

## AGENDA ITEM MEMO

**BOARD MEETING DATE:** January 19, 2023

**TO:** Board Members

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

**FROM:** T. Clay Schultz, Ph.D., Director, Regional Water Project Development  
Nancy Richards, Manager, Regional Water Project Development

**SUBJECT:** Extension of Commitment for Willow Fork Drainage District

### **ACTION REQUESTED**

Consider amending by resolution, the previously adopted Texas Water Development Board (TWDB) Resolution Nos. 21-097 and 22-009 to extend the Willow Fork Drainage District's Flood Infrastructure Fund commitment.

### **BACKGROUND**

In August 2021, the TWDB made a commitment of funding to Willow Fork Drainage District (District) in the amount of \$24,006,760 consisting of \$22,085,000 in financing and \$1,921,760 in grant from the Flood Infrastructure Fund. The proposed project, located in the elevated flood pool of the US Army Corps of Engineers' (USACE) Barker Reservoir, includes construction of a 3,000 acre-feet regional flood storage pond within the reservoir. The regional pond would host wet and dry features over a new 420-acre park east of the Willow Fork Diversion Channel and south of Westheimer Parkway. As part of the scope, USACE originally asked the District to work with Fort Bend and Harris counties to obtain a sub-lease agreement, which was part of the closing requirements (Special Conditions 25, 26, and 27).

In February 2022, the TWDB extended the commitment until February 28, 2023. The District had started the process to obtain the outgrant lease but needed additional time to account for any unknown site conditions that could require additional review and coordination with USACE due to the potential for cultural resources. The prior Special

#### **Our Mission**

Leading the state's efforts in  
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Brooke T. Paup, Chairwoman | George B. Peyton V, Board Member | L'Oreal Stepney, P.E., Board Member  
Jeff Walker, Executive Administrator

Conditions related to the sublease agreements (Nos. 25, 26, and 27) were eliminated and the Special Condition (No. 28) requiring the District's own outgrant lease remained.

### **KEY ISSUES**

In 2019, the Court of Federal Claims found USACE liable for damages from attendant flooding upstream of the Addicks and Barker Dams in the wake of Hurricane Harvey. In June 2022, the Court concluded trial hearings of the damages phase of the litigation process. The District is requesting an additional 10-month extension to the commitment. The purpose of this extension is to allow the damages phase of upstream litigation to be complete. Based on the final outcome of the upstream litigation, the applicable Court could impose a permanent flowage easement held by the United States over any properties flooded by Harvey. As a result, the upstream litigation could have long lasting implications on the upstream flood pool that could negatively impact the project and the underlying tax base necessary for future bond/loan repayment and could irreparably impact the ability of the District to sell bonds.

The initial cultural resource investigation and environmental assessment have been complete; however due to wet conditions of the reservoir in the project area and the pending upstream litigation, the geotechnical field work related to the USACE outgrant has not been finalized. Based on the court schedule, the District anticipated the initial ruling around November 2022; however, it is still pending. Once the results of the upstream litigation are known, the District will assess the project's feasibility and, if feasible, continue with the necessary field work.

### **RECOMMENDATION**

The Executive Administrator recommends that TWDB Resolution No. 21-097 as amended by Resolution No. 22-009 be amended to extend the commitment through December 31, 2023 to correspond with the ruling of the litigation. The request does not change the total amount of funding committed to the District.

### **Attachments**

1. Proposed Resolution (23- )
2. Resolution (21-097)
3. Resolution (22-009)
4. District's request to extend commitment

A RESOLUTION OF THE TEXAS WATER DEVELOPMENT BOARD  
AMENDING TWDB RESOLUTION NO. 21-097, AS AMENDED BY RESOLUTION NO. 22-009,  
TO EXTEND THE LOAN COMMITMENT PERIOD FOR THE  
WILLOW FORK DRAINAGE DISTRICT

(23-)

WHEREAS, at its August 19, 2021, meeting, the Texas Water Development Board (TWDB), by TWDB Resolution No. 21-097 (Resolution, as amended), made a commitment to provide financial assistance in the amount of \$24,006,760 to the Willow Fork Drainage District (District) from the Flood Infrastructure Fund, for Project No. 40180 (Project) financing the planning, design, and construction of a drainage improvement project; and

WHEREAS, upon written request of the District, the TWDB extended by resolution No. 22-009 the commitment period for the District to close on financial assistance provided by Resolution No. 21-097 to expire on February 28, 2023; and

WHEREAS, the District has submitted in writing a second request dated September 21, 2022, requesting a second extension of the TWDB's commitment period for 10-months, all as is more specifically set forth in the recommendations of the TWDB's staff, to which documents express reference is made; and

WHEREAS, the Executive Administrator of the TWDB has considered the District's request and recommends that the District's commitment be extended to December 31, 2023 with no additional considerations for future extensions of the commitment; and

WHEREAS, the TWDB hereby finds that granting an extension of the District's commitment based on the Executive Administrator's recommendation is in the public interest.

