

AGENDA ITEM MEMO

BOARD MEETING DATE: February 8, 2024

TO: Board Members

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

FROM: T. Clay Schultz, Ph.D., Director, Regional Water Project Development
Jesse Milonovich, P.E., Manager, Regional Water Project Development
Tyrone Alcorn, Credit Manager, Regional Water Project Development

SUBJECT: Amendment to the Town of Pecos City Commitment Expiration Date

ACTION REQUESTED

Consider amending by resolution previously adopted Texas Water Development Board Resolution No. 21-014 to extend Town of Pecos City's Clean Water State Revolving Fund funding commitment to June 30, 2024, and the Executive Administrator may, at his discretion, grant up to one extension.

BACKGROUND

In February 2021, the Texas Water Development Board (TWDB) approved a \$51,360,000 commitment to the Town of Pecos City (Town) from the Clean Water State Revolving Fund (CWSRF) Program for planning, design, and construction of a wastewater system project. The commitment included the TWDB's proposed purchase of \$51,360,000 Town of Pecos City, Texas, Combination Tax and Surplus Revenue Certificates of Obligation as follows:

- a) \$11,115,000 Proposed Series 2021 to expire on February 28, 2022
- b) \$21,490,000 Proposed Series 2022, to expire on February 28, 2023; and
- c) \$18,755,000 Proposed Series 2023, to expire on February 29, 2024.

KEY ISSUES

The Town received a commitment of funds from the TWDB for funding through the State FY 2020 CWSRF program in the amount of \$51,360,000 and has been closing on those funds in three tranches. The first two tranches (Series 2021 and 2022) have closed. The

third (Series 2023), in an amount of \$18,755,000, is yet to close with a commitment expiration date of February 29, 2024.

The Town is requesting an extension to the expiration date of its commitment to June 30, 2024. The Town has yet to complete its financial audits for Fiscal Year (FY) 2020, FY2021, and FY2022. The requirement for annual financial audits is in Condition No. 3 of the standard conditions of commitment Resolution TWDB 21-014. The audit requirement can be found in 31 TAC 375.41(b)(10). Also, annual audits are required per the current bond ordinances. Therefore, prior to the next closing, the Town will need to be current with its annual financial audits.

The Town is on track to complete its FY2020 annual financial audit report at the time of writing this memorandum. However, the Town plans to complete both its FY2021 and FY2022 audits by approximately July 26, 2024, which is after the commitment expiration date. The Town plans to complete its FY2023 audit by approximately September 30, 2024.

The Town requests an extension to allow time to bring it into full compliance with its outstanding covenants prior to completing the closing process for the remaining series. This requirement includes outstanding prior years' audits as well as the FY2023 audit, which will be due at the end of March. If the audits are not complete, and in a form and substance satisfactory to the Executive Administrator prior to closing, the remaining commitment will be allowed to expire.

The project scope consists of two phases. Phase I consists of wastewater treatment plant (WWTP) improvements to address the immediate capacity need, allowing the WWTP to discharge up to 2.5 million gallons per day (MGD). Phase II would expand treatment capacity up to 3.5 MGD. The available project funds allow for completion of Phase I in its entirety and the planning and design portions of Phase II. The third tranche is needed to fund the construction phase of Phase II. The design of Phase I is complete. If the commitment expires, then the Town will not have sufficient funds to start construction of Phase II, resulting in a delay to meet the Town's increasing wastewater treatment capacity needs.

RECOMMENDATION

The requested amendment does not change the total amount of financing to the Town. To allow the Town time to complete past due audits prior to closing on the remaining commitment, the Executive Administrator recommends that TWDB Resolution 21-014 be amended to extend the remaining commitment expiration to June 30, 2024, and the Executive Administrator may, at his discretion, grant up to one extension.

Attachments:

1. Proposed Resolution (24-)
2. Resolution (21-014)

A RESOLUTION OF THE TEXAS WATER DEVELOPMENT BOARD
AMENDING TWDB RESOLUTION NO. 21-014
TO EXTEND THE FUNDING COMMITMENT EXPIRATION DATE FOR THE \$18,755,000
TOWN OF PECOS CITY, TEXAS COMBINATION TAX AND SURPLUS REVENUE
CERTIFICATES OF OBLIGATION, PROPOSED SERIES 2024 TO BE ISSUED BY THE TOWN OF
PECOS CITY, TEXAS

(24-)

At its February 10, 2021 meeting, the Texas Water Development Board (TWDB), by TWDB Resolution No. 21-014, made a commitment to provide financial assistance to the Town of Pecos City, Texas (Town) for the purpose of financing improvements to the Town's wastewater system in the amount of \$51,360,000 consisting of the TWDB's purchase of Combination Tax and Surplus Revenue Certificates of Obligation in proposed series 2022, 2023, and 2024, from the Clean Water State Revolving Fund program, all as is more specifically set forth in the TWDB's Resolution and accompanying documentation, to which documents express reference is made.

