

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose amendments to §§2.5, 2.7, 2.14, 2.43, 2.45, 2.49, 2.81, 2.83 - 2.85, 2.101 - 2.103, and §§2.105 - 2.110, the repeal of §§2.12, 2.104, and 2.131, and new §2.104, all relating to the environmental review of transportation projects, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed amendments, attached to this minute order as Exhibits A, B, C, D, E, and F, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the general counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the commission that the amendments to §§2.5, 2.7, 2.14, 2.43, 2.45, 2.49, 2.81, 2.83 - 2.85, 2.101 - 2.103, and §§2.105 - 2.110, the repeal of §§2.12, 2.104, and 2.131, and new §2.104 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



Director, Environmental Affairs Division

Recommended by:



Executive Director

115224 May 24 '18
Minute Date
Number Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §§2.5, 2.7, 2.14, 2.43, 2.45, 2.49, 2.81, 2.83 -
4 2.85, 2.101 - 2.103, and §§2.105 - 2.110, the repeal of §§2.12,
5 2.104, and 2.131, and new §2.104, all relating to the
6 environmental review of transportation projects.

7

8 EXPLANATION OF PROPOSED AMENDMENTS, REPEAL, AND NEW SECTION

9 The department has identified the need to make various changes
10 to its environmental review rules to add clarity, correct
11 inconsistencies, eliminate unnecessary rule language, more
12 accurately implement statutory requirements, and generally
13 further streamline and improve the environmental review process.
14 The proposed changes also implement Senate Bill 312, Section 21,
15 85th Legislature, Regular Session, requiring a hearing for
16 projects that substantially change the layout or function of a
17 connecting roadway or an existing facility, including the
18 addition of managed lanes, high-occupancy vehicle lanes, bicycle
19 lanes, bus lanes, and transit lanes. The various changes
20 proposed in this rulemaking are summarized below.

21

22 SUBCHAPTER A. GENERAL PROVISIONS

23 Amendments to §2.5, Definitions, add a definition for "bicycle
24 lane." The department is amending §2.107, Public Hearing, in
25 this rulemaking to add a requirement to hold a hearing for a

1 project that "substantially changes the layout or function of a
2 connecting roadway or an existing facility, including the
3 addition of managed lanes, high-occupancy vehicle lanes, bicycle
4 lanes, bus lanes, and transit lanes." This amendment implements
5 new Transportation Code, §203.023, enacted by the 85th Texas
6 Legislature during its 2017 Regular Session. Section 2.5
7 defines "bicycle lane" as a lane that is dedicated *exclusively*
8 for bicycle use to avoid an interpretation of new §203.023 that
9 would require public hearings for projects that merely add wide
10 shoulders, sidewalks, shared-use paths or other facilities that
11 may be used by bicycles but also serve other purposes. The
12 department believes that such an interpretation is not
13 consistent with the legislative intent behind new §203.023.
14 Section 2.107 is also amended to provide exceptions to the new
15 hearing requirement for certain types of projects that involve
16 bicycle lanes, but do not substantially change the layout or
17 function of a roadway.

18

19 The amendments clarify that the definition of "environmental
20 report" does not include an environmental issues checklist
21 prepared to demonstrate a categorical exclusion determination,
22 or a checklist used to perform a reevaluation of a project. The
23 phrase, "environmental report," as used in the department's
24 environmental review rules, is meant to refer to those types of
25 reports and documents prepared in support of a categorical

1 exclusion or reevaluation, not to the categorical exclusion
2 determination or reevaluation itself.

3

4 The amendments revise the definition of "FHWA transportation
5 project" to clarify that it includes a project for which the
6 Federal Highway Administration (FHWA) has assigned its
7 environmental review responsibilities to the department pursuant
8 to an memorandum of understanding, such as the Memorandum of
9 Understanding Between the Federal Highway Administration and the
10 State of Texas' Participation in the Project Delivery Program
11 Pursuant to 23 U.S.C. 327, which was executed on December 16,
12 2014.

13

14 The amendments remove the definition for "MAPO." In this
15 rulemaking, the department is repealing §2.104, "Meeting with
16 Affected Property Owners (MAPO)," and replacing it with a new
17 §2.104, "Notice and Opportunity to Comment." As a result the
18 term is no longer used and the definition is unnecessary.

19

20 Amendments to §2.7, Project Sponsor, clarify that a department
21 district or division may allow a public entity that qualifies to
22 be a project sponsor, but does not wish to be a project sponsor,
23 to develop an environmental review document or documentation of
24 categorical exclusion for the district's or division's use.

25 This clarification is needed because, on occasion, a local

1 government, such as a county, city, or regional mobility
2 authority, that is on the list of the types of entities that are
3 eligible to be an official project sponsor for purposes of
4 environmental review does not wish to be the official project
5 sponsor, but still is willing to prepare the environmental
6 review document for a project. This situation may arise when
7 the local government simply wants to prepare a draft of the
8 document for the department's review, but does not want to be
9 involved in scoping or take on any of the other responsibilities
10 generally required of project sponsors under the department's
11 rules. In this situation, a department district or division may
12 designate itself as the official project sponsor, but allow the
13 local government to assist by producing a draft of the
14 environmental review document. The existing rule is problematic
15 because it may be read as allowing only those local governments
16 that are *not* eligible to be the project sponsor to fulfill that
17 role.

18

19 Section 2.12, Project Coordination, is repealed because it is
20 overly broad in that it may be read as imposing an obligation to
21 identify and coordinate with all entities that may have an
22 interest in every project, including those projects that are
23 categorically excluded from the requirement to prepare an
24 environmental assessment or environmental impact statement. For
25 categorically excluded projects, the only coordination required

1 should be that called for by specific memoranda of understanding
2 with outside entities or laws, such as Section 106 of the
3 National Historic Preservation Act or Section 7 of the
4 Endangered Species Act. Further, the existing rule requires the
5 department to identify and coordinate with all entities that
6 "may have an interest" in a given project. It is difficult for
7 the department to comply with this requirement because it is not
8 always clear which outside entities "may have an interest" in a
9 given project. For these reasons, it does not make sense to
10 have a rule of broad application that requires the department to
11 coordinate with outside entities on all projects, even if not
12 required by any specific memoranda of understanding or law. The
13 department will, of course, regardless of the class of action
14 (categorical exclusion, environmental assessment, or
15 environmental impact statement), continue to honor its existing
16 memoranda of understanding with resource agencies and any
17 applicable laws that require the department to coordinate with
18 an outside entity. In addition, for environmental impact
19 statement-level projects, the department's rules will continue
20 to require the development of a coordination plan. See 43
21 T.A.C. §§2.84(c)(1)(A) and 2.103. And for environmental
22 assessment-level projects, in this rulemaking the department is
23 amending its environmental assessment rule, §2.83, to require
24 coordination with interested governmental entities.

25

1 Amendments to §2.14, Project File, remove the prohibition
2 against disclosing a draft environmental review document or
3 documentation of categorical exclusion before the department
4 delegate approves it for public disclosure. The department
5 prefers to not have incomplete, early, or multiple drafts of the
6 same document circulating in the public domain. However, a
7 request for a document under the Texas Public Information Act is
8 governed by that Act rather than a rule of the department.

9

10 SUBCHAPTER C. ENVIRONMENTAL REVIEW PROCESS FOR HIGHWAY PROJECTS

11 Amendments to §2.43, Project Sponsor Responsibilities, revise
12 paragraph (2) to recognize that environmental reports may be
13 prepared in support of documentation of categorical exclusion.

14

15 In paragraph (5) the reference to §2.12, Project Coordination,
16 which is being repealed, is removed. The paragraph is also
17 revised to state that the project sponsor conducts any required
18 coordination, for example with resource agencies, only if both
19 the department and the entity with which coordination is being
20 conducted agree. For some types of coordination, the department
21 may wish to be the entity that conducts the coordination in the
22 interest of consistency among projects and maintenance of the
23 relationship with the respective resource agency. Therefore,
24 the rule should allow the project sponsor to conduct
25 coordination only when the department agrees.

1
2 Amendments to §2.45, Optional Early Submittal of Environmental
3 Reports, remove the following sentence, “[n]othing in this
4 subchapter requires the preparation of environmental reports for
5 the department’s review.” While it is correct that no provision
6 of the department’s environmental review rules requires any
7 specific environmental report to be prepared, it is common for
8 the department to identify certain types of reports during the
9 scoping process that must be prepared by the project sponsor to
10 comply with the department’s guidance and processes. Examples
11 include a historical resources survey and an archeological
12 background study. This revision is needed to avoid a
13 misconception that environmental review may, in all cases, be
14 performed by a project sponsor without preparing any
15 environmental reports.

16
17 Amendments to §2.49, Technical Review, remove the statement that
18 a purpose of technical review of an environmental review
19 document is to confirm that the document is “legally
20 sufficient.” This language is problematic because it may be
21 read to imply legal sufficiency review, which is a special type
22 of review by an attorney that is required only for certain types
23 of documents, such as an FHWA transportation project final
24 environmental impact statement. The amendment clarifies that a
25 purpose of technical review is to confirm that the document is

1 "compliant with applicable regulatory requirements."

2

3 SUBCHAPTER D. REQUIREMENTS FOR CLASSES OF PROJECTS

4 Amendments to §2.81, Categorical Exclusions, update and clarify
5 the intention of the section. In subsection (a)(3) the
6 reference to §2.131 is removed because that section is being
7 repealed in this rulemaking. Subsection (b) is revised to
8 improve clarity and readability. Paragraph (3) is amended to
9 remove the requirement that the project sponsor must indicate on
10 the environmental issues checklist if coordination is required,
11 and if so, that the portion of coordination that can be
12 completed before final approval of the environmental review
13 document has been completed. Resource agency coordination is
14 tracked in the department's electronic Environmental Compliance
15 and Oversight System. Therefore, there is no need for this data
16 to also be captured on the environmental issues checklist used
17 to make the final categorical exclusion determination.

18 Additionally, the reference to "environmental review document"
19 is incorrect, as the department uses an environmental issues
20 checklist to make categorical exclusion determinations.

21

22 Subsection (c)(2) is revised to state that the action may not
23 involve unusual circumstances "such as," rather than "or lead
24 to," the list of three unusual circumstances in subsections
25 (c)(2)(A)-(B). The phrase, "such as," is more appropriate

1 because the three conditions listed are examples of the types of
2 unusual circumstances that would disqualify a project from being
3 a categorical exclusion.

4

5 Amendments to §2.83, Environmental Assessments, add a new
6 subsection (c) regarding coordination. The new subsection
7 removes the reference to §2.12, which is being repealed, and
8 more accurately describes the type of coordination that the
9 department intends to conduct for environmental assessment-level
10 projects. As explained in new subsection (c), project sponsors
11 must coordinate with any governmental entities that have
12 indicated interest in the project. This provision is based on
13 elements of FHWA's analogous rule regarding coordination for
14 environmental assessment-level projects at 23 C.F.R.
15 §771.119(b). Of course, any coordination required under a
16 memorandum of understanding with a resource agency or required
17 by an applicable law, such as Section 106 of the National
18 Historic Preservation Act or Section 7 of the Endangered Species
19 Act, must still be conducted regardless of the rule requirement.
20 New subsection (c) also clarifies that it is generally the
21 project sponsor's responsibility to conduct any required
22 coordination, but only if the department and the entity with
23 whom coordination is being conducted agree. In some cases,
24 either the department or the coordinating agency may wish for
25 coordination to be conducted by the department, and

1 specifically, the department's Environmental Affairs Division.
2
3 Amended subsection (d) indicates that only a summary of public
4 involvement need be included in the body of an environmental
5 assessment. There is no requirement or need to recite or
6 include within an environmental assessment the actual comments
7 received. Any comments received as part of a public meeting or
8 public hearing are compiled and addressed as part of the public
9 meeting or public hearing documentation. While the public
10 meeting or public hearing documentation is an important part of
11 the environmental review process, it is physically a separate
12 document from the environmental assessment itself due to its
13 potential length and bulkiness. The comment/response matrix may
14 be included as an appendix to the environmental assessment, but
15 the environmental assessment must always summarize any public
16 input received and explain where the public meeting or public
17 hearing documentation may be inspected and copied.

18
19 Amended §2.83 also removes the prohibition against disclosing
20 drafts of EAs prior to approval for public disclosure by the
21 department delegate. As explained in connection with amendments
22 to §2.14, Project File, the department prefers to not have
23 incomplete, early, or multiple drafts of the same document
24 circulating in the public domain. However, a request for a
25 document under the Texas Public Information Act is governed by

1 that Act.