NOW THEREFORE, based on these considerations and findings, the TWDB resolves as follows:

1. The commitment of the TWDB to provide financial assistance to the Willow Fork Drainage District as authorized in TWDB Resolution No. 21-097, and amended by 22-009, is extended. The commitment will expire on December 31, 2023. The commitment is conditioned as follows:
  - a. The District must submit required reporting to the EA's staff on a quarterly basis; and
  - b. As is contemplated by Special Condition No. 28 in TWDB resolution No. 21-097, as amended, prior to the release of funds for construction, the District must submit an executed Agency Agreement related to the District's lease with the U.S. Corps of Engineers in a form acceptable to the Executive Administrator.

2. All other terms and conditions of TWDB Resolution No. 21-097, as amended by, shall remain in full force and effect.

APPROVED and ordered of record this 19th day of January 2023.

TEXAS WATER DEVELOPMENT BOARD

\_\_\_\_\_  
Brooke T. Paup, Chairwoman

DATE SIGNED: \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
Jeff Walker, Executive Administrator

**A RESOLUTION OF THE TEXAS WATER DEVELOPMENT BOARD  
APPROVING AN APPLICATION FOR FINANCIAL ASSISTANCE IN THE AMOUNT OF  
\$24,006,760 TO THE WILLOW FORK DRAINAGE DISTRICT  
FROM THE FLOOD INFRASTRUCTURE FUND  
THROUGH THE PROPOSED PURCHASE OF  
\$22,085,000 WILLOW FORK DRAINAGE DISTRICT UNLIMITED TAX BONDS  
PROPOSED TAXABLE SERIES 2021  
AND  
THE EXECUTION OF A GRANT AGREEMENT IN THE AMOUNT OF \$1,921,760**

**(21-097)**

WHEREAS, the Willow Fork Drainage District (District), located in Fort Bend and Harris Counties, Texas, has filed an application for financial assistance from the Flood Infrastructure Fund (FIF) in accordance with Texas Water Code Chapter 15, Subchapter I, to finance planning, design, and construction of a drainage improvement project, identified as Project No. 40180; and

WHEREAS, the District seeks financial assistance from the Texas Water Development Board (TWDB) in the amount of \$24,006,760 through the TWDB's proposed purchase of \$22,085,000 Willow Fork Drainage District Unlimited Tax Bonds, Proposed Taxable Series 2021 (together with all authorizing documents (Obligations)) and \$1,921,760 through execution of a Grant Agreement, all as is more specifically set forth in the application and in recommendations of the Executive Administrator's staff; and

WHEREAS, the District has offered a pledge of ad valorem taxes as sufficient security for the repayment of the Obligations; and

WHEREAS, the TWDB hereby finds:

1. that the application and financial assistance requested meet the requirements of Texas Water Code, Chapter 15, Subchapter I; 31 TAC Chapter 363, Subchapters A and D; and the State Fiscal Year 2020 Flood Intended Use Plan (FIUP);
2. the District has demonstrated a sufficient level of cooperation among eligible political subdivisions and has included all of the eligible political subdivisions substantially affected by the flood project in accordance with Texas Water Code § 15.536(2);
3. that the District has submitted a written memorandum of understanding relating to the management of the project watershed executed by all governing bodies of eligible political subdivisions located in the project watershed; and

4. that in its opinion the taxes pledged by the District will be sufficient to meet all Obligations assumed by the District in accordance with Texas Water Code § 15.536(3); and
5. that the District is eligible to receive grant funding in accordance with Texas Water Code § 15.534 and the FIUP; and
6. that the District has demonstrated that the benefit-cost ratio of the Project meets the requirements of the FIUP; and
7. that the request for financial assistance does not include redundant funding for activities already performed and/or funded through another source, in accordance with the FIUP; and
8. that the District has demonstrated that the application meets the requirements of the FIUP related to the National Flood Insurance Program in the area to be served by the Project; and
9. that the Project was developed using the best and most recent available data, in accordance with the FIUP; and
10. that the District has documented that it has planned for operations and maintenance costs associated with the Project, in accordance with the FIUP; and
11. that the District has considered possible floodwater capture techniques that could be associated with the Project for water supply purposes, in accordance with the FIUP; and

