

AGENDA ITEM MEMO

BOARD MEETING DATE: April 6, 2023

TO: Board Members

THROUGH: Jeff Walker, Executive Administrator
Ashley Harden, General Counsel

FROM: Alexis Lorick, Assistant General Counsel

SUBJECT: Authorizing the adoption of rules to 31 Texas Administrative Code (TAC) Ch. 380 and adoption of the notice of intent to review to be published in Texas Register.

ACTION REQUESTED

Consider authorizing (1) the publication of a notice of adoption of rule review for 31 TAC Chapter 380, Subchapters B, C, and D; and (2) the publication of proposed adopted amendments to 31 TAC § 380.2 and § 380.3.

BACKGROUND

On January 19, 2023, the Board authorized the publication of a notice of intent to review Texas Water Development Board (TWDB) rules contained in 31 TAC Chapter 380, as well as proposed amendments to § 380.2 and § 380.3. This action requests authorization to publish notice adopting the Agency's rule review and adoption of proposed amendments to § 380.2 and § 380.3 following notice and comment in the *Texas Register*.

KEY ISSUES

The TWDB is required pursuant to Texas Government Code (Tex. Gov't Code) § 2001.039 to review all existing rules every four years. After review, it must either re-adopt, re-adopt with amendments, or repeal existing rules.

The Office of General Counsel filed with *The Texas Register* a notice of intent to review certain subchapters in 31 TAC Chapter 380 and two proposed amendments to § 380.2 and § 380.3. These notices were published on February 2, 2023. No comments on either the review of 31 TAC Chapter 380, Subchapters B, C, and D, or the proposed amendments to Section 380.2 and § 380.3, were received during the public comment period. The public comment period ended on March 6, 2023.

[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

Board Members

Date

Page 2

After review of the 31 TAC 380, Subchapters B, C, and D, the Office of General Counsel recommends re-adopting the rules in these subchapters without any changes as the reasons for the rules continue to exist. Chapter 380 contains the rules related to Alternative Dispute Resolution and these rules are required by statute. In addition, because no comments were received from the public related to the proposed amendments to § 380.2 and § 380.3, the Office of General Counsel recommends that the amendments to § 380.2 and Section 380.3 as previously proposed be adopted. The Office of General Counsel requests authorization to publish a notice of adoption rule review and to publish amendments to rules in the *Texas Register* for 31 TAC Chapter 380.

RECOMMENDATION

The Executive Administrator recommends the publication of a notice in the *Texas Register* adopting the rule review of 31 TAC Chapter 380, Subchapters B, C, and D and the adoption of rulemaking to 31 TAC § 380.2 and § 380.3.

Attachments:

1. Proposed notice of adoption of rule review to be filed with the *Texas Register*.
2. Proposed adoption of rulemaking to be filed with the *Texas Register*.

Texas Water Development Board

Title 31, Part 10, Chapter 353

The Texas Water Development Board (TWDB) files this notice of intent to review the rules in 31 Texas Administrative Code, Title 31, Part 10, Chapter 353, Subchapters B, D, E, F, and I.

This review is being conducted in accordance with the requirements of the Texas Government Code §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years.

Notice of the review of the aforementioned subchapters was published on February 3, 2023, issue of the *Texas Register* (48 TexReg 525). TWDB received no comments during the comment period.

TWDB conducted its review in accordance with the requirements of the Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The TWDB considered whether the initial factual, legal, and policy reasons for adopting each rule in these subchapters continued to exist and determined that the original reasons for adopting these rules continue to exist and readopts these subchapters. This concludes TWDB's review of 31 TAC, Title 31, Part 10, Chapter 353, Subchapters B, D, E, F, and I.

The Texas Water Development Board (TWDB) adopts amendments to 31 Texas Administrative Code (TAC) §380.2, Applicability, and §380.3 Definitions. The proposal is adopted without changes as published in the February 3, issue of the *Texas Register*, (48 Tex Reg 474).

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

The TWDB adopts amendments to 31 TAC Chapter 380, Alternative Dispute Resolution, Subchapter A, General Provisions. These amendments are adopted to make the rules consistent with statute in Chapter 2260, Texas Government Code.

SECTION BY SECTION DISCUSSION OF ADOPTED AMENDMENTS.

31 TAC §380.2, Applicability

Section 380.2 Applicability, is revised to add new paragraph (4). New paragraph (4) allows a claim for breach of contract to which Chapter 114, Civil Practices and Remedies Code to proceed against the TWDB, consistent with applicable statute in Chapter 2260, Texas Government Code.

31 TAC §380.3, Definitions

Section 380.3 Definitions, is revised to provide that certain attorney's fees may be recoverable in an action against the TWDB, consistent with applicable statute in Chapter 2260, Texas Government Code.

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 adopted 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 and there will be no change in costs for either state or local governments as these changes are necessary to comply with the resolution of certain contract claims against the state in Chapter 2260 of the Texas Government Code. 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.

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 necessary to implement

legislation.

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 adopted rulemaking is in effect, the public will benefit from the rulemaking as it clarifies the resolution process between the TWDB and contractors regarding certain contract claims against the state. Ms. Rebecca Trevino also has determined that for each year of the first five years the adopted rulemaking is in effect, the rules will not impose an economic cost on persons required to comply with the rule as these requirements are imposed by statute in Chapter 2260 of the Texas Government Code.

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

The TWDB has determined that a local employment impact statement is not required because the adopted rule does not adversely affect a local economy in a material way for the first five years that the adopted 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 as adopted. Therefore, no regulatory flexibility analysis is necessary.