2

3 Finally, subsection (h) is revised to provide a more accurate
4 description of a "finding of no significant impact" or "FONSI."
5 The existing definition of a FONSI at subsection (h)(1) states
6 that a FONSI "briefly presents the reasons why" a project will
7 not have a significant effect on the human environment.

8 However, it is more accurate to describe a FONSI as simply
9 concluding that the project will not have a significant effect
10 on the human environment, with reference to the various
11 explanations and discussions in the environmental assessment for
12 the project. It is redundant and not necessary for the FONSI to
13 present reasons why there will be no significant effect.

14

15 Amendments to §2.84, Environmental Impact Statements, remove the
16 statement in subsection (a) that the rule applies "if the
17 project is of a type for which an EIS is typically prepared,"
18 while keeping the other applicability trigger, "if there are
19 likely to be significant environmental impacts." The department
20 does not intend to convey that there is any type of project for
21 which an EIS must be prepared, without regard to the likelihood
22 of significant environmental impacts. Rather, the need for an
23 environmental impact statement should depend solely on the
24 likelihood of significant environmental impacts. If there is
25 substantial uncertainty about that likelihood, the project

1 sponsor may instead prepare an environmental assessment under
2 §2.83, which will determine whether an environmental impact
3 statement is required.

4
5 Subsection (b)(2) is amended to remove the reference to §2.12,
6 Project Coordination, because that section is being repealed.
7 Coordination for environmental impact statement-level projects
8 will continue to be conducted under the coordination plan
9 required by §2.84(c)(1)(A) and §2.103.

10

11 Amended subsection (c)(1)(B) clarifies that it is generally the
12 project sponsor's responsibility to conduct any required
13 coordination, but only if the department and the entity with
14 whom coordination is being conducted agree. In some cases,
15 either the department or the coordinating agency may wish for
16 coordination to be conducted by the department, and
17 specifically, the department's Environmental Affairs Division.

18

19 Subsection (f)(3) is corrected to indicate that a notice of
20 availability of a final environmental impact statement is
21 published in either the *Texas Register* or the *Federal Register*,
22 pursuant to §2.108(c)(4).

23

24 Amendments to §2.85, Reevaluations, remove the reference to
25 §2.12, Project Coordination, as that rule is being repealed.

1

2 SUBCHAPTER E. PUBLIC PARTICIPATION

3 Amendments to §2.101, General Requirements, revise a reference
4 in subsection (b) to a Meeting with Affected Property Owners, to
5 instead refer to a Notice and Opportunity to Comment. Section
6 2.104, Meeting with Affected Property Owners (MAPO), is being
7 repealed by this rulemaking and replaced with a new §2.104,
8 Notice and Opportunity to Comment.

9

10 Subsection (e) is revised to indicate that the project sponsor,
11 in consultation with the department delegate, will determine
12 whether any notice required by this chapter must be "provided,"
13 rather than "published," in another language in addition to
14 English. This revision reflects that publication is not the
15 only means of providing notice under Subchapter E.

16

17 Amendments to §2.102, Notice of Intent, eliminate the
18 requirement to publish in a newspaper a notice of intent (NOI).
19 An NOI signals the department's intent to begin the process for
20 preparing an environmental impact statement for a transportation
21 project. The department believes that the remaining requirement
22 to publish an NOI in the *Texas Register* or *Federal Register*,
23 depending on whether the project is or is not federally funded,
24 should be sufficient to alert those entities with interest in
25 the department's environmental impact statement-level projects.

1 Additionally, on an environmental impact statement-level
2 project, scoping meetings take place very early in the
3 environmental review process, and are the primary means by which
4 early public involvement in a project occurs. For any given
5 environmental impact statement-level project, the project
6 sponsor will determine an appropriate public outreach method for
7 announcing scoping meetings at its discretion. For most
8 department projects, the project sponsor is the department
9 district in which the project is located. Certain local
10 government entities may also be project sponsors. See 43 T.A.C.
11 §2.7, Project Sponsor. Public outreach methods for public
12 scoping meetings may include newspaper notice, website notice,
13 changeable message signs, social media, email, or any other
14 method determined to be appropriate by the project sponsor.

15
16 There would likely be cost savings associated with elimination
17 of the requirement to publish NOIs in the newspaper. The
18 department estimates that it issues approximately two NOIs per
19 year. In the department's experience, newspaper notice
20 publication costs for a department notice can range from
21 approximately \$100 to approximately \$5,700 per notice, depending
22 on various factors such as the location, newspaper, day of week,
23 type and size of advertisement, and section of the newspaper.
24 Based on these figures, the department estimates that this
25 amendment of §2.102 could result in a potential cost savings of

1 approximately \$200 to \$11,400 per year. This does not take into
2 account costs associated with publishing additional notices in
3 languages other than English, which may be appropriate in
4 certain circumstances. These savings would, potentially, be
5 realized by either the department, or for a local government-
6 sponsored project, the local government project sponsor.
7 Because it is impossible to predict exactly how many notices
8 will be published in a given year, and what the costs of those
9 notices will be, the department cannot reasonably calculate any
10 more specific estimate of cost savings.

11
12 Amendments to §2.103, Coordination Plan for EIS, clarify that a
13 copy of the approved coordination plan shall be made available
14 to the public "on request." This clarification is needed
15 because there is no separate notice of availability of an
16 approved coordination plan on an environmental impact statement-
17 level project.

18
19 The amendments repeal §2.104, Meeting with Affected Property
20 Owners (MAPO), and replace it with a new §2.104, Notice and
21 Opportunity to Comment. MAPOs are not statutorily required.
22 Additionally, the term, "MAPO," does not accurately describe a
23 form of public participation typically provided under §2.104.
24 As allowed by the existing section, oftentimes the department
25 conducts the "MAPO" by written letter, in which case there is no

1 actual face-to-face meeting with the property owner. Further,
2 the requirement in the existing section to hold a MAPO when a
3 project requires a detour or a road or bridge closure, is
4 problematic. When a project involves a detour or a road or
5 bridge closure, all persons who depend on the roadway are
6 "affected." It is, therefore, difficult for department staff to
7 decisively and accurately determine which property owners are,
8 and are not, "affected" by a detour in order to comply with the
9 existing MAPO rule. These difficulties are exacerbated by the
10 fact that it is often not clear at the environmental review
11 stage whether a project will even require a detour or road or
12 bridge closure, as this type of detail is sometimes not known
13 until construction plans are established. Other aspects of
14 existing §2.104 have caused confusion in the department's
15 experience. Specifically, the existing section refers to
16 "minimal" right-of-way acquisition as a MAPO trigger, but does
17 not further specify what amount qualifies as "minimal." It also
18 fails to explicitly indicate that no MAPO is required if the
19 project triggers a higher level of public participation, namely
20 a public meeting, opportunity for public hearing, or public
21 hearing. However, this has been the department's
22 interpretation, as notices of opportunities for public hearings
23 and notices of public hearings are provided to adjacent property
24 owners under existing §§2.106(c) and 2.107(c)(2), respectively,
25 and, although not required by rule, notices of public meetings

1 are also oftentimes provided to adjacent property owners.

2

3 New §2.104, Notice and Opportunity to Comment, addresses these
4 issues by simply providing that when a project will acquire any
5 new right-of-way, and no notice of public meeting, opportunity
6 for public hearing, or public hearing will be provided to the
7 affected property owners, then the department must notify the
8 affected property owners and provide them an opportunity to
9 provide comments on the project as part of the environmental
10 review process. The section also establishes a 15-day comment
11 period, which is consistent with the department's approach with
12 respect to public meetings and public hearings. Although the
13 new section does not refer to a "meeting" with affected property
14 owners during the environmental review process, department staff
15 may choose to meet in person or by telephone to discuss any
16 concerns raised by a property owner after receiving the required
17 notice.

18

19 Additionally, new §2.104 implements Transportation Code,
20 §203.022 by requiring the provision of notice and opportunity to
21 comment to adjoining landowners and local governments and public
22 officials when a project involves added capacity or the
23 construction of a highway at a new location. Historically, the
24 department has implemented Transportation Code, §203.022 by
25 requiring an opportunity for public hearing for added-capacity

1 projects (see existing §2.106(b)(1)(C)), and an actual public
2 hearing for new location highway projects (see existing
3 §2.107(b)(4)(C)), and requiring that notices of both
4 opportunities and actual hearings be provided to landowners
5 abutting the roadway within the proposed project limits, as well
6 as to affected local governments and public officials (see
7 existing §2.106(c)(3) and §2.107(c)(3)). However, the
8 department believes that it is more consistent with the wording
9 of Transportation Code, §203.022 to simply provide notice and
10 opportunity to comment in these scenarios. As with notices to
11 owners of property to be acquired as part of the proposed
12 project, the new section establishes a 15-day comment period,
13 which is consistent with the department's approach with respect
14 to public meetings and public hearings. And again, the new
15 section provides that if a notice of a public meeting,
16 opportunity for public hearing, or public hearing is provided to
17 the adjoining landowners, local governments, and public
18 officials, then additional notice under new §2.104 is not
19 required.

20
21 Amendments to §2.105, Public Meeting, add a reminder to provide
22 notice of a public meeting to any public official, individual,
23 or affected interest group that has expressed an interest in a
24 transportation project. This is a general requirement
25 applicable to public participation activities under existing

1 §2.101, General Requirements. However, it is appropriate to
2 have a provision reminding the reader of this obligation within
3 the public meeting section.

4

5 Amendments to §2.106, Opportunity for Public Hearing, add a
6 cross-reference to §2.107 in subsection (a) for further clarity.
7 Subsection (b)(1)(B), which requires an opportunity for public
8 hearing if a project "substantially changes the layout or
9 function of connecting roadways or of the facility being
10 improved" is repealed. The 85th Texas Legislature recently
11 enacted new Transportation Code, §203.023, which requires a
12 hearing, not merely an opportunity for one, for a project that
13 substantially changes the layout or function of a connecting
14 roadway or an existing facility, including the addition of
15 managed lanes, high-occupancy vehicle lanes, bicycle lanes, bus
16 lanes, and transit lanes. Therefore, the "substantial change in
17 layout or function" trigger for an opportunity for public
18 hearing is being removed, and a trigger is added in §2.107,
19 Public Hearing, to implement newly enacted Transportation Code,
20 §203.023.

21

22 Subsection (b)(1)(C), which requires an opportunity for public
23 hearing when a project adds capacity is also repealed.

24 Transportation Code, §203.022 only requires notice and
25 opportunity to comment be provided to adjoining landowners and

1 affected local governments and public officials for added-
2 capacity projects. Therefore, the department is re-implementing
3 §203.022 under new §2.104, Notice and Opportunity to Comment,
4 and removing this trigger from §2.106.

5
6 Sections 2.106 and 2.107 are amended to state that the project
7 sponsor must "provide," rather than "mail," notice to
8 landowners, affected local governments, and public officials.
9 This revision is needed because there are other methods, such as
10 email, by which this notice may be provided. Amendments to
11 those sections add reminders to provide notice of an opportunity
12 for public hearing or public hearing to any public official,
13 individual, or affected interest group that has expressed an
14 interest in a transportation project. This is a general
15 requirement applicable to public participation activities under
16 existing §2.101, General Requirements. However, it is
17 appropriate to have provisions reminding the reader of this
18 obligation within the opportunity for public hearing and public
19 hearing rules.

20
21 Additionally, §2.106(c) is amended to revise the notice period
22 for an opportunity for public hearing from 30 days to 15 days.
23 In 2016, the department amended §2.107, Public Hearing, to
24 revise the notice period for a public hearing from 30 days to 15
25 days. 41 *Texas Register* 5234, 5238 (July 15, 2016). The

1 department's experience since making that regulatory change has
2 been that a minimum of 15 days' notice for a public hearing is
3 sufficient. In retrospect, the department should have similarly
4 shortened the notice period for an opportunity for public
5 hearing in 2016, given that the public should be able to
6 determine relatively quickly after receiving notice of an
7 opportunity for public hearing whether a project affects them
8 and whether to request a hearing. Also, if a public hearing is
9 required following an opportunity for public hearing, additional
10 notice of the hearing will be provided in accordance with
11 §2.107. For purposes of clarity, language is also added to
12 explain that, for mailed notices, notice will be considered to
13 have been provided three days after the notice is mailed.

14
15 Both §§2.106 and 2.107 are revised to require the public hearing
16 to be held or opportunity to be afforded after "preliminary"
17 location and design studies are prepared. This revision is
18 needed to clarify that that the sections do not require all
19 location and design studies be prepared and finalized prior to
20 holding a hearing or affording an opportunity for one.