By letter dated November 17, 2023, the Town requested that the TWDB amend the previous resolution, TWDB Resolution No. 21-014, to extend the commitment expiration date for the 2024 Series from February 29, 2024, to May 31, 2024, to allow the Town to complete its FY2021 and FY2022 financial audits.

In accordance with the Texas Water Code, the TWDB has carefully considered all matters required by law.

The TWDB finds that the amendment to the term of this loan is reasonable and that the request is in the public interest and will serve a public purpose.

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

1. The commitment made through TWDB Resolution 21-014 is amended to extend the commitment for the 2024 Series closing. The commitment will expire on June 30, 2024; however, the Executive Administrator may, at his discretion, grant up to one extension.
2. Before closing, the Town must submit financial audits for FY2020, FY2021, FY2022, and FY2023 the form and substance of which is satisfactory to the Executive Administrator.
3. All other terms and conditions of TWDB Resolution No. 21-014 remain in full force and effect.

APPROVED and ordered of record this the 8th day of February 2024.

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
TO THE TOWN OF PECOS CITY IN THE FORM OF A MULTI-YEAR COMMITMENT
FROM THE CLEAN WATER STATE REVOLVING FUND
THROUGH THE PROPOSED PURCHASE OF \$51,360,000 TOWN OF PECOS CITY, TEXAS,
COMBINATION TAX AND SURPLUS REVENUE CERTIFICATES OF OBLIGATION, PROPOSED
SERIES 2021, PROPOSED SERIES 2022, AND PROPOSED SERIES 2023

(21-014)

WHEREAS, the Town of Pecos City (Town), located in Reeves County, has filed an application for financial assistance in the amount of \$51,360,000 from the Clean Water State Revolving Fund (CWSRF) to finance the planning, design, and construction of certain wastewater system improvements identified as Project No. 73871; and

WHEREAS, the Town seeks financial assistance from the Texas Water Development Board (TWDB) in the form of a multi-year commitment through the TWDB's proposed purchase of \$51,360,000 Town of Pecos City, Texas, Combination Tax and Surplus Revenue Certificates of Obligation, Proposed Series 2021, Proposed Series 2022, and Proposed Series 2023 (together with all authorizing documents, (Obligations)), all as is more specifically set forth in the application and in recommendations of the TWDB's staff; and

WHEREAS, the Town has offered a pledge of ad valorem tax and surplus revenue of the Town's waterworks and sewer system as sufficient security for the repayment of the Obligations; and

WHEREAS, the commitment is approved for funding under the TWDB's pre-design funding option, and initial and future releases of funds are subject to 31 TAC § 375.14; and

WHEREAS, the TWDB hereby finds:

1. that the revenue and/or taxes pledged by the Town will be sufficient to meet all the Obligations assumed by the Town, in accordance with Texas Water Code § 15.607;
2. that the application and assistance applied for meet the requirements of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*, as well as state law, in accordance with Texas Water Code § 15.607;
3. that the Town has adopted and implemented a water conservation program for the more efficient use of water that will meet reasonably anticipated local needs and conditions and that incorporates practices, techniques or technology prescribed by the Texas Water Code and TWDB's rules; and
4. that the Town has considered cost-effective, innovative, and nonconventional methods of treatment, in accordance with Texas Water Code § 15.007.

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

A commitment is made by the TWDB to the Town of Pecos City for financial assistance in the amount of \$51,360,000 from the Clean Water State Revolving Fund through the TWDB's proposed purchase of \$51,360,000 Town of Pecos City, Texas, Combination Tax and Surplus Revenue Certificates of Obligation as follows:

- a) \$11,115,000 Proposed Series 2021 to expire on February 28, 2022
- b) \$21,490,000 Proposed Series 2022, to expire on February 28, 2023; and
- c) \$18,755,000 Proposed Series 2023, to expire on February 29, 2024.

The Executive Administrator is delegated the authority to adjust the schedule of proposed installments as approved through this commitment.