REGULATORY IMPACT ANALYSIS DETERMINATION (Texas Government Code §2001.0225)

The TWDB reviewed the adopted 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 the resolution process between the TWDB and contractors regarding certain contract claims against the state.

Even if the adopted 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 adopted solely under the general powers of the agency, but rather under Chapter 2260 of the Texas Government Code. Therefore, this adopted rule does not fall under any of the applicability criteria in Texas Government Code §2001.0225.

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

TAKINGS IMPACT ASSESSMENT (Texas Government Code §2007.043)

The TWDB evaluated this adopted 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 the resolution process between the TWDB and contractors regarding certain contract claims against the state. The adopted rule would substantially advance this stated purpose by aligning currently adopted TWDB rules with statutory changes regarding the kinds of contract claims subject to TWDB rule and the recovery of certain attorney's fees in the resolution of a contract dispute with the TWDB.

The TWDB's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this adopted 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 primarily charged with the responsibility for water planning and for administering water financing for the state.

Nevertheless, the TWDB further evaluated this adopted rule and performed an assessment of whether it constitutes a taking under Texas Government Code Chapter 2007.

Promulgation and enforcement of this adopted rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted 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 existing state law related to the resolution of contract claims against the state by contractor in accordance with Texas Government Code, Chapter 2260. Therefore, the adopted rule does not constitute a taking under Texas

Government Code, Chapter 2007.

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

No public comments were received during the comment period, which ended on March 6, 2023.

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 Government Code, Chapter 2260. This rulemaking affects Water Code, Chapter 6 of the and Government Code, Chapter 2260.

<rule>

TITLE 31 NATURAL RESOURCES AND CONSERVATION
PART 10 TEXAS WATER DEVELOPMENT BOARD
CHAPTER 380 ALTERNATIVE DISPUTE RESOLUTION
SUBCHAPTER A GENERAL PROVISIONS

§380.2 Applicability.

This chapter does not apply to:

- (1) claims for personal injury or wrongful death arising from a breach of contract;
- (2) an action of the board for which the contractor is entitled to a specific remedy pursuant to state or federal constitution or statute;
- (3) contracts that are:
 - (A) between the board and:
 - (i) the federal government or its agencies, another state, or another nation;
 - (ii) a unit of state government; or
 - (iii) a local governmental body, or a political subdivision of another state;
 - (B) between a subcontractor and a contractor;

(C) within the exclusive jurisdiction of:

(i) a state or local regulatory body; or

(ii) a federal court or regulatory body; or

(D) solely and entirely funded by federal grant monies other than for a project defined in §380.3(12) of this title (relating to Definitions); and

(4) a claim for breach of contract to which Chapter 114, Civil Practices and Remedies Code, applies.

§380.3 Definitions.

The following words and terms, when used in this chapter, shall have the following meaning, unless the context clearly indicates otherwise:

(1) Board--Texas Water Development Board.

(2) Executive administrator--The executive administrator of the Texas Water Development Board.

(3) Claim--An assertion by a contractor that the board has breached a contract.

(4) Contract--A written agreement between the board and a contractor by the terms of which the contractor agrees either to:

(A) provide goods or services, by sale or lease, to or for the board; or

(B) perform a project as defined by Texas Government Code, §2166.001.

(5) Contractor--An independent contractor who has entered into a contract directly with the board.

The term does not include:

(A) the contractor's subcontractors, officers, employees, agents, or other persons furnishing goods or services to the contractor;

(B) an employee of the board; or

(C) a student at an institution of higher education.

(6) Counterclaim--An assertion by the board that:

(A) a contractor has breached a contract; or

(B) justifies the actions taken by the board that are the subject of a contractor's claim.

(7) Damages--The total amount of money recoverable on a claim for breach of contract after deducting any amount owed the board for work not performed under the contract or not in substantial compliance with the contract's terms. Damages do not include:

(A) consequential or similar damages;

(B) exemplary damages;

(C) damages based on an unjust enrichment theory;

(D) attorney's fees except attorney's fees may be recoverable if:

(i) the claim is for breach of a written contract for (I) engineering, architectural, or construction services, (II) material related to the services described in the preceding Paragraph (1); and

(ii) the amount in controversy is less than \$250,000, excluding penalties, costs, expenses, prejudgment interest, and attorney's fees; or

(E) home office overhead.

(8) Day--A calendar day.

(9) Event--An act or omission, or a series of acts or omissions, giving rise to a claim or counterclaim.

(10) Goods--Supplies, materials, or equipment.

(11) Parties--The board and the contractor who entered into the contract that is alleged to have been breached.

(12) Project--As defined in Texas Government Code, §2166.001, a building construction project that is financed wholly or partly by a specific appropriation, bond issue, or federal money, including the construction of:

(A) a building, structure, or appurtenant facility or utility, including the acquisition and installation of original equipment and original furnishing; and

(B) an addition to, or alteration, modification, rehabilitation, or repair of an existing building, structure, or appurtenant facility or utility.

(13) Services--The furnishing of skilled or unskilled labor or consulting or professional work, or a

combination thereof, excluding the labor of an employee of the board.

(14) Unit of state government--The state or an agency, department, commission, bureau, board, office, council, court, or other entity that is in any branch of state government and that is created by the constitution or a statute of this state, including a university system or institution of higher education. The term does not include a county, municipality, court of a county or municipality, special purpose district, or other political subdivision of this state.

The agency certifies that legal counsel has reviewed the adoption and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on _____.