21
22 Both §§2.106 and 2.107 are revised to no longer require that the
23 documentation of categorical exclusion be approved for public
24 disclosure by the department delegate prior to holding the
25 hearing or affording the opportunity one. Projects that qualify

1 as categorical exclusions are generally smaller-scale projects
2 that are categorically excluded from the requirement to prepare
3 an environmental assessment or environmental impact statement.
4 For categorical exclusions, there is no draft environmental
5 assessment or environmental impact statement for the public to
6 review in connection with a public hearing. Rather, the
7 department uses an electronically-signed form to make a CE
8 determination for a project in the department's Environmental
9 Compliance Oversight System (ECOS). Because the categorical
10 exclusion determination form, which contains a checklist of
11 environmental issues, is simply a generic form, it is not
12 necessary to require that the documentation of categorical
13 exclusion be approved for public disclosure prior to holding a
14 hearing on a project.

15
16 Additionally, one of the restrictions on classifying a project
17 as a categorical exclusion is that the action may not involve
18 substantial controversy. (See §2.81(c)(2)(B).) For projects
19 that trigger a public hearing, the project sponsor may intend to
20 use the public's comments at the public hearing to gauge whether
21 the project does or does not involve substantial controversy, in
22 which case it may make sense to hold the hearing fairly early in
23 the environmental review process, prior to completion and
24 approval of all environmental reports (also called technical
25 reports) analyzing specific environmental issues. To require

1 the project sponsor to wait until all environmental reports have
2 been completed and approved prior to holding the public hearing
3 on a project proposed to be classified as a categorical
4 exclusion could result in substantial delay if the project turns
5 out to have substantial controversy and has to be re-done as an
6 environmental assessment. Of course, any completed
7 environmental reports that have been approved by the department
8 delegate and therefore, are ready for public disclosure at the
9 time of the hearing would have to be made available for public
10 review not less than 15 days before the hearing as required by
11 §2.107(d)(2).

12
13 Section 2.106 is amended to remove §2.106(d)(2), which specifies
14 that a public hearing is not required if no hearing requests are
15 received by the deadline, or if the project sponsor has
16 addressed all concerns of the persons requesting the public
17 hearing. All the situations in which a hearing is or is not
18 required are now covered in §2.107, Public Hearing.

19
20 Amendments to §2.107, Public Hearing, change some of the
21 requirements for holding a public hearing on a transportation
22 project. First, the amendments add a requirement to hold a
23 hearing when an agency with jurisdiction over the project
24 submits a written request for a hearing that is supported by
25 reasons why a hearing will be helpful. This conforms the

1 department's rules to the Council on Environmental Quality's
2 rules at 50 C.F.R. §1506.6(c)(2). Second, the amendments remove
3 the requirement to hold a public hearing when between one and
4 nine individuals request a hearing in response to the department
5 affording an opportunity for public hearing. It is not a
6 judicious use of public resources to hold a hearing on a project
7 that does not meet any of the other hearing triggers when only a
8 relatively small number of individuals request one. In such an
9 instance, it makes more sense to simply consider any comments
10 the individuals might have in the course of finalizing the
11 environmental review of the project. The section continues to
12 require a public hearing when ten or more individuals request
13 one. Third, amended §2.107 specifies that no hearing is
14 required on the basis of requests made by an agency or members
15 of the public if such request or requests are received after the
16 deadline specified in an opportunity for public hearing issued
17 under §2.106, or, as provided in existing §2.106(d)(2), if the
18 project sponsor has addressed all concerns of the agency or
19 persons requesting the hearing.

20
21 Section 2.107(b) is revised to remove the requirement to hold a
22 hearing for a project that constructs a new highway on a new
23 location. Because Transportation Code, §203.022 only requires
24 notice and opportunity to comment be provided to adjoining
25 landowners and affected local governments and public officials

1 for new location highway projects, the department is re-
2 implementing §203.022 under new rule, §2.104, Notice and
3 Opportunity to Comment, and removing this trigger from §2.107.
4
5 Additionally, §2.107 is amended to add a new trigger for holding
6 a public hearing for a project that "substantially changes the
7 layout or function of a connecting roadway or an existing
8 facility, including the addition of managed lanes, high-
9 occupancy vehicle lanes, bicycle lanes, bus lanes, and transit
10 lanes." This trigger is added to implement Transportation Code,
11 §203.023, which was recently enacted by the 85th Texas
12 Legislature, and requires the department to, by rule, require a
13 hearing for those projects. In the existing rules, a
14 substantial change in layout or function is among the triggers
15 for affording an opportunity for public hearing under §2.106.
16 However, under newly enacted §203.023, this trigger will require
17 an actual hearing, not just an opportunity for one. Newly
18 enacted §203.023 also requires projects that add "managed lanes,
19 high-occupancy vehicle lanes, bicycle lanes, bus lanes, and
20 transit lanes" to be treated as substantially changing the
21 layout or function. Additionally, §2.107 is amended to include
22 exceptions to the hearing requirement for certain types of
23 actions relating to bicycle lanes. First, no hearing
24 requirement will be triggered by the striping of bicycle lanes
25 when the existing roadway already accommodated bicycles. For

1 example, if a roadway has a wide curb lane or shoulder that
2 already accommodates usage of the roadway by bicycles, and that
3 roadway is merely being re-striped to have a dedicated bike lane
4 for improved safety of bicyclists and motorized vehicles, then
5 neither the layout nor function of the roadway is being
6 substantially changed, and no public hearing is justified.

7
8 Second, no hearing requirement will be triggered by the striping
9 of one or more non-continuous bicycle lanes approaching or
10 through intersections, driveways, or other conflict areas. Some
11 projects only add intermittent bicycle lanes to safely guide
12 bicycle users through intersections, for example, but do not add
13 continuous bicycle lanes along the entirety of the roadway
14 corridor. These types of projects do not substantially change
15 the layout or function of the roadway, and do not justify a
16 public hearing.

17
18 Third, no hearing requirement will be triggered by the striping
19 of bicycle lanes not along, but across a roadway at an
20 intersection to allow the continuation of planned or existing
21 bicycle lanes on crossing local streets or other bicycle
22 facilities. Again, the department does not believe that the
23 Legislature intended for such projects to require a public
24 hearing, as they do not substantially change the layout or
25 function of the roadway, but rather facilitate connectivity and

1 safety on the local street network. These three exceptions are
2 needed to avoid an interpretation that would require a public
3 hearing, which is the department's highest and most formal form
4 of public involvement event, for projects that involve the
5 striping of bicycle lanes, but do not substantially change the
6 layout or function of the roadway.

7
8 Section 2.107 is also amended to indicate that no hearing is
9 required under §2.107 by the addition of bicycle lanes to a
10 roadway if the project was addressed in a local hearing held
11 under §25.55, Comment Solicitation on Bicycle Road Use. Section
12 25.55 requires each of the department's 25 districts to annually
13 provide an opportunity for a public hearing on district
14 transportation projects and programs that might affect bicycle
15 use, and specifies particular requirements for noticing such
16 opportunities and public hearings. If a project that adds
17 bicycle lanes is addressed in a hearing held under §25.55, the
18 department does not believe it would be consistent with
19 Legislative intent for that same project to also trigger the
20 requirement to hold a public hearing under §2.107 as part of the
21 environmental review process merely because it involves the
22 addition of bicycle lanes. If, beyond adding bicycle lanes, the
23 project otherwise substantially changes the layout or function
24 of the roadway or involves any of the other conditions for
25 requiring a public hearing under §2.107, a hearing must be held

1 under §2.107 as part of the environmental review process.

2

3 Section 2.107 is also revised for purposes of clarity to explain
4 that, for mailed notices, notice will be considered to have been
5 provided three days after the notice is mailed.

6

7 Finally, §2.107 is amended with new subsection (h), which
8 clarifies that nothing in §2.107 limits the department's ability
9 to hold one or more public meetings on any project under §2.105
10 (relating to Public Meeting). In other words, if a public
11 hearing is required for a given project because it meets one of
12 the triggers set forth in §2.107(b), such as a substantial
13 change in layout or function, then of course the department must
14 hold a public hearing on that project, but the department may,
15 at its discretion, also hold one or more public meetings on that
16 same project. Public meetings are useful for communicating with
17 members of the public in a format that is less formal than a
18 public hearing, and it is not uncommon for the department to
19 hold one or more public meetings prior to holding the actual
20 public hearing on a larger project.

21

22 Amendments to §2.108, Notice of Availability, remove the
23 requirement to publish an notice of availability (NOA) for a
24 record of decision in the *Texas Register* or the *Federal*
25 *Register*, depending on whether the project is a state or FHWA

1 transportation project. There is no requirement to publish this
2 type of notice for an FHWA project under either FHWA's or the
3 Council on Environmental Quality's NEPA-implementing rules (23
4 C.F.R. Part 771 and 40 C.F.R. Chapter V, respectively).
5 Further, it is the department's intent to, where practicable,
6 combine the record of decision with the final environmental
7 impact statement into a single document as allowed by
8 §2.84(c)(2)(B). Notice of a final environmental impact
9 statement will continue to be required to be published in the
10 *Texas Register* or *Federal Register*, depending on whether the
11 project is a state or FHWA transportation project. Because the
12 final environmental impact statement will be combined with the
13 record of decision, for most environmental impact statement-
14 level projects, there will, in effect, be a notice of the
15 combined final environmental impact statement/record of decision
16 in the *Texas Register* or *Federal Register*, even without a
17 separate requirement that the record of decision be noticed in
18 the *Texas Register* or *Federal Register*.

19
20 Section 2.108 is also revised to require the project sponsor to
21 "provide," rather than "send," an NOA. This is more appropriate
22 as there are multiple means by which an NOA may be provided to
23 the recipient. The section is also revised to eliminate the
24 provision stating that email notice could be provided only when
25 the entity had provided an email address to the department. If

1 the department has a valid email address for a recipient, a
2 notice may be provided using that email address regardless of
3 whether it was specifically provided by the recipient to the
4 department. Also, superfluous language regarding providing
5 instructions on how to access the document electronically in an
6 emailed notice is removed, as all notices of availability must
7 provide instructions on how to access the document under
8 subsection (a). The language about how no notice of
9 availability is required when a full copy of the document is
10 provided is also removed because this should be self-evident
11 without a specific provision.

12

13 Section 2.108 is amended to revise the list of entities required
14 to receive a notice of availability. The existing section
15 requires that notices be sent to "entities identified as having
16 an interest in or regulatory jurisdiction over an aspect of the
17 project in accordance with §2.12, relating to Project
18 Coordination." However, §2.12 is being repealed. Therefore,
19 this language is being revised to require notices to be sent to
20 affected units of federal, state, and local government; any
21 entities that requested in writing to receive notices regarding
22 the environmental review of the project; and any other entities
23 with which environmental review of the project is being
24 coordinated. The reference regarding affected units of federal,
25 state, and local government is based on FHWA's requirement that

1 these entities be notified of environmental assessments and
2 FONSIIs. (See 23 C.F.R. §§771.119(d) and 771.121(b).)
3 Determination of which units of federal, state, and local
4 governments are "affected" will be determined on a case-by-case
5 basis taking into account the nature of the project and other
6 factors deemed relevant by the department. The amendment also
7 clarifies that, although all notices of availability must be
8 sent to entities with which environmental review of the project
9 is being coordinated, provision of notices to those entities
10 with whom the department has a memorandum of understanding
11 regarding environmental review will be governed by the
12 memoranda, and not §2.108. This is because the specific
13 memorandum with each resource agency specifies the negotiated
14 requirements for notifying that resource agency.

15
16 Section 2.108 is amended to specify that for a notice of
17 availability of a draft environmental assessment for which no
18 public hearing is held, the notice must establish a deadline for
19 accepting public comments of not less than 30 days after the
20 date of newspaper publication. This is consistent with FHWA's
21 rule at 23 C.F.R. §771.119(f).

22
23 Amendments to §2.109, Additional Notice and Comment for Projects
24 Affected by Significant Changes, clarify that the requirements
25 in this section are triggered by a project that "adds capacity."

1 The existing rule refers to "the addition of one or more
2 vehicular lanes to an existing highway." This language is
3 problematic because it may be read as implying that an auxiliary
4 lane, such as a passing lane or turn lane, would trigger the
5 public involvement requirement. The department believes it is
6 clearer, and more consistent with the Legislature's intent in
7 enacting Transportation Code, §203.022, to simply state the
8 trigger as "adds capacity," which is generally understood as not
9 including the addition of passing lanes, turn lanes, or other
10 types of auxiliary lanes.

