closing must occur.

(36) Financial assistance--Funding made available to eligible Applicants, as authorized in 33 U.S.C. §1383(d), including principal forgiveness.

(37) Fiscal sustainability plan--At a minimum, it includes:

(A) an inventory of critical assets that are part of the treatment works;

(B) an evaluation of the condition and performance of inventoried assets or asset groupings;

(C) a certification that the assistance recipient has evaluated and will be implementing water and energy conservation efforts as part of the plan; and

(D) a plan for maintaining, repairing, and, as necessary, replacing the treatment works and a plan for funding such activities.

(38) Force majeure--Acts of god, strikes, lockouts, or other industrial disturbances, acts of the public enemy, war, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, droughts, tornadoes, hurricanes, arrests and restraints of government and people, explosions, breakage or damage to machinery, pipelines or canals, and any other incapacities of either party, whether similar to those enumerated or otherwise, and not within the control of the party claiming such incapacity, which by the exercise of due diligence and care such party could not have avoided.

(39) Green project--A project or components of a project that, when implemented, will result in energy efficiency, water efficiency, green infrastructure, or environmental innovation and that are characterized as green projects either categorically or by utilizing a business case as approved by the executive administrator.

(40) Green project reserve--A federal directive requiring a specified portion of the capitalization grant to finance green projects.

(41) Initial Invited Project List--That portion of the Project Priority List listing the eligible projects, ranked according to their rating, that will initially be invited to submit applications in accordance with procedures and deadlines as detailed in the applicable Intended Use Plan.

(42) Intended Use Plan (IUP)--A document prepared annually by the Board, after public review and comment, which identifies the intended uses of all CWSRF program funds and describes how those uses support the overall goals of the CWSRF.

(43) Lending rate--The rate of interest applicable to financial assistance that must be repaid.

(44) Market interest rate--Interest rates comparable to those attained for securities in an open market offering.

(45) Municipality--A city, town, borough, county, parish, district, association, or other public body created by or pursuant to state law, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under 33 U.S.C. §1288.

(46) Non-equivalency projects--All projects other than Equivalency projects.

(47) Nonpoint source pollution plan--A plan for managing nonpoint source pollution as described in 33 U.S.C. §1329. Nonpoint source pollution is any source of water pollution that does not enter water from a point source and includes pollution generally resulting from land runoff, precipitation, atmospheric deposition, drainage, seepage, or hydrologic modification.

(48) Nonpoint source pollution project--A project implemented pursuant to a nonpoint source pollution plan.

(49) Outlay report--The Board's form used to report costs incurred on the project.

(50) Permit--Any permit, license, registration, or other legal document required from any local, regional, state, or federal government for construction of the project.

(51) Person--An individual, corporation, partnership, association, State, municipality, commission, or political subdivision of the State, or any interstate body.

(52) Planning--The project phase during which the Applicant identifies and evaluates potential alternatives to meet the needs of the proposed project. It includes the cost and effectiveness analysis and environmental review described in Subchapter E of this chapter and preparation of the engineering feasibility report described in Subchapter F of this chapter.

(53) Point source--Any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling

stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(54) Political subdivision--A municipality, intermunicipal, interstate, or state agency, or any other public entity eligible for assistance under Texas Water Code Chapter 16, Subchapter J, or a nonprofit water supply corporation created and operating under Texas Water Code Chapter 67, if such entity is eligible for financial assistance under federal law.

(55) Population--The number of people who reside within the territorial boundaries of or receive wholesale or retail wastewater service from the Applicant based upon data that is acceptable to the executive administrator and which includes the following:

(A) acceptable demographic projections or other information in the engineering feasibility report or the latest official data from the U.S. Census Bureau for an incorporated city; or

(B) information on the population for which the project is designed, where the Applicant is not an incorporated city or town.

(56) Principal forgiveness--A type of additional subsidization authorized by 33 U.S.C. §1383(i) or federal appropriations acts, as detailed in the Intended Use Plan and principal forgiveness agreement or bond transcript applicable to the project.

(57) Private Placement Memorandum (PPM)--A document functionally similar to an "official statement" used in connection with an offering of municipal securities in a private placement.

(58) Project--The planning, acquisition, environmental review, design, construction, and other activities designed to accomplish the objectives, goals, and policies of the Act by providing assistance for projects and activities identified in 33 U.S.C. §1383(c), which may include those projects eligible for funding under §375.2 of this title.

(59) Project engineer--The engineer retained by the Applicant to provide professional engineering services during any phase of a project.

(60) Project information form (PIF)--The form that the executive administrator determines must be submitted by Applicants for rating and ranking in an IUP.

(61) Project Priority List--A listing, found in the IUP, of projects eligible for funding, ranked according to their rating criteria score and that may be further prioritized as described in the applicable IUP.

(62) Ready to proceed--A project for which available information indicates that there are no significant permitting, land acquisition, social, contractual, environmental, engineering, or financial issues that would keep the project from proceeding in a timely manner to the construction phase of a project.

(63) Release of funds--The sequence and timing for Applicant's release of financial assistance funds from the escrow account to the construction account.

(64) Small and Medium-Sized Publicly Owned Treatment Works--A Publicly Owned Treatment Work with a design flow equal to or less than 5 million gallons per day.

(65) Small systems--Those systems that serve a population of not more than ten thousand individuals.

(66) State--The State of Texas.

(67) Subsidy--A reduction in the interest rate from the market interest rate.

(68) Treatment works--Any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature to implement 33 U.S.C. §1281, or necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment, and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units, clear well facilities and distribution facilities for recycled or reused water; and acquisition of the land that will be an integral part of the treatment process (including land use for the storage of treated wastewater in land treatment systems prior to land application) or will be used for ultimate disposal of residues resulting from such treatment and acquisition of other land, and interests in land, that are necessary for construction. The term also means any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewer systems.

(69) Utility Commission--The Public Utility Commission of Texas.

(70) Water conservation plan--A plan that complies with the requirements of Texas Water Code Section 16.4021.

(71) Water quality management plan--A plan prepared and updated annually by the State and approved by the Environmental Protection Agency that determines the nature, extent, and causes of water quality problems in various areas of the State and identifies cost-effective and locally acceptable facility and nonpoint measures to meet and maintain water quality standards.

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

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 Texas Water Code §§15.001, 15.601, 15.603, and 15.605.

This rulemaking affects Water Code, Chapter 15.

<rule>

SUBCHAPTER F ENGINEERING REVIEW AND APPROVAL

§375.84. Use of Alternative Delivery Guidance.

An applicant choosing to follow an alternative delivery method must elect to do so, and notify the Board, prior to commitment of TWDB funds. Once a funding request is approved by the Board, release of funds for project-specific tasks is governed by the provisions of the Alternative Delivery Guidance rather than the rules and procedures generally applied to Design-Bid-Build project delivery as set out in Subchapters F, G, and H of this Chapter.