Such commitment is conditioned as follows:

Standard Conditions

1. this commitment is contingent on a future sale of bonds by the TWDB or on the availability of 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 all of the requirements of the laws under which said Obligations were issued have been complied with; 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 Town;
3. this commitment is contingent upon the Town's compliance with all applicable requirements contained in 31 TAC Chapter 375;
4. the Obligations must provide that the Town agrees to comply with all of the conditions set forth in the TWDB Resolution, which conditions are incorporated herein;
5. the Obligations must provide that the Obligations can be called for early redemption on any date beginning on or after the first interest payment date which is 10 years from the dated date of the Obligations, at a redemption price of par, together with accrued interest to the date fixed for redemption;
6. the Town, 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 Town'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 Town's Obligations, if the TWDB sells or otherwise transfers such Obligations, and the beneficial owners of the TWDB's bonds if the Town is an obligated person with respect to such bonds under SEC Rule 15c2-12;

7. the Obligations must contain a provision requiring the Town to levy a tax and/or maintain and collect sufficient rates and charges, as applicable, to produce system funds 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;
8. the Obligations must include a provision requiring the Town to use any loan proceeds from the Obligations that are determined to be remaining unused funds, which are those funds unspent after the original approved project is completed, for enhancements to the original project that are explicitly approved by the Executive Administrator or if no enhancements are authorized by the Executive Administrator, requiring the Town to submit a final accounting and disposition of any unused funds;
9. the Obligations must include a provision requiring the Town to use any loan proceeds from the Obligations that are determined to be surplus funds remaining after completion of the project and completion of a final accounting in a manner as approved by the Executive Administrator;
10. 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;
11. loan 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;
12. loan proceeds shall not be used by the Town 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 Town 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 and disposition of any contaminated sewage sludge, contaminated sediments and/or contaminated media that may be generated by the Town, its contractors, consultants, agents, officials and

employees as a result of activities relating to the project to the extent permitted by law;

13. prior to closing, the Town shall submit documentation evidencing the adoption and implementation of sufficient system rates and charges and/or the levy of an interest and sinking tax rate (if applicable) sufficient for the repayment of all system debt service requirements;
14. prior to closing, and if not previously provided with the application, the Town shall submit executed contracts for engineering, and, if applicable, financial advisor and bond counsel contracts, 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;
15. prior to closing, when any portion of the financial assistance is to be held in escrow or in trust, the Town shall execute an escrow or trust agreement, approved as to form and substance by the Executive Administrator, and shall submit that executed agreement to the TWDB;
16. the Executive Administrator may require that the Town execute a separate financing agreement in form and substance acceptable to the Executive Administrator;
17. the Obligations must provide that the Town will comply with all applicable TWDB laws and rules related to the use of the financial assistance;
18. the Obligations must provide that the Town 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;
19. the Obligations must contain a provision requiring the Town to maintain insurance coverage sufficient to protect the TWDB's interest in the project;

Conditions Related to Tax-Exempt Status

20. the Town's bond counsel must prepare a written opinion that states that the interest on the Obligations is excludable from gross income or is exempt from federal income taxation. Bond counsel may rely on covenants and representations of the Town when rendering this opinion;
21. the Town's bond counsel opinion must also state that the Obligations are not "private activity bonds." Bond counsel may rely on covenants and representations of the Town when rendering this opinion;

22. the Obligations must include a provision prohibiting the Town from using the proceeds of this loan in a manner that would cause the Obligations to become “private activity bonds” within the meaning of section 141 of the Internal Revenue Code of 1986, as amended (Code) and the Treasury Regulations promulgated thereunder (Regulations);
23. the Obligations must provide that no portion of the proceeds of the loan will be used, directly or indirectly, in a manner that would cause the Obligations to be “arbitrage bonds” within the meaning of section 148(a) of the Code and Regulations, including to acquire or to replace funds which were used, directly or indirectly, to acquire Nonpurpose Investments (as defined in the Code and Regulations) which produce a yield materially higher than the yield on the TWDB’s bonds that are issued to provide financing for the loan (Source Series Bonds), other than Nonpurpose Investments acquired with:
 - a. proceeds of the TWDB’s Source Series Bonds invested for a reasonable temporary period of up to three (3) years after the issue date of the Source Series Bonds until such proceeds are needed for the facilities to be financed;
 - b. amounts invested in a bona fide debt service fund, within the meaning of section 1.148-1(b) of the Regulations; and
 - c. amounts deposited in any reasonably required reserve or replacement fund to the extent such amounts do not exceed the least of maximum annual debt service on the Obligations, 125% of average annual debt service on the Obligations, or 10 percent of the stated principal amount (or, in the case of a discount, the issue price) of the Obligations;
24. the Obligations must include a provision requiring the Town take all necessary steps to comply with the requirement that certain amounts earned on the investment of gross proceeds of the Obligations be rebated to the federal government in order to satisfy the requirements of section 148 of the Code. The Obligations must provide that the Town will:
 - a. account for all Gross Proceeds, as defined in the Code and Regulations, (including all receipts, expenditures and investments thereof) on its books of account separately and apart from all other funds (and receipts, expenditures and investments thereof) and retain all records of such accounting for at least six years after the final Computation Date. The Town may, however, to the extent permitted by law, commingle Gross Proceeds of its loan with other money of the Town, provided that the Town separately accounts for each receipt and expenditure of such Gross Proceeds and the obligations acquired therewith;
 - b. calculate the Rebate Amount, as defined in the Code and Regulations, with respect to its loan, not less frequently than each Computation Date, in