NOW THEREFORE, based on these findings, the TWDB resolves as follows: A commitment is made by the TWDB to the Willow Fork Drainage District for financial assistance in the amount of \$24,006,760 from the Flood Infrastructure Fund, to be evidenced by the TWDB's proposed purchase of \$22,085,000 Willow Fork Drainage District Unlimited Tax Bonds, Proposed Taxable Series 2021 and execution of a Grant Agreement in the amount of \$1,921,760. This commitment will expire on February 28, 2022; however, the Executive Administrator may, at his discretion, grant up to one extension for a maximum of three months.

Such commitment is conditioned as follows:

Standard Conditions:

1. this commitment is contingent on availability of TWDB funds on hand;
2. this commitment is contingent upon the issuance of a written approving opinion of the Attorney General of the State of Texas stating that the District has complied with all of the requirements of the laws under which said Obligations were issued,

that said Obligations were issued in conformity with the Constitution and laws of the State of Texas, and that said Obligations are valid and binding obligations of the District;

3. this commitment is contingent upon the District's continued compliance with all applicable laws, rules, policies, and guidance (as these may be amended from time to time to adapt to a change in law, in circumstances, or any other legal requirement), including but not limited to 31 TAC Chapter 363;
4. the District shall use a paying agent/registrar in accordance with 31 TAC § 363.42(c)(2);

The Following Conditions Must Be Included in the Obligations:

5. the Obligations must provide that the District will comply with all applicable TWDB laws and rules related to the use of the financial assistance;
6. the Obligations must provide that the District must comply with all conditions as specified in the final environmental finding of the Executive Administrator when issued, including the standard emergency discovery conditions for threatened and endangered species and cultural resources;
7. the Obligations must provide that the District will not begin construction for a portion of the Project until the environmental finding has been issued for that portion of the Project;
8. the Obligations must contain a provision requiring the District to maintain insurance coverage sufficient to protect the TWDB's interest in the project;
9. the Obligations must include a provision wherein the District, or an obligated person for whom financial or operating data is presented to the TWDB in the application for financial assistance either individually or in combination with other issuers of the District's Obligations or obligated persons, will, at a minimum, regardless of the amount of the Obligations, covenant to comply with requirements for continuing disclosure on an ongoing basis substantially in the manner required by Securities and Exchange Commission (SEC) in 17 CFR § 240.15c2-12 (Rule 15c2-12) and determined as if the TWDB were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the TWDB and the beneficial owners of the District's Obligations, if the TWDB sells or otherwise transfers such Obligations, and the beneficial owners of the TWDB's bonds if the District is an obligated person with respect to such bonds under SEC Rule 15c2-12;
10. the Obligations must contain a provision requiring the District to levy a tax and/or maintain and collect sufficient rates and charges to produce revenues in an

- amount necessary to meet the debt service requirements of all outstanding obligations and to maintain the funds established and required by the Obligations;
11. the Obligations must include a provision requiring a final accounting to be made of the total sources and authorized use of Project funds within 60 days of the completion of the Project;
  12. the Obligations must include a provision requiring the District to deposit any bond proceeds from the Obligations that are determined to be surplus proceeds remaining after completion of the Project and completion of a final accounting, including any interest earned on the bond proceeds, into the Interest and Sinking Fund;
  13. the Grant Agreement must include a provision stating that the District shall either return or deposit into the Interest and Sinking Fund any grant funds that are determined to be surplus funds remaining after completion of the Project and completion of a final accounting, including any interest earned on the grant funds;
  14. the Obligations must contain a provision that the TWDB may exercise all remedies available to it in law or equity, and any provision of the Obligations that restricts or limits the TWDB's full exercise of these remedies shall be of no force and effect;
  15. financial assistance proceeds are public funds and, as such, the Obligations must include a provision requiring that these proceeds shall be held at a designated state depository institution or other properly chartered and authorized institution in accordance with the Public Funds Investment Act, Government Code, Chapter 2256 and the Public Funds Collateral Act, Government Code, Chapter 2257;
  16. financial assistance proceeds shall not be used by the District when sampling, testing, removing or disposing of contaminated soils and/or media at the Project site. The Obligations shall include an environmental indemnification provision wherein the District agrees to indemnify, hold harmless and protect the TWDB from any and all claims, causes of action or damages to the person or property of third parties arising from the sampling, analysis, transport, storage, treatment, recycling, and disposition of any contaminated sewage sludge, contaminated sediments, and/or contaminated media that may be generated by the District, its contractors, consultants, agents, officials, and employees as a result of activities relating to the Project to the extent permitted by law;
  17. the Obligations must contain a provision stating that the District shall abide by all applicable construction contract requirements related to the use of iron and steel products produced in the United States, as required by Texas Government Code, Chapter 2252, Subchapter G;
  18. the Obligations must contain a provision requiring the District to submit quarterly status reports on the progress of the project that details information requested by