11
12 Section 2.109 is revised to require provision of notice and
13 opportunity to comment to adjacent landowners and affected local
14 governments and public officials, rather than an opportunity for
15 public hearing, when a qualifying project experiences certain
16 types of significant changes following project approval. Notice
17 and opportunity to comment is all that is required under the
18 relevant statute, Transportation Code, §203.022(b). Providing
19 an opportunity for public hearing in these situations is more
20 process than the legislature intended, and could result in
21 substantial project delays. The section also establishes a 15-
22 day comment period, which is consistent with the department's
23 approach with respect to public meetings and public hearings.

24
25 Amendments to §2.110, Notice of Availability, are similar to

1 changes made in §2.109 to clarify that the requirements in this
2 section are triggered by a project that "adds capacity." The
3 existing section refers to "the addition of at least one travel
4 lane." This language is problematic because it may be read as
5 implying that an auxiliary lane, such as a passing lane or turn
6 lane, would trigger the public involvement requirement. The
7 department believes it is clearer, and more consistent with the
8 Legislature's intent in enacting Transportation Code, §203.022,
9 to simply state the trigger as "adds capacity," which is
10 generally understood as not including the addition of passing
11 lanes, turn lanes, or other types of auxiliary lanes.

12

13 SUBCHAPTER F. REQUIREMENTS FOR SPECIFIC TYPES OF PROJECTS AND
14 PROGRAMS

15 The amendments repeal §2.131, Advance Acquisition of Right-of-
16 Way, as the department no longer believes it is necessary to
17 have an environmental review-related rule regarding this
18 subject. The department's environmental review rules are
19 written primarily to implement Transportation Code, §201.604,
20 requiring the department to have rules governing environmental
21 review of the department's transportation projects. House Bill
22 2646, enacted by the 85th Texas Legislature in 2017, amended
23 Transportation Code, §202.112 to provide express authority to
24 acquire right-of-way before environmental clearance has been
25 issued for the transportation facility. The department believes

1 that its processes for acquiring right-of-way early are more
2 appropriately set forth in the Right-of-Way Division's written
3 policies than in the department's environmental review rules.

4

5 FISCAL NOTE

6 Brian Ragland, Chief Financial Officer, has determined that for
7 each of the first five years in which the amendments, repeals,
8 and new rule as proposed are in effect, there will be a
9 potential cost savings for the department and local government
10 project sponsors of between approximately \$200 and approximately
11 \$11,400. This is based on assumptions that (1) the department
12 and local governments could avoid the costs associated with
13 publishing in the newspaper two NOIs per year, and (2) those
14 notices would cost between approximately \$100 and approximately
15 \$5,700 each. This does not take into account costs associated
16 with publishing additional notices in languages other than
17 English, which may be appropriate in certain circumstances.
18 There will be no additional costs or impacts on revenue for the
19 state or local governments as a result of this rulemaking.

20

21 Carlos Swonke, Director, Environmental Affairs Division, has
22 certified that there will be no significant impact on local
23 economies or overall employment as a result of enforcing or
24 administering the proposed amendments, repeals, and new rule.

25

1 PUBLIC BENEFIT AND COST

2 Mr. Swonke has also determined that for each year of the first
3 five years in which the proposed amendments, repeals, and new
4 rule are in effect, the public benefit anticipated as a result
5 of enforcing or administering the amendments will be overall
6 improvements to the department's environmental review process
7 resulting from clearer and more streamlined rules. There are no
8 anticipated economic costs for persons required to comply with
9 the sections as proposed. There will be no adverse economic
10 effect on small businesses or a municipality with a population
11 of less than 25,000 and therefore, an economic impact statement
12 and regulatory flexibility analysis are not required under
13 Government Code, §2006.002.

14

15 GOVERNMENT GROWTH IMPACT STATEMENT

16 Mr. Swonke has also considered the requirements of Government
17 Code, §2001.0221 and has determined that for the first five
18 years in which the proposed amendments, repeals, and new rule
19 are in effect, there is no impact on the growth of state
20 government.

21

22 COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

23 The department determined that this rulemaking relates to
24 actions subject to the Texas Coastal Management Program (CMP)
25 under the Coastal Coordination Act of 1991, as amended (Natural

1 Resources Code, §§33.201 et seq.), because it concerns the
2 department's rules on the environmental review of transportation
3 projects. The department reviewed this action for consistency
4 with the CMP goals and policies provided in 31 TAC Chapter 501,
5 Subchapter B. The department has determined that the action is
6 consistent with applicable CMP goals and policies.

7
8 A CMP goal applicable to the department's activities is that
9 transportation projects shall comply with certain practices
10 concerning the siting of a project to lessen the impacts on
11 coastal natural resources (see 31 TAC §501.31). The
12 department's Chapter 2 rules concern the method by which to
13 evaluate the environmental impacts of a transportation project,
14 and do not dictate the siting of a project. However, §2.134,
15 Coastal Management Program, specifies that approval of a
16 transportation project located in whole or in part within the
17 coastal boundary is an action subject to the Texas Coastal
18 Management Program, and that such a project may not be approved
19 if it is found to be inconsistent with the goals and policies of
20 the CMP. The department's rules are consistent with CMP goals
21 and policies by specifically incorporating them in this manner.
22 Section 2.134 is not revised as part of this rulemaking.

23
24 A copy of this rulemaking will be submitted to the General Land
25 Office for its comments on the consistency of the proposed

1 rulemaking with the CMP. The department requests that the
2 public also give comment on whether the proposed rulemaking is
3 consistent with the CMP.

4

5 PUBLIC HEARING

6 Pursuant to the Administrative Procedure Act, Government Code,
7 Chapter 2001, the Texas Department of Transportation will
8 conduct a public hearing to receive comments concerning the
9 proposed amendments, repeals, and new rule. The public hearing
10 will be held at 1:30 p.m. on June 26, 2018 at 125 East 11th St.,
11 Austin, Texas, in the Ric Williamson Hearing Room on the first
12 floor, and will be conducted in accordance with the procedures
13 specified in 43 TAC §1.5. Those desiring to make comments or
14 presentations may register starting at 1:00 p.m. Any interested
15 persons may appear and offer comments, either orally or in
16 writing; however, questioning of those making presentations will
17 be reserved exclusively to the presiding officer as may be
18 necessary to ensure a complete record. While any person with
19 pertinent comments will be granted an opportunity to present
20 them during the course of the hearing, the presiding officer
21 reserves the right to restrict testimony in terms of time and
22 repetitive content. Organizations, associations, or groups are
23 encouraged to present their commonly held views and identical or
24 similar comments through a representative member when possible.
25 Comments on the proposed text should include appropriate

1 citations to sections, subsections, paragraphs, etc. for proper
2 reference. Any suggestions or requests for alternative language
3 or other revisions to the proposed text should be submitted in
4 written form. Presentations must remain pertinent to the issues
5 being discussed. A person may not assign a portion of his or her
6 time to another.

7

8 SUBMITTAL OF COMMENTS

9 Written comments on this proposed rulemaking may be submitted to
10 Rule Comments, Office of General Counsel, Texas Department of
11 Transportation, 125 East 11th Street, Austin, Texas 78701-2483
12 or to RuleComments@txdot.gov with the subject line
13 "Environmental Review Rules." The deadline for receipt of
14 comments is 5:00 p.m. on July 9, 2018. In accordance with
15 Transportation Code, §201.811(a)(5), a person who submits
16 comments must disclose, in writing with the comments, whether
17 the person does business with the department, may benefit
18 monetarily from the proposed amendments, repeals, and new rule
19 or is an employee of the department.

20

21 STATUTORY AUTHORITY

22 The amendments, repeals, and new rule are proposed under
23 Transportation Code, §201.101, which authorizes the commission
24 to establish rules for the conduct of the work of the
25 department, and more specifically, Transportation Code, §91.033,

1 which authorizes the department to adopt rules concerning the
2 environmental processing of a rail project; Transportation Code,
3 §201.604, which requires the department to promulgate rules
4 providing for its review of transportation projects that are not
5 subject to review under the National Environmental Policy Act
6 (42 U.S.C. §4321 et seq.); Transportation Code, §201.752, which
7 requires the department to promulgate rules to establish
8 standards for processing environmental review documents for
9 highway projects; Transportation Code, §203.022, which requires
10 the department to promulgate rules concerning public
11 participation during the environmental processing of certain
12 projects; and Transportation Code, §203.023, which requires the
13 department to by rule require a hearing for certain types of
14 projects.

15

16 CROSS REFERENCE TO STATUTE

17 Transportation Code, §91.033, §201.101, §201.6035, §201.604,
18 §201.607, §203.022, §203.023, §202.112, and Chapter 201,
19 Subchapter I-1.

1 SUBCHAPTER A. GENERAL PROVISIONS

2 §2.5. Definitions. The following words and terms, when used in
3 this chapter, have the following meanings, unless the context
4 clearly indicates otherwise.

5 (1) Affected local government--The governing body of a
6 county or municipality in which a project is located.

7 (2) Best management practices--Practices that are
8 determined to be the most efficient, practical, and cost
9 effective measures to guide a particular activity or address a
10 particular problem.

11 (3) Bicycle lane--A portion of a roadway that is
12 designated by striping, signing, or pavement markings for the
13 exclusive use of bicyclists.

14 (4) [~~3~~] CE (Categorical Exclusion)--Is covered by §2.81
15 of this chapter (relating to Categorical Exclusions).

16 (5) [~~4~~] Commission--The Texas Transportation
17 Commission.

18 (6) [~~5~~] DEIS (Draft Environmental Impact Statement)--Is
19 covered by §2.84 of this chapter (relating to Environmental
20 Impact Statements).

21 (7) [~~6~~] Department--The Texas Department of
22 Transportation.

23 (8) [~~7~~] Disposal plan--An operationally suitable method
24 for the placement of dredged material that avoids or minimizes
25 adverse environmental impacts.

1 (9) [~~8~~] District--One of the 25 geographical districts
2 into which the department is divided.

3 (10) [~~9~~] Division--One of the department's divisions
4 listed on the department's organizational chart.

5 (11) [~~10~~] EA (Environmental Assessment)--Is covered by
6 §2.83 of this chapter (relating to Environmental Assessments).

7 (12) [~~11~~] EIS (Environmental Impact Statement)--Is
8 covered by §2.84 of this chapter.

9 (13) [~~12~~] Environmental Affairs Division--The
10 Environmental Affairs Division of the department.

11 (14) [~~13~~] Environmental report--A report, form,
12 checklist, or other documentation analyzing an environmental
13 issue in the context of a specific transportation project or
14 presenting a thorough summary of an environmental study
15 conducted in support of an environmental review document, or
16 demonstrating compliance with a specific environmental
17 requirement. The term does not include a permit or other
18 approval outside the scope of the environmental review process.
19 The term also does not include an environmental issues checklist
20 prepared to demonstrate a CE determination or a checklist used
21 to perform a reevaluation of a project.

22 (15) [~~14~~] Environmental review document--An
23 environmental assessment, an environmental impact statement, a
24 documented reevaluation, a supplemental environmental impact
25 statement, or, for an FHWA transportation project, a document

1 prepared to demonstrate that it qualifies as a categorical
2 exclusion when FHWA requires a narrative document as opposed to
3 a checklist. An environmental review document includes any
4 attached environmental reports.

5 (16) [~~(15)~~] FEIS (Final Environmental Impact Statement)--
6 Is covered by §2.84 of this chapter.

7 (17) [~~(16)~~] FHWA--The United States Department of
8 Transportation Federal Highway Administration.

9 (18) [~~(17)~~] FHWA transportation project--A transportation
10 project for which:

11 (A) FHWA's approval is required by law to comply with
12 NEPA, FHWA is the lead federal agency, and FHWA agrees the
13 department may act as the joint lead agency under 23 Code of
14 Federal Regulations §771.109; or

15 (B) FHWA has assigned its environmental review
16 responsibilities under NEPA or other federal environmental laws
17 to the department pursuant to a memorandum of understanding.

18 (19) [~~(18)~~] FONSI (Finding of No Significant Impact)--Is
19 covered by §2.83 of this chapter.

20 (20) [~~(19)~~] Highway project--A project that is:

21 (A) for the construction or maintenance of a highway or
22 related improvement on the state highway system; or

23 (B) for the construction or maintenance of a highway or
24 related improvement not on the state highway system but that is
25 funded wholly or partly with federal money.