accordance with rules set forth in section 148(f) of the Code, section 1.148-3 of the Regulations, and the rulings thereunder. The Town shall maintain a copy of such calculations for at least six years after the final Computation Date;

- c. as additional consideration for the making of the loan, and in order to induce the making of the loan by measures designed to ensure the excludability of the interest on the TWDB's Source Series Bonds from the gross income of the owners thereof for federal income tax purposes, pay to the United States the amount described in paragraph (b) above within 30 days after each Computation Date;
 - d. exercise reasonable diligence to assure that no errors are made in the calculations required by paragraph (b) and, if such error is made, to discover and promptly to correct such error within a reasonable amount of time thereafter, including payment to the United States of any interest and any penalty required by the Regulations;
- 25. the Obligations must include a provision prohibiting the Town from taking any action that would cause the interest on the Obligations to be includable in gross income for federal income tax purposes;
 - 26. the Obligations must provide that the Town will not cause or permit the Obligations to be treated as "federally guaranteed" obligations within the meaning of section 149(b) of the Code;
 - 27. the transcript must include a No Arbitrage Certificate or similar Federal Tax Certificate setting forth the Town's reasonable expectations regarding the use, expenditure and investment of the proceeds of the Obligations;
 - 28. the Obligations must contain a provision that the Town will refrain from using from using the proceeds provided by this TWDB commitment or the proceeds of any prior bonds to pay debt service on another issue more than 90 days after the date of issue of the Obligations in contravention of the requirements of section 149(d) of the Code (relating to advance refundings);
 - 29. the transcript must include evidence that the information reporting requirements of section 149(e) of the Code will be satisfied. This requirement may be satisfied by filing an IRS Form 8038 with the Internal Revenue Service. In addition, the applicable completed IRS Form 8038 or other evidence that the information reporting requirements of section 149(e) have been satisfied must be provided to the Executive Administrator within fourteen (14) days of closing. The Executive Administrator may withhold the release of funds for failure to comply;

30. the Obligations must provide that neither the Town nor a related party thereto will acquire any of the TWDB's Source Series Bonds in an amount related to the amount of the Obligations to be acquired from the Town by the TWDB;

State Revolving Fund Conditions

31. the Town shall submit outlay reports with sufficient documentation on costs on a quarterly or monthly basis in accordance with TWDB outlay report guidelines;
32. the Obligations must include a provision stating that all laborers and mechanics employed by contractors and subcontractors for projects shall be paid wages at rates not less than those prevailing on projects of a similar character in the locality in accordance with the Davis-Bacon Act, and the U.S. Department of Labor's implementing regulations. The Town, all contractors, and all sub-contractors shall ensure that all project contracts mandate compliance with Davis-Bacon. All contracts and subcontracts for the construction of the project carried out in whole or in part with financial assistance made available as provided herein shall insert in full in any contract in excess of \$2,000 the contracts clauses as provided by the TWDB;
33. the Obligations must include a provision stating that the Town shall provide the TWDB with all information required to be reported in accordance with the Federal Funding Accountability and Transparency Act of 2006, Pub. L. 109-282, as amended by Pub. L. 110-252. The Town shall obtain a Data Universal Numbering System (DUNS) Number and shall register with System for Award Management (SAM), and maintain current registration at all times during which the Obligations are outstanding;
34. the Obligations shall provide that all loan proceeds will be timely and expeditiously used, as required by 40 CFR § 35.3135(d), and also shall provide that the Town will adhere to the approved project schedule;
35. the Obligations must contain a covenant that the Town will abide by all applicable construction contract requirements related to the use of iron and steel products produced in the United States, as required by 31 TAC § 375.3, 33 U.S.C. § 1388, and related State Revolving Fund Policy Guidelines;
36. the Obligations must contain language detailing compliance with the requirements set forth in 33 U.S.C. § 1382 *et seq.* related to maintaining project accounts containing financial assistance for planning, design, acquisition, or construction, as applicable, in accordance with generally accepted accounting principles (GAAP). These standards and principles also apply to the reporting of underlying infrastructure assets;