the Executive Administrator. The Executive Administrator may withhold authorization to release funds from escrow or adjust the amount of funds to be released from escrow based on the receipt of the quarterly status reports and the projected quarterly needs for the project.

#### Pledge Conditions for the Loan

19. the Obligations must contain a provision that for each year the Obligations are outstanding, the District will levy a debt service tax rate, and collect taxes sufficient for the repayment of annual principal requirements on the Obligations;

#### Conditions to Close or for Release of Funds:

20. prior to closing, the District shall submit documentation evidencing the adoption and implementation of sufficient system rates and charges or, if applicable, the levy of an interest and sinking tax rate sufficient for the repayment of all system debt service requirements;
21. prior to release of funds for the relevant services, and if required under the TWDB's financial assistance program and if not previously provided with the application, the District shall submit executed contracts for engineering and, if applicable, financial advisor and bond counsel, for the Project that are satisfactory to the Executive Administrator. Fees to be reimbursed under the contracts must be reasonable in relation to the services performed, reflected in the contract, and acceptable to the Executive Administrator;
22. prior to closing, when any portion of financial assistance is to be held in escrow or in trust, the District shall execute an escrow agreement or trust agreement, approved as to form and substance by the Executive Administrator, and shall submit that executed agreement to the TWDB;
23. prior to closing, the District's bond counsel must prepare a written, unqualified approving opinion acceptable to the executive administrator. Bond counsel may rely on covenants and representations of the District when rendering this opinion;

PROVIDED, however, the commitment is subject to the following special conditions:

#### Special Conditions:

24. prior to closing, the District shall execute a Grant Agreement in a form and substance acceptable to the Executive Administrator;
25. prior to closing, the District must submit an executed "Letter of Agreement" as a sublease for an agency agreement with Harris County, related to Harris County's lease with the U.S. Corps of Engineers in a form and substance acceptable to the Executive Administrator;

26. prior to closing, the District must submit an executed "Letter of Agreement" as a sublease for an agency agreement with Fort Bend County, related to Fort Bend County's lease with the U.S. Corps of Engineers in a form and substance acceptable to the Executive Administrator;
27. prior to closing, the District must submit an executed Agency Agreement between Harris County and the U.S. Corps of Engineers;
28. prior to release of funds for construction, the District must submit an executed Agency Agreement related to the District's lease with the U.S. Corps of Engineers in a form acceptable to the Executive Administrator.
29. the District must notify the Executive Administrator in writing thirty (30) days prior to taking any actions to alter its legal status in any manner; and
30. the Obligations must include a provision requiring that prior to any action by the District to convey its Obligations held by the TWDB to another entity, the conveyance and the assumption of the Obligations must be approved by the TWDB;

APPROVED and ordered of record this, the 19th day of August, 2021.