1 ~~[(20) MAPO (Meeting with Affected Property Owners) Is~~
2 ~~covered by §2.104 of this chapter (relating to Meeting with~~
3 ~~Affected Property Owners (MAPO)).]~~

4 (21) NEPA--The National Environmental Policy Act,
5 codified at 42 United States Code §§4321, et seq.

6 (22) NOI (Notice of Intent)--Is covered by §2.102 of this
7 chapter (relating to Notice of Intent (NOI)).

8 (23) ROD (Record of Decision)--Is covered by 2.84 of this
9 chapter.

10 (24) SEIS (Supplemental Environmental Impact Statement)--
11 Is covered by §2.86 of this chapter (relating to Supplemental
12 Environmental Impact Statements).

13 (25) Significant--As used in reference to the
14 significance of the impact of a project, has the meaning as that
15 term is used and has been interpreted under NEPA and its related
16 regulations, including 40 Code of Federal Regulations §1508.27.

17 (26) State highway system--The system of highways
18 designated by the commission under Transportation Code,
19 §203.002.

20 (27) State transportation project--A transportation
21 project that is not subject to NEPA.

22 (28) Toll project--Has the meaning assigned by
23 Transportation Code, §201.001.

24 (29) Transportation project--A project to construct,
25 maintain or improve a highway, rest area, toll facility,

1 aviation facility, public transportation facility, rail
2 facility, ferry, or ferry landing.

3

4 §2.7. Project Sponsor.

5 (a) Project sponsor required. Each transportation project
6 must have a project sponsor that accepts responsibility for
7 preparing the environmental review document or documentation of
8 categorical exclusion, and performing related tasks.

9 (b) Project sponsor for projects developed by the
10 department.

11 (1) For transportation projects developed by the
12 department, the project sponsor will be the department district
13 or division that is developing the project.

14 (2) A district or division, at its discretion, may allow
15 a public entity that does not qualify as a project sponsor under
16 subsection (c) of this section, a public entity that qualifies
17 as a project sponsor under subsection (c) of this section but
18 does not wish to be the official project sponsor, or a private
19 entity to develop an environmental review document or
20 documentation of categorical exclusion for the district's or
21 division's use, but neither a public entity that does not
22 qualify under subsection (c) of this section nor a private
23 entity may be a project sponsor.

24 (c) Local government as project sponsor. A local
25 governmental entity that is eligible under this subsection may

1 be a project sponsor for a highway project under Subchapter C of
2 this chapter (relating to Environmental Review Process for
3 Highway Projects) if the department approves the notice
4 submitted by the local government under §2.47 of this chapter
5 (relating to Approval of Local Government as Project Sponsor).
6 To be eligible, an entity must be a municipality; a county; a
7 group of adjoining counties; a county acting under
8 Transportation Code, Chapter 284; a regional tollway authority
9 operating under Transportation Code, Chapter 366; a regional
10 mobility authority operating under Transportation Code, Chapter
11 370; a local government corporation; or a transportation
12 corporation created under Transportation Code, Chapter 431.

13

14 [~~§2.12. Project Coordination.~~]

15 [~~(a) Interested entities. The project sponsor in~~
16 ~~collaboration with the department delegate shall identify any~~
17 ~~agency, department, or other unit of federal, state, local, or~~
18 ~~Indian tribal government, including a local flood control~~
19 ~~authority, that may have an interest in a transportation~~
20 ~~project, or that is a regulatory agency with jurisdiction over~~
21 ~~an aspect of a project. The project sponsor will coordinate~~
22 ~~with each entity identified regarding the project, as~~
23 ~~appropriate based on the nature of the project, its potential~~
24 ~~impacts, and the specific interest of the entity.]~~

25 [~~(b) At a minimum, a project will be coordinated with the~~

1 ~~Texas Commission on Environmental Quality, the Texas Historical~~
2 ~~Commission, and the Texas Parks and Wildlife Department to the~~
3 ~~extent provided for in the department's respective memoranda of~~
4 ~~understanding with those agencies.]~~

5 ~~[(c) Coordination. The project sponsor is responsible for~~
6 ~~conducting coordination. If an entity declines to coordinate a~~
7 ~~project with the project sponsor and instead requests to~~
8 ~~coordinate with a particular organizational unit of the~~
9 ~~department, then that organizational unit will coordinate with~~
10 ~~the agency, unless otherwise provided by a memorandum of~~
11 ~~understanding between the department and the agency.]~~

12 ~~[(d) Comments. The project sponsor will require comments~~
13 ~~to be submitted to the department within 45 days of the date the~~
14 ~~entity receives the department's request for comments, unless~~
15 ~~the coordination is being done in satisfaction of another law or~~
16 ~~formal agreement providing for a different review period, in~~
17 ~~which event that review period applies. Any comment received~~
18 ~~after the deadline shall be considered only to the extent~~
19 ~~possible given the stage of completion of the environmental~~
20 ~~review when the comments are received, unless otherwise required~~
21 ~~by law.]~~

22 ~~[(e) Description of coordination results. An environmental~~
23 ~~review document or documentation of categorical exclusion will~~
24 ~~describe the results of any coordination conducted and summarize~~
25 ~~contacts with agencies and the comments received up to the date~~

1 ~~of submittal.]~~

2

3 §2.14. Project File. The project sponsor will, as directed by
4 the department delegate, maintain the documentation showing work
5 completed under this chapter in a project file. [~~The project~~
6 ~~sponsor may not disclose a draft of documentation of categorical~~
7 ~~exclusion or an environmental review document before public~~
8 ~~disclosure of the draft or document is approved by the~~
9 ~~department delegate or, for an FHWA transportation project, by~~
10 ~~FHWA.] If the project sponsor is a local government, prior to
11 approval of the environmental review document or documentation
12 of categorical exclusion, the local government will forward the
13 project file to the department as directed by the department
14 delegate.~~

1 SUBCHAPTER C. ENVIRONMENTAL REVIEW PROCESS FOR HIGHWAY PROJECTS

2 §2.43. Project Sponsor Responsibilities. Unless the project
3 sponsor and department delegate agree in the project scope to
4 alternative roles and responsibilities in accordance with
5 §2.44(d) of this subchapter (relating to Project Scope), the
6 project sponsor for a highway project is responsible for:

7 (1) preparing the project scope, in collaboration with
8 the department delegate, in accordance with §2.44 of this
9 subchapter;

10 (2) preparing any environmental reports identified in the
11 project scope that support an environmental review document or
12 documentation of categorical exclusion, and performing all
13 related studies and surveys identified in the project scope;

14 (3) preparing the environmental review document or
15 documentation of categorical exclusion in accordance with
16 Subchapter D of this chapter (relating to Requirements for
17 Classes of Projects);

18 (4) preparing all materials for and obtaining or
19 implementing all required permits and commitments;

20 (5) preparing necessary materials for any required
21 coordination and, if both the department and the entity with
22 whom coordination is being conducted agree, conducting the
23 coordination; [~~, and, to the extent possible based on the~~
24 ~~actions of the agencies with which coordination is required,~~
25 ~~performing the activities required under §2.12 of this chapter~~

1 ~~(relating to Project Coordination);]~~

2 (6) preparing all materials for and conducting all
3 required and appropriate public participation in accordance with
4 Subchapter E of this chapter (relating to Public Participation);
5 and

6 (7) arranging, paying for, and performing all mitigation
7 of project impacts undertaken in accordance with §2.13 of this
8 chapter (relating to Mitigation).

9

10 §2.45. Optional Early Submittal of Environmental Reports.

11 (a) Submittal. The project sponsor may submit to the
12 department delegate any environmental reports as they are
13 developed in the course of preparing an environmental review
14 document. ~~[Nothing in this subchapter requires the preparation~~
15 ~~of environmental reports for the department's review.]~~

16 (b) Review. The department delegate will review an
17 environmental report submitted under this section and inform the
18 project sponsor in writing of any deficiencies, flaws, or
19 omissions within 60 days of receipt of the environmental report.
20 The project sponsor and department delegate may agree to extend
21 this deadline.

22

23 §2.49. Technical Review.

24 (a) Environmental issues checklist. For categorically
25 excluded projects for which an environmental issues checklist is

1 prepared, the department delegate will begin a technical review
2 of the documentation of categorical exclusion when it is
3 received from the project sponsor, or in the case of an
4 electronic checklist, when the project sponsor indicates that
5 the checklist is ready for review. The project sponsor shall
6 ensure that all tasks and coordination required prior to making
7 the environmental decision are complete when the documentation
8 or electronic checklist is submitted for technical review.

9 (b) Environmental review document. The department delegate
10 will begin a technical review of a draft EA, FEIS, documented
11 reevaluation, or a CE for which a narrative document, rather
12 than a checklist, is prepared when the department delegate
13 determines that it is administratively complete under §2.48 of
14 this subchapter (relating to Administrative Completeness
15 Review). The department delegate will begin a technical review
16 of a DEIS when it is received from the project sponsor.

17 (c) Purpose. The purpose of a technical review is for the
18 department delegate to confirm that:

19 (1) for a categorically excluded project for which an
20 environmental issues checklist is prepared, the documentation
21 provided by the project sponsor shows that the project qualifies
22 as a categorically excluded project, as applicable; or

23 (2) for all other projects, the environmental review
24 document prepared by the project sponsor is:

25 (A) an evaluation of all required subject areas;

1 (B) written in a professional and understandable
2 manner;

3 (C) based on sound reasoning and accepted scientific
4 and engineering principles; and

5 (D) compliant with all applicable regulatory
6 requirements~~[legally sufficient, including satisfying]~~ including
7 the requirements of Subchapter D of this chapter (relating to
8 Requirements for Classes of Projects).

9 (d) Disapproval. The department delegate may conclude that
10 the environmental review document or documentation of
11 categorical exclusion cannot be approved because it does not
12 meet the requirements of this section. The department delegate
13 will provide the project sponsor with a written explanation for
14 its disapproval of an environmental review document or
15 documentation of categorical exclusion.

1 SUBCHAPTER D. REQUIREMENTS FOR CLASSES OF PROJECTS

2 §2.81. Categorical Exclusions.

3 (a) Applicability.

4 (1) This section applies to a transportation project that
5 is classified by the department delegate as a CE. A CE is a
6 category of actions that have been found to have no significant
7 effect on the environment, individually or cumulatively.

8 (2) This section applies to a transportation project that
9 is a state transportation project or an FHWA transportation
10 project, except that subsection (e) of this section applies only
11 if the project is an FHWA transportation project.

12 (3) This section does not apply to the purchase of an
13 option to acquire real property, or to the exercise of an option
14 or other early and advance acquisition of land. [~~The required
15 environmental review for those types of transactions is
16 specified in §2.131 of this chapter (relating to Advance
17 Acquisition of Right of Way).~~]

18 (b) Approval for classification as CE.

19 (1) If the project sponsor satisfies the requirements of
20 this subsection the department delegate may approve the
21 classification of a transportation project as a CE.

22 (2) Except as provided in subsection (4) below, the
23 project sponsor will submit to the department delegate
24 [~~documentation that is~~] an environmental issues checklist,
25 prepared electronically in the department's environmental

1 database, showing compliance with the section. [~~The checklist~~
2 ~~may be prepared electronically in the department's environmental~~
3 ~~database. A categorical exclusion determination in the form of~~
4 ~~a checklist is not.] The checklist does not constitute an
5 environmental review document. [~~However, if required by the~~
6 ~~FHWA for an FHWA transportation project, the project sponsor~~
7 ~~must submit, instead of a checklist,] FHWA may require an
8 environmental review document for one of its projects, in which
9 case the project sponsor must submit to the department delegate
10 a brief environmental review document discussing and analyzing
11 the potential environmental impacts. If the department delegate
12 determines that a transportation project qualifies as a CE, it
13 will document that determination in the project file.~~~~

14 (3) The environmental issues checklist must show that the
15 project does not violate the restrictions in subsection (c) of
16 this section and that significant environmental impacts will not
17 result based on the results of an evaluation of the project.
18 [~~The project sponsor must indicate if coordination is required,~~
19 ~~and if so, the portion of coordination that can be completed~~
20 ~~before final approval of the environmental review document has~~
21 ~~been completed.]~~

22 (4) The department's environmental affairs division may
23 direct that certain types of projects meeting specified criteria
24 be processed as CEs, without preparation of individual
25 environmental issues checklists, by recording verification that

1 the project meets the specified criteria.

2 (c) Restrictions on classification.