37. the Town shall submit, prior to the release of funds, a schedule of the useful life of the project components prepared by an engineer as well as a certification by the applicant that the average weighted maturity of the obligations purchased by the TWDB does not exceed 120% of the average projected useful life of the project, as determined by the schedule;

Clean Water State Revolving Fund Conditions

38. for each proposed bond series as described in the commitment of this Resolution, the Town shall pay at closing an origination fee approved by the Executive Administrator to the TWDB pursuant 31 TAC Chapter 375;
39. at the TWDB's option, the TWDB may fund the financial assistance under this Resolution with either available cash-on-hand or from bond proceeds. If the financial assistance is funded with available cash-on-hand, the TWDB reserves the right to change the designated source of funds to bond proceeds issued for the purpose of reimbursing funds used to provide the financial assistance approved in this Resolution;
40. prior to release of funds for professional consultants including, but not limited to, the engineer, financial advisor, and bond counsel, as appropriate, the Town must provide documentation that it has met all applicable state procurement requirements as well as all federal procurement requirements under the Disadvantaged Business Enterprises program;
41. prior to release of funds for professional services related to architecture or engineering, including but not limited to contracts for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or other architectural and engineering services as defined in 40 U.S.C. § 1102(2)(A)–(C), the Town must provide documentation that it has met all applicable federal procurement requirements as more specifically set forth in 40 U.S.C. § 1101 *et seq* and 33 U.S.C. § 1382(b)(14);

Pledge Conditions for the Loan

42. the Obligations must contain a provision that provides as follows:
 - a. if system revenues are actually on deposit in the Interest and Sinking Fund in advance of the time when ad valorem taxes are scheduled to be levied for any year, then the amount of taxes which otherwise would have been required to be levied and collected may be reduced to the extent and by the amount of revenues then on deposit in the Interest and Sinking Fund; or
 - b. if surplus revenues are based upon budgeted amounts:
 - i. the Obligations must include a requirement that the Town transfer

and deposit in the Interest and Sinking Fund each month an amount of not less than 1/12th of the annual debt service on the Obligations until the amount on deposit in the Interest and Sinking Fund equals the amount required for annual debt service on the Obligations; further, that the ordinance authorizing the issuance of the Obligations must include a requirement that the Town shall not transfer any funds from the Town's pledged system revenues to any fund other than the Interest and Sinking Fund until such time as an amount equal to the annual debt service on the Obligations for the then-current fiscal year has been deposited in the Interest and Sinking Fund;

- ii. the Obligations must include a requirement that for each year the Obligations are outstanding, and prior to the time taxes are to be levied for such year, the Town shall establish, adopt, and maintain an annual budget that provides for either the monthly deposit of sufficient surplus pledged revenues and/or tax revenues, the monthly deposit of any other legally available funds on hand at the time of the adoption of the annual budget, or a combination thereof, into the Interest and Sinking Fund for the repayment of the Obligations; and
- iii. the Obligations must include a requirement that the Town shall at all times maintain and collect sufficient rates and charges in conjunction with any other legally available funds so that after payment of the costs of operating and maintaining the system, it produces revenues in an amount not less than 1.10 times debt service requirements of all outstanding Obligations of the Town and other obligations of the Town which are secured in whole or in part by the pledged revenues, for which the Town is budgeting the repayment of such Obligations, or the Town shall provide documentation which evidences the levy and collection of an ad valorem tax rate dedicated to the Interest and Sinking Fund, in conjunction with any other legally available funds, sufficient for the repayment of debt service requirements.

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

Special Condition:

- 43. prior to the closings of Proposed Series 2022 and Proposed Series 2023, the Town shall submit additional documentation as required by the Executive Administrator.

APPROVED and ordered of record this 10th day of February, 2021.



TEXAS WATER DEVELOPMENT BOARD

A handwritten signature in blue ink, appearing to be "P. Lake", is written over a horizontal line.

Peter M. Lake, Chairman

DATE SIGNED: 2/10/21

ATTEST:

A handwritten signature in blue ink, appearing to be "J. Walker", is written over a horizontal line.

Jeff Walker, Executive Administrator