TEXAS WATER DEVELOPMENT BOARD



Brooke T. Paup

Brooke T. Paup, Chairwoman

DATE SIGNED: 8/19/21

ATTEST:

Jeff Walker  
Jeff Walker, Executive Administrator

**A RESOLUTION OF THE TEXAS WATER DEVELOPMENT BOARD  
AMENDING TWDB RESOLUTION NO. 21-097  
TO EXTEND THE LOAN COMMITMENT PERIOD FOR THE  
WILLOW FORK DRAINAGE DISTRICT**

(22 - 009)

WHEREAS, at its August 19, 2021 meeting, the Texas Water Development Board (TWDB), by TWDB Resolution No. 21-097 (Resolution), made a commitment to provide financial assistance in the amount of \$24,006,760 to the Willow Fork Drainage District (District) from the Flood Infrastructure Fund, for Project No. 40180 (Project) financing the planning, design, and construction of a drainage improvement project; and

WHEREAS, pursuant to the Resolution, the commitment period for the financial assistance committed to the District will expire February 28, 2022; and

WHEREAS, the District has submitted in writing a request dated December 9, 2021, requesting an extension of the TWDB's commitment period for 15-months, to expire on May 31, 2023, all as is more specifically set forth in the recommendations of the TWDB's staff, to which documents express reference is made; and

WHEREAS, the Executive Administrator (EA) of the TWDB has considered the District's request and recommends that the District's commitment be extended for 12-months to expire on February 28, 2023 with reporting to the EA's staff on a quarterly basis; and

WHEREAS, the TWDB hereby finds that granting an extension of the District's commitment based on the Executive Administrator's recommendation is in the public interest.

NOW THEREFORE, based on these considerations and findings, the TWDB resolves as follows:

1. The commitment of the TWDB to provide financial assistance to the Willow Fork Drainage District as authorized in TWDB Resolution No. 21-097 is extended with required reporting to the EA's staff on a quarterly basis. The District must close by February 28, 2023.
2. Special Conditions No. 25, 26, and 27 are eliminated as conditions required to close.
3. As is contemplated by Special Condition No. 28 in TWDB resolution No. 21-097, prior to the release of funds for construction, the District must submit an executed Agency Agreement related to the District's lease with the U.S. Corps of Engineers in a form acceptable to the Executive Administrator.

4. Except for the statements in the preceding subparagraph number 2, all other terms and conditions, including other special conditions, of TWDB Resolution No. 21-097 shall remain in full force and effect.

APPROVED and ordered of record this 2nd day of February, 2022.

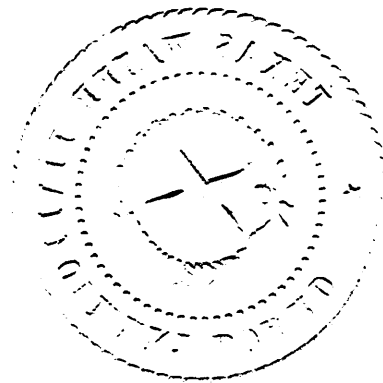
TEXAS WATER DEVELOPMENT BOARD

  
Brooke T. Paup  
Brooke T. Paup, Chairwoman

DATE SIGNED: 2/2/22

ATTEST:

  
Jeff Walker, Executive Administrator





1904 W Grand Parkway N, Suite 100, Katy, Texas 77449  
t 713.953.5200 f 713.953.5026 LJA.com TBPE F-1386

September 21, 2022

Mr. Marcus Snell  
Texas Water Development Board  
P.O. Box 13231  
Austin, Texas 78711-3231

Re: Extension Request  
Barker Reservoir Flood Risk Reduction and Park Project (TWDB Proj. No. 40180)  
Willow Fork Drainage District  
LJA Job No. 2642-0009T (6.0)

Dear Mr. Snell:

Per our phone conversation, the Willow Fork Drainage District (District) is requesting a 10-month extension on the financial commitment. This would be the District's 2<sup>nd</sup> Extension Request.

The purpose of this extension is to allow the damages phase of the upstream litigation to be complete. Based on the final outcome of the upstream litigation, the applicable Court could impose a permanent flowage easement held by the United States over any properties flooded by Harvey. As a result, the upstream litigation could have long lasting implications on the upstream flood pool that could negatively impact the project and the underlying tax base necessary for future bond/loan repayment, and could irreparably impact the ability of the District to sell bonds. The initial cultural resource investigation and environmental assessment have been complete; however due to wet conditions of the reservoir in the project area and the pending upstream litigation, the geotechnical field work related to the USACE Outgrant has not been finalized. Based on the court schedule, we anticipate the initial ruling around November 2022. Once the final results of the upstream litigation are known, the District will assess the projects feasibility and if feasible continue with the necessary field work.

Please call me at 713.953.5276 if you have any questions regarding the bid.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. W. Kalkomey', written over a light blue horizontal line.

Craig W. Kalkomey, PE, CFM  
District Engineer, Willow Fork Drainage District

CWK/sb