3 (1) A CE project directly, indirectly, or cumulatively,
4 may not:

5 (A) induce significant impacts to planned growth or
6 land use for the area;

7 (B) cause any significant environmental impacts to any
8 natural, cultural, recreational, historic, or other resource;

9 (C) cause any significant impacts to air, noise, or
10 water quality;

11 (D) relocate significant numbers of people; or

12 (E) cause significant impacts on travel patterns.

13 (2) The CE action may not involve unusual circumstances
14 such as [~~or lead to~~]:

15 (A) significant environmental impacts;

16 (B) substantial controversy on environmental grounds;

17 or

18 (C) inconsistencies with federal or state law.

19 (d) Categories of projects. For a state transportation
20 project or an FHWA transportation project, the categories of
21 projects listed at 23 C.F.R. §771.117(c) and (d) normally will
22 qualify as categorical exclusions, unless unusual circumstances
23 make the project ineligible for designation as a categorical
24 exclusion under subsection (c) of this section. The categories
25 of projects listed at 23 C.F.R. §771.117(c) and (d) are not the

1 only types of projects that may qualify as categorical
2 exclusions.

3 (e) FHWA transportation projects.

4 (1) For an FHWA transportation project, in addition to
5 subsections (a) - (d) of this section, the department delegate
6 and project sponsor must comply with any federal laws, including
7 FHWA's rules, applicable to the processing of the project as a
8 CE.

9 (2) If federal law, including FHWA's rules, or a
10 programmatic agreement conflicts with this chapter, the federal
11 law or programmatic agreement provision controls to the extent
12 of the conflict.

13

14 §2.83. Environmental Assessments.

15 (a) Applicability.

16 (1) This section applies to a transportation project that
17 the department delegate has not classified as a categorical
18 exclusion and that does not clearly require the preparation of
19 an EIS, or if the department delegate believes an EA would
20 assist in determining the need for an EIS.

21 (2) This section applies to a transportation project that
22 is a state transportation project or an FHWA transportation
23 project, except that subsection (i) of this section applies only
24 if the project is an FHWA transportation project.

25 (b) Purpose and content.

1 (1) An EA describes the purpose and need for the project,
2 any alternatives considered, any mitigation measures that are to
3 be incorporated into the project, and the extent of
4 environmental impact, including direct, indirect, and cumulative
5 impacts. The project sponsor will investigate environmental
6 impacts and prepare an EA to determine the nature and extent of
7 environmental impacts, and to provide full disclosure of project
8 impacts to the public.

9 (2) If, taking into account any mitigation measures or
10 commitments documented in the EA, the EA shows that the
11 environmental impacts are not significant, the EA will conclude
12 with a FONSI. If, taking into account any mitigation measures
13 or commitments documented in the EA, the EA shows that the
14 impacts are significant, the EA will conclude that an EIS is
15 required.

16 (c) Coordination. The project sponsor will coordinate with
17 any governmental entities that have indicated interest in the
18 project to advise them of basic project information and will
19 take into consideration such an entity's input regarding social,
20 economic, or environmental impacts, alternatives and measures
21 that might mitigate adverse environmental impacts, and other
22 environmental review and consultation requirements that should
23 be performed concurrently with the EA. As provided in §2.43 of
24 this chapter (relating to Project Sponsor Responsibilities), the
25 project sponsor will conduct any required coordination only if

1 both the department and the entity with whom coordination is
2 being conducted agree. The project sponsor [~~comply with §2.12~~
3 ~~of this chapter (relating to Project Coordination), and~~] will
4 include in the EA the results of coordination.

5 (d) Public participation. The project sponsor will conduct
6 appropriate public participation in accordance with Subchapter E
7 of this chapter (relating to public participation) and will
8 include in the EA a summary of the results of public
9 participation and the comments received. If changes resulting
10 from public participation are minimal, the project sponsor may
11 incorporate the results into the EA by appending errata sheets,
12 rather than revising the EA as a whole.

13 (e) Organization of EA. To the maximum extent possible, an
14 EA should summarize and incorporate by reference any separately
15 prepared environmental reports supporting the EA's conclusions.
16 If these reports are not included as appendices, the reports
17 must be available for public inspection on request.

18 (f) Circulation of draft EA. [~~The project sponsor may not~~
19 ~~disclose a draft of an EA before public disclosure of the EA is~~
20 ~~approved by the department delegate or, for an FHWA~~
21 ~~transportation project, by FHWA.] The project sponsor will
22 comply with §2.108 of this chapter (relating to Notice of
23 Availability).~~

24 (g) Change in determination of impact. If the department
25 delegate, taking into account any mitigation measures or

1 commitments documented in the EA, determines at any point prior
2 to the issuance of a FONSI that the project may have a
3 significant impact on social, economic, or environmental
4 concerns, the department delegate will direct the project
5 sponsor to prepare an EIS.

6 (h) Preparation of FONSI.

7 (1) Finding of no significant impact (FONSI) means a
8 document that is issued by the department delegate that briefly
9 concludes that, [~~presents the reasons why,~~] taking into account
10 any mitigation measures or commitments documented in the EA, the
11 transportation project will not have a significant effect on the
12 human environment and, therefore, for which an environmental
13 impact statement will not be prepared. To describe the impacts
14 of the project, and to identify any mitigation measures or
15 commitments that factor into the determination that impacts are
16 not significant, a FONSI will reference the EA and any other
17 environmental documents related to the FONSI rather than
18 repeating the information contained in those documents within
19 the body of the FONSI.

20 (2) The department delegate will review the EA, any
21 proposed mitigation measures, the results of project
22 coordination, and if a public hearing was held, the
23 documentation of public hearing required by §2.107 of this
24 chapter (relating to Public Hearing). The department delegate,
25 if appropriate, will present the decision in a written FONSI.

1 (3) The project sponsor will give notice of availability
2 of a FONSI in accordance with §2.108 of this chapter.

3 (i) FHWA transportation project. For an FHWA
4 transportation project, in addition to the requirements of
5 subsections (a) - (h) of this section, the department delegate
6 and project sponsor must comply with any federal laws, including
7 FHWA's rules, applicable to the processing of the project as an
8 EA. If federal law, including FHWA's rules, conflicts with this
9 chapter, federal law controls to the extent of the conflict. At
10 the conclusion of the technical review, the department delegate
11 will forward the environmental review document and any other
12 relevant documentation to FHWA with an appropriate
13 recommendation.

14
15 §2.84. Environmental Impact Statements.

16 (a) Applicability.

17 (1) This section applies to a transportation project if
18 there are likely to be significant environmental impacts [~~or if~~
19 ~~the project is of a type for which an EIS is typically~~
20 ~~prepared~~]. The project sponsor will prepare an EIS that is a
21 detailed public disclosure document that evaluates the impacts
22 of the project.

23 (2) This section applies to a transportation project that
24 is a state transportation project or an FHWA transportation
25 project, except that subsection (g) of this section applies only

1 if the project is an FHWA transportation project.

2 (b) Content.

3 (1) An EIS must include:

4 (A) a discussion of the purpose and need for the
5 project;

6 (B) an evaluation of all reasonable alternatives
7 satisfying the purpose and need, their associated social,
8 economic, and environmental impacts, an evaluation of
9 alternatives eliminated from detailed study, and a determination
10 of the preferred alternative;

11 (C) a summary of studies conducted to determine the
12 nature and extent of environmental impacts;

13 (D) a description of the environmental impact of the
14 project, any unavoidable adverse environmental impacts and
15 associated measures to minimize harm, and any irreversible and
16 irretrievable commitments of resources involved if the project
17 is implemented;

18 (E) a description of the direct, indirect, and
19 cumulative effects of the project; and

20 (F) a discussion of compliance with all applicable laws
21 or reasonable assurances that the requirements can be met, and a
22 description of the mitigation measures that are to be
23 incorporated into the project.

24 (2) Coordination. The project sponsor will ~~[comply with~~
25 ~~§2.12 of this chapter (relating to Project Coordination), and~~

1 ~~will~~ include in the EIS the results of coordination conducted
2 before final approval of the EIS.

3 (3) Public participation. The project sponsor will
4 conduct appropriate public participation in accordance with
5 Subchapter E of this chapter (relating to Public Participation)
6 and will include in the EIS the results of public participation
7 and the comments received.

8 (4) Organization. To the maximum extent possible, an EIS
9 should summarize, incorporate by reference and include as
10 appendices any separately prepared environmental reports
11 supporting the EIS's conclusions, rather than repeat the
12 detailed information from environmental reports in the body of
13 the EIS.

14 (c) Processing the EIS.

15 (1) The project sponsor will in the following order:

16 (A) publish a notice of intent under §2.102 of this
17 chapter (relating to Notice of Intent (NOI)) and develop a
18 coordination plan under §2.103 of this chapter (relating to
19 Coordination Plan for EIS);

20 (B) conduct public participation and, subject to
21 agreement by both the department and the entity with whom
22 coordination is being conducted, coordination in the manner and
23 at the times prescribed by law;

24 (C) prepare the draft EIS (DEIS);

25 (D) issue the notice of availability of the DEIS;

- 1 (E) conduct the public hearing;
- 2 (F) prepare the final EIS (FEIS);
- 3 (G) issue the notice of availability of the FEIS; and
- 4 (H) prepare the record of decision (ROD).

5 (2) Accelerated Decision-making.

6 (A) If public comments are minor, and changes are
7 limited to factual corrections or explanations of why comments
8 do not warrant additional agency response, the project sponsor
9 may prepare errata sheets and attach them to the DEIS, rather
10 than preparing the FEIS. When errata sheets are attached to the
11 DEIS in lieu of a separately prepared FEIS, all other applicable
12 requirements for completing the EIS set forth in subsection (e)
13 of this section apply.

14 (B) The project sponsor may prepare the FEIS and ROD as
15 a single document unless:

16 (i) the FEIS makes substantial changes to the
17 proposed project that are relevant to environmental or safety
18 concerns; or

19 (ii) there are significant new circumstances or
20 information relevant to environmental concerns that bear on the
21 proposed action or the impacts of the proposed action.

22 (3) The project sponsor will prepare a supplemental DEIS,
23 a supplemental FEIS, or both if required by §2.86 of this
24 subchapter (relating to Supplemental Environmental Impact
25 Statements).

1 (d) Preparation of DEIS.

2 (1) The project sponsor will prepare a DEIS that meets
3 the requirements of subsection (b) of this section. A preferred
4 alternative may be designated, if appropriate. The preferred
5 alternative may be developed to a higher level of detail than
6 other alternatives. The higher level detail must be limited to
7 work necessary for preliminary design, as described by paragraph
8 (5) of this subsection. The department delegate will review,
9 and will approve the development of the preferred alternative to
10 a higher level of detail if appropriate, and only if that
11 development does not prevent the department from making an
12 impartial decision as to whether to accept another alternative
13 under consideration in the environmental review process.

14 (2) The DEIS is subject to the department delegate's
15 approval before it is made available to the public as a
16 department document. For highway projects processed under
17 Subchapter C of this chapter (relating to Environmental Review
18 Process for Highway Projects), the DEIS is approved for public
19 review on the department delegate's completing the technical
20 review of the DEIS under §2.49 of this chapter (relating to
21 Technical Review).

22 (3) After the department delegate approves the DEIS, the
23 project sponsor will circulate the DEIS and give notice of its
24 availability in accordance with §2.108 of this chapter (relating
25 to Notice of Availability).

1 (4) After the DEIS is circulated, public hearing held,
2 and comments reviewed, the project sponsor will prepare an FEIS,
3 or a supplemental DEIS if required.

4 (5) For the purposes of paragraph (1) of this subsection,
5 preliminary design defines the general project location and
6 design concepts. It includes, but is not limited to,
7 preliminary engineering and other activities and analyses, such
8 as environmental investigations, topographic surveys, metes and
9 bounds surveys, geotechnical investigations, hydrologic
10 analysis, hydraulic analysis, utility engineering, traffic
11 studies, financial plans, revenue estimates, hazardous materials
12 assessments, general estimates of the types and quantities of
13 materials, and other work needed to establish parameters for the
14 final design.

15 (e) Preparation of FEIS.

16 (1) The project sponsor will prepare an FEIS that meets
17 the requirements of subsection (b) of this section and will
18 prepare a public hearing record under §2.107 of this chapter
19 (relating to Public Hearing). The FEIS may consist of the DEIS
20 and attached errata sheets, if appropriate.

21 (2) After the department delegate approves the FEIS, the
22 project sponsor will circulate the FEIS and issue notice of its
23 availability in accordance with §2.108 of this chapter.

24 (f) Preparation of ROD.

25 (1) The department delegate will issue a ROD that:

1 (A) presents the basis for the department's decision;

2 (B) identifies all alternatives considered;

3 (C) specifies the alternative or alternatives that were
4 considered to be environmentally preferable;

5 (D) states whether all practical means to avoid or
6 minimize environmental harm have been adopted, and if practical
7 means were not adopted, why they were not adopted; and

8 (E) summarizes mitigation measures.

9 (2) If the FEIS and ROD are prepared as a single
10 document, the document will indicate on the cover of the
11 document that it is both the FEIS and ROD, and the department
12 delegate's approval of that document represents approval of both
13 the FEIS and ROD.

14 (3) If the FEIS and ROD are not prepared as a single
15 document, the department delegate will complete and sign the ROD
16 not earlier than the 30th day after the date that the notice of
17 the availability of the FEIS is published in the Texas Register
18 or Federal Register, and the department delegate will separately
19 issue notice of the availability of the ROD in accordance with
20 §2.108 of this chapter.

21 (4) Until the ROD is signed, neither the department nor
22 any local government project sponsor may take any action
23 concerning the project that would have an adverse environmental
24 impact or limit the choice of reasonable alternatives.

25 (5) If after a ROD is issued for a project the department

1 approves an alternative that was not identified as the preferred
2 alternative, the department delegate will prepare a revised ROD
3 and will publish notice of the availability of the revised ROD
4 in accordance with §2.108 of this chapter.

5 (g) FHWA transportation project. For an FHWA
6 transportation project, in addition to subsections (a) -
7 (f)~~(g)~~ of this section, the department delegate and project
8 sponsor must comply with any federal laws, including FHWA's
9 rules, applicable to the processing of the project as an EIS.
10 If federal law, including FHWA's rules, conflicts with this
11 chapter, federal law controls to the extent of the conflict. At
12 the conclusion of technical review, the department delegate will
13 forward the environmental review document and any other relevant
14 documentation to FHWA with an appropriate recommendation.

15

16 §2.85. Reevaluations.

17 (a) Applicability.

18 (1) This section applies to a transportation project that
19 is classified by the department delegate as a CE, EA, or EIS.

20 (2) This section applies to a transportation project that
21 is a state transportation project or an FHWA transportation
22 project, except that subsection (c)~~(d)~~ of this section applies
23 only if the project is an FHWA transportation project.

24 (b) Purpose and content.

25 (1) A documented reevaluation of a DEIS, which may be in

1 the form of a checklist, will be prepared by the project sponsor
2 in cooperation with the department delegate if an acceptable
3 FEIS is not submitted to the department delegate within three
4 years after the date that the DEIS is circulated. The purpose
5 of this reevaluation is to determine whether or not a supplement
6 to the DEIS or a new DEIS is needed.

7 (2) A documented reevaluation of a FEIS, which may be in
8 the form of a checklist, will be required before further
9 approvals may be granted if major steps to advance the project,
10 such as authority to undertake final design, authority to
11 acquire a significant portion of the right-of-way, or approval
12 of the plans, specifications, and estimates, have not occurred
13 within three years after the date of the approval of the FEIS,
14 FEIS supplement, or the last major department approval or grant.

15 (3) A consultation reevaluation will be required after
16 approval of a ROD, FONSI, or CE designation if changed
17 circumstances could affect the continued validity of the ROD,
18 FONSI, or CE designation. When a consultation reevaluation is
19 required, the project sponsor will consult with the department
20 delegate before requesting any major approvals or grants from
21 the department to establish whether or not the approved
22 environmental document or CE designation remains valid for the
23 project. The project sponsor will record the consultation
24 reevaluation in the project file. If, as a result of
25 consultation, the department delegate determines that a

1 documented reevaluation is appropriate, the project sponsor
2 shall prepare a documented reevaluation, which may be in the
3 form of a checklist.

4 ~~[(c) Coordination. The department delegate may require the~~
5 ~~project sponsor to carry out coordination under §2.12 of this~~
6 ~~chapter (relating to Project Coordination).]~~

7 (c) ~~[(d)]~~ FHWA transportation project. For an FHWA
8 transportation project, in addition to subsections (a) and (b)
9 ~~[(e)]~~ of this section, the department delegate and project
10 sponsor must comply with any federal laws, including FHWA's
11 rules, applicable to the processing of the reevaluation. If
12 federal law, including FHWA's rules, conflicts with this
13 chapter, federal law controls to the extent of the conflict. At
14 the conclusion of technical review, the department delegate will
15 forward the environmental review document and any other relevant
16 documentation to FHWA with an appropriate recommendation.

1 SUBCHAPTER E. PUBLIC PARTICIPATION

2 §2.101. General Requirements.

3 (a) Guidelines. The department will publish guidelines
4 that identify a selection of outreach methods that project
5 sponsors may choose in collaboration with the department
6 delegate to inform the public and maximize participation in the
7 public involvement process. Outreach methods may include
8 posting information on a website, publishing a [an additional]
9 notice in the newspaper, or use of changeable message signs.

10 (b) Notification to interested parties. Each project
11 sponsor shall maintain a list of elected public officials,
12 individuals, and affected interest groups that have expressed an
13 interest in a transportation project. The project sponsor will
14 provide notification to these individuals and groups of any
15 public participation opportunities related to the project, apart
16 from a Notice and Opportunity to Comment [~~Meeting with Affected~~
17 ~~Property Owners~~].

18 (c) Minimum Requirements. This subchapter establishes the
19 minimum requirements for public participation for a project.

20 (d) FHWA Transportation Projects. For an FHWA
21 transportation project, in addition to the public participation
22 requirements set forth in this subchapter, the project sponsor
23 will comply with any additional public participation or
24 coordination requirements that may apply under Federal law, such
25 as the requirements at 23 U.S.C. §139, 23 U.S.C §128 and 40

1 C.F.R. Part 1500. To the extent there is a conflict between
2 this subchapter and an applicable Federal law, the Federal law
3 will prevail.

4 (e) Limited English Proficiency. The project sponsor, in
5 consultation with the department delegate, will determine
6 whether any notice required by this chapter must be provided
7 [~~published~~] in a language, in addition to English, to comply
8 with Executive Order 13166, Improving Access to Services for
9 Persons with Limited English Proficiency (LEP).

10 (f) Joint Public Participation. The department may
11 collaborate with local governments, metropolitan planning
12 organizations, or other transportation entities to conduct joint
13 public participation activities. Public participation hosted by
14 other entities may satisfy department public participation
15 requirements provided the requirements established in this
16 subchapter are met.

17

18 §2.102. Notice of Intent (NOI)

19 (a) Purpose. An NOI formally initiates the process for
20 preparing an EIS or a supplemental EIS.

21 (b) Notice of Intent Required. The project sponsor will
22 prepare an NOI before the preparation of an EIS or supplemental
23 EIS. An NOI must be prepared according to guidelines and
24 procedures established by the department. The department
25 delegate will review the NOI and submit it for publication in

1 the Texas Register if the project is a state transportation
2 project or in the Federal Register if the project is an FHWA
3 transportation project.

4 ~~[(c) Notice Requirements. The project sponsor will publish~~
5 ~~the approved NOI in a local newspaper having general circulation~~
6 ~~in the area affected by the project. If there is no local~~
7 ~~newspaper in the area affected by the project, the project~~
8 ~~sponsor will publish the NOI in any newspaper having general~~
9 ~~circulation in the area affected by the project.]~~

10

11 **§2.103.** Coordination Plan for EIS.

12 (a) Purpose. A coordination plan is a plan for
13 coordinating public and agency participation in and comment on
14 the environmental review process when an EIS is required. A
15 coordination plan is intended to involve the agencies with an
16 interest in the project and the public in the early stages of
17 development of an EIS, and is distinct from the process for
18 preparation of the project scope prepared by a project sponsor
19 and department delegate under §2.44 of this chapter (relating to
20 Project Scope). A coordination plan must include, at a minimum,
21 participation by any agency for which participation is required
22 under a memorandum of understanding with the department,
23 including the memoranda of understanding under Subchapters G, H,
24 and I of this chapter (relating to Memorandum of Understanding
25 with the Texas Parks and Wildlife Department, Memorandum of

1 Understanding with the Texas Historical Commission, and
2 Memorandum of Understanding with the Texas Commission on
3 Environmental Quality).

4 (b) Coordination Plan Required. The project sponsor, in
5 collaboration with the department delegate, will prepare a
6 coordination plan after publication of the NOI for an EIS or
7 supplemental EIS, in accordance with guidelines and procedures
8 established by the department.

9 (c) Notice Requirements.

10 (1) The project sponsor will circulate the draft of the
11 coordination plan to the agencies identified in the coordination
12 plan and will make it available to the public at a public
13 meeting. The project sponsor will allow not less than 30 days
14 for comment on the draft coordination plan and schedule.

15 (2) A deadline for comment by agencies and the public may
16 be extended for good cause. The good cause must be documented
17 in the project file.

18 (3) The project sponsor will give a copy of the approved
19 coordination plan and any approved schedule for completion of
20 the environmental review process to the agencies identified in
21 the coordination plan and will make it available to the public
22 on request.

23

24 §2.104. Notice and Opportunity to Comment.

25 (a) Applicability. Subject to the exception in subsection

1 (b) of this section, this section applies to any project that
2 would:

3 (1) require the acquisition of new right-of-way;

4 (2) add capacity; or

5 (3) involve the construction of a highway at a new
6 location.

7 (b) Exception. This section does not apply to a project
8 for which a public meeting is held under §2.105 of this
9 subchapter (relating to Public Meeting), an opportunity for
10 public hearing is afforded under §2.106 of this subchapter
11 (relating to Opportunity for Public Hearing), or a public
12 hearing is held under §2.107 of this subchapter (relating to
13 Public Hearing), provided that notice of the meeting,
14 opportunity for public hearing, or public hearing is provided to
15 the entities specified in subsections (c) and (d) of this
16 section.

17 (c) Notice and opportunity to comment for property owners.
18 Prior to the environmental decision on a project subject to this
19 section, the project sponsor will provide written notice to the
20 owner or owners of real property that would be acquired for the
21 project and, for a project described by subsection (a)(2) or (3)
22 of this section, the owner or owners of real property that is
23 adjacent to the project. The purpose of this notice is to
24 inform the real property owner or owners of the project and
25 allow them an opportunity to submit comments on the project

1 prior to the environmental decision.

2 (d) Notice and opportunity to comment for local
3 governments. Prior to the environmental decision on a project
4 described by subsection (a)(2) or (3), the project sponsor will
5 provide written notice to affected local governments and public
6 officials. The purpose of this notice is to inform the affected
7 local governments and public officials of the project and allow
8 them an opportunity to submit comments on the project prior to
9 the environmental decision.

10 (e) Comment deadline. The notice required by subsections
11 (c) and (d) of this section will specify a comment deadline of
12 not sooner than 15 days after the date that the notice is made.
13 If the notice is sent by United States mail, the minimum comment
14 period begins on the third day after the date that the notice is
15 mailed.

16 (f) Documentation requirements. The project sponsor will
17 maintain records of all notices provided and written comments
18 received.

19
20 ~~[\$2.104. Meeting with Affected Property Owners (MAPO).~~

21 ~~(a) Purpose. A MAPO is an informal meeting to inform~~
22 ~~affected property owners of impacts that may result from a~~
23 ~~project. The requirements of this section may be met by~~
24 ~~telephone, in-person, or written contact with affected property~~
25 ~~owners.~~

1 ~~(b) When to conduct MAPO.~~

2 ~~(1) The project sponsor will hold one or more MAPOs prior~~
3 ~~to the environmental decision if a project requires a detour,~~
4 ~~road or bridge closure, minimal amount of right-of-way~~
5 ~~acquisition, or temporary construction easement.~~

6 ~~(2) The project sponsor will hold a MAPO in addition to~~
7 ~~any previous public participation if a location or design~~
8 ~~revision occurs after public participation requirements have~~
9 ~~been completed that would result in a substantial change in the~~
10 ~~impacts previously disclosed to the affected property owner.~~

11 ~~(3) The project sponsor may hold a MAPO for any project~~
12 ~~to supplement other required public participation. A MAPO may~~
13 ~~be used to engage an affected property owner throughout the~~
14 ~~process.~~

15 ~~(4) The affected property owners include:~~

16 ~~(A) owners of property adjacent to the project; and~~

17 ~~(B) other affected property owners, such as a business~~
18 ~~or governmental entity that may be affected by the project.~~

19 ~~(c) Notice Requirements. The project sponsor may select~~
20 ~~appropriate outreach methods to inform property owners of a~~
21 ~~MAPO.~~

22 ~~(d) Documentation requirements. The project sponsor will~~
23 ~~maintain records of all MAPOs in the project file, and will~~
24 ~~forward those records to the department delegate on request.]~~

25

1 §2.105. Public Meeting.

2 (a) Purpose. Public meetings are intended to gather input
3 from the public and keep the public informed during the
4 development of a project.

5 (b) When to hold a Public Meeting.

6 (1) A project sponsor may hold one or more public
7 meetings for any project. The decision to hold a public meeting
8 should be based on the project's type, complexity, and level of
9 public concern.

10 (2) The project sponsor shall hold a public meeting
11 during the drafting of a DEIS to present the draft coordination
12 plan.

13 (c) Notice Requirements. The project sponsor may select
14 one or more appropriate outreach methods to inform the public of
15 a public meeting. Outreach methods will be appropriate for the
16 anticipated audience to maximize attendance. At a minimum,
17 notice of the meeting will be provided to any public official,
18 individual, or affected interest group that has expressed
19 interest in the relevant transportation project.

20 (d) Documentation Requirements. After a public meeting,
21 the project sponsor will assemble documentation of the public
22 meeting. The public meeting documentation will be forwarded to
23 the department delegate for review and maintained in the project
24 file.

25

1 §2.106. Opportunity for Public Hearing.

2 (a) Purpose. An opportunity for a public hearing permits
3 the public to request a public hearing for a project when the
4 project sponsor is not otherwise obligated to hold a public
5 hearing under §2.107 of this subchapter.

6 (b) When to afford an opportunity for public hearing.

7 (1) The project sponsor will afford an opportunity for a
8 public hearing for a project if:

9 (A) the project requires the acquisition of significant
10 amounts of right-of-way;

11 ~~(B) [the project substantially changes the layout or~~
12 ~~function of connecting roadways or of the facility being~~
13 ~~improved;]~~

14 ~~[(C) the project adds through-lane capacity, not~~
15 ~~including auxiliary lanes or other lanes less than one mile in~~
16 ~~length;]~~

17 ~~[(D)]~~ the project has a substantial adverse impact on
18 abutting real property; or

19 (C) ~~[(E)]~~ the project is the subject of an
20 environmental assessment.

21 (2) A project sponsor is not required to comply with this
22 section if the project sponsor holds a public hearing for the
23 project under §2.107 of this subchapter (relating to Public
24 Hearing).

25 (c) Notice Requirements.

1 (1) The project sponsor will publish, at a minimum, one
2 notice of the opportunity to request a public hearing in a local
3 newspaper having general circulation. [~~The notice shall be~~
4 ~~published before the 30th day before the deadline for submission~~
5 ~~of written requests for holding a public hearing.~~] If there is
6 no local newspaper in the area affected by the project, the
7 project sponsor will publish notice in a newspaper having
8 general circulation in the area affected by the project.

9 (2) In addition, the project sponsor will select a
10 minimum of one additional outreach method to inform the public
11 of an opportunity to request a public hearing.

12 (3) The project sponsor will provide [~~mail~~] notice of the
13 opportunity to request a public hearing to landowners abutting
14 the roadway within the proposed project limits, as identified by
15 tax rolls or other reliable land ownership records, and to
16 affected local governments and public officials.

17 (4) The project sponsor will provide notice of the
18 opportunity to request a public hearing to any public official,
19 individual, or affected interest group that has expressed
20 interest in the relevant transportation project.

21 (5) Notice of an opportunity for public hearing will be
22 provided under this section at least 15 days prior to the
23 deadline for requesting a public hearing. If the notice is sent
24 by United States mail, the notice is considered to be provided
25 on the third day after the date of mailing.

1 (d) Procedural Requirements.

2 [~~(1)~~] The project sponsor will provide notice of the
3 opportunity after preliminary location and design studies are
4 developed and, if an environmental review document is being
5 prepared, after the environmental review document [~~or~~
6 ~~documentation of categorical exclusion~~] is approved for public
7 disclosure by the department delegate.

8 [~~(2) A public hearing is not required under this section~~
9 ~~if, at the end of the time set for affording an opportunity to~~
10 ~~request a public hearing, no requests have been received or the~~
11 ~~project sponsor has addressed all concerns of the persons~~
12 ~~requesting the public hearing.~~]

13 (e) Documentation Requirements. If, after providing an
14 opportunity for a public hearing under this section, the project
15 sponsor does not hold a public hearing, the project sponsor will
16 submit to the department delegate an original certification of
17 the public participation process containing a statement that the
18 requirements of this section have been met.

19

20 §2.107. Public Hearing.

21 (a) Purpose. A public hearing is held to present project
22 alternatives and to encourage and solicit public comment.

23 (b) When to hold a public hearing. A project sponsor will
24 hold a public hearing if:

25 (1) an agency with jurisdiction over the project submits

1 a written request for a hearing that is supported by reasons why
2 a hearing will be helpful, or [~~a request for hearing is received~~
3 ~~under §2.106 of this subchapter (relating to Opportunity for~~
4 ~~Public Hearing);~~]

5 [~~2~~] ten or more individuals submit a written request
6 for a hearing, except that a public hearing is not required
7 under this paragraph if:

8 (A) a public hearing has been held concerning the
9 project before the request or requests are received;

10 (B) [~~or if~~] the hearing request or requests are
11 received after the environmental review document or
12 documentation of categorical exclusion for the project is
13 approved;

14 (C) the hearing request or requests are received after
15 the deadline specified in a notice issued under §2.106 of this
16 subchapter (relating to Opportunity for Public Hearing); or

17 (D) the project sponsor has addressed all concerns of
18 the agency or persons requesting the public hearing;

19 (2) [~~3~~] the department delegate determines it is in the
20 public interest; or

21 (3) [~~4~~] the project is:

22 (A) a project with substantial public interest or
23 controversy;

24 (B) an EIS project; or

25 (C) subject to subsection (c) of this section, a

1 project that substantially changes the layout or function of a
2 connecting roadway or an existing facility, including but not
3 limited to the addition of managed lanes, high-occupancy vehicle
4 lanes, bicycle lanes, bus lanes, and transit lanes [a project
5 that constructs a new highway on a new location].

6 (c) Exceptions for certain types of actions relating to
7 bicycle lanes.

8 (1) For purposes of subsection (b)(3)(C) of this section,
9 none of the following actions are considered to substantially
10 change the layout or function of a connecting roadway or an
11 existing facility:

12 (A) striping bicycle lanes when the pre-existing
13 roadway already accommodated bicycles;

14 (B) striping one or more non-continuous bicycle lanes
15 approaching or through intersections, driveways, or other
16 conflict areas; or

17 (C) striping bicycle lanes not along, but across a
18 roadway at an intersection to allow the continuation of planned
19 or existing bicycle lanes on crossing local streets or other
20 bicycle facilities.

21 (2) Notwithstanding subsection (b) of this section, a
22 hearing is not required under this section by the addition of
23 bicycle lanes to a roadway if the project was addressed in a
24 local hearing held under §25.55 of this title (relating to
25 Comment Solicitation on Bicycle Road Use).

1 (d)~~(e)~~ Notice requirements.

2 (1) At a minimum, the project sponsor will publish~~[~~
3 ~~before the 15th day before the day of a public hearing,~~] one
4 notice of the hearing in a local newspaper having general
5 circulation in the area affected by the project. If there is no
6 local newspaper in the area affected by the project, the project
7 sponsor will publish notice in a newspaper having general
8 circulation in the area affected by the project. For a project
9 that constructs a reliever route, notice must also be published
10 in a newspaper of general circulation in the bypassed area.

11 (2) In addition to the other notice required by this
12 subsection, the project sponsor will select a minimum of one
13 additional outreach method to inform the public of the public
14 hearing.

15 (3) The project sponsor will provide ~~[mail]~~ notice of the
16 public hearing to landowners abutting the roadway within the
17 proposed project limits, as identified by tax rolls or other
18 reliable land ownership records, and to affected local
19 governments and public officials.

20 (4) The project sponsor will provide notice of the public
21 hearing to any public official, individual, or affected interest
22 group that has expressed interest in the relevant transportation
23 project.

24 (5) Notice of public hearing will be provided under this
25 section at least 15 days prior to the date of the public

1 hearing. If the notice is sent by United States mail, the
2 notice is considered to be provided on the third day after the
3 date of mailing.

4 (e)~~(d)~~ Procedural requirements.

5 (1) The hearing will be held after preliminary location
6 and design studies are developed and, if an environmental review
7 document is being prepared, after the environmental review
8 document [~~or documentation of categorical exclusion~~] is approved
9 for public disclosure by the department delegate.

10 (2) The project sponsor will make the maps, drawings,
11 environmental reports, and documents concerning the project
12 available to the public for not less than the 15 consecutive
13 days before the date of the public hearing.

14 (3) The project sponsor shall establish a deadline for
15 accepting public comments of not less than 15 days after the
16 date of the public hearing.

17 (f)~~(e)~~ Documentation requirements.

18 (1) After a public hearing, the project sponsor will
19 assemble documentation of the public hearing. The public
20 hearing documentation will be forwarded to the department
21 delegate for review and maintained in the project file.

22 (2) For a public hearing regarding an EIS, the project
23 sponsor will document the number of positive, negative, and
24 neutral public comments received in accordance with
25 Transportation Code, §201.811(b). This information must be

1 presented to the commission in an open meeting and reported on
2 the department's website in a timely manner.

3 (g)~~(f)~~ Role of department staff. One or more department
4 employees must begin a public hearing by making opening remarks
5 to the audience of attendees. Additionally, one or more
6 department employees must be physically present during any
7 portion of a public hearing.

8 (h) No effect on public meetings. Nothing in this section
9 limits the department's ability to hold one or more public
10 meetings on any project under §2.105 of this subchapter
11 (relating to Public Meeting).

12
13 §2.108. Notice of Availability.

14 (a) Purpose. A notice of availability is issued to inform
15 the public or recipient of when certain important documents are
16 available for review, and how to obtain copies of those
17 documents.

18 (b) When to issue notice. A notice of availability is
19 required for:

20 (1) a draft EA;

21 (2) a FONSI;

22 (3) a DEIS;

23 (4) a FEIS; or

24 (5) a ROD.

25 (c) Notice requirements.

1 (1) The project sponsor will provide [~~send~~] copies of all
2 notices of availability to the appropriate metropolitan planning
3 organization; any other affected units of federal, state, and
4 local government; any entities that requested in writing to
5 receive notices regarding the environmental review of the
6 project; and any other entities with which environmental review
7 of the project is being coordinated, except that if the project
8 is being coordinated under a memorandum of understanding, the
9 terms of the memorandum of understanding govern the provision of
10 notice rather than this subsection. [~~and entities identified as~~
11 ~~having an interest in or regulatory jurisdiction over an aspect~~
12 ~~of the project in accordance with §2.12, relating to Project~~
13 ~~Coordination. The copy of a notice with instructions on how to~~
14 ~~access the document electronically, may be provided by e-mail if~~
15 ~~the recipient has provided the department with an e-mail~~
16 ~~address. If the entity will receive a full copy of the~~
17 ~~document, it is not necessary to also send a notice of~~
18 ~~availability.]~~

19 (2) The project sponsor, in collaboration with the
20 department delegate, will publish a notice of availability on
21 the department website regarding a FONSI, DEIS, FEIS, ROD, or
22 draft EA.

23 (3) The project sponsor, in collaboration with the
24 department delegate, will publish in a local newspaper having
25 general circulation in the area affected by the project a notice

1 of availability regarding a draft EA for which no public hearing
2 is held or an FEIS. If there is no local newspaper in the area
3 affected by the project, the project sponsor will publish notice
4 in a newspaper having general circulation in the area affected
5 by the project. For a notice of availability regarding a draft
6 EA for which no public hearing is held, the notice must
7 establish a deadline for accepting public comments of not less
8 than 30 days after the date of newspaper publication.

9 (4) The department delegate also must submit for
10 publication a notice of availability regarding a DEIS[~~7~~] or FEIS
11 [~~or ROD~~] in the Texas Register if the project is a state
12 transportation project or in the Federal Register if the project
13 is an FHWA transportation project. For an NOA for a DEIS
14 published in the Texas Register or Federal Register, the NOA
15 shall establish a period of not fewer than 45 days and no more
16 than 60 days for the return of comments on the DEIS.

17 (5) If the FEIS and ROD will be a single document, the
18 notice of availability regarding the FEIS should indicate that
19 fact.

20
21 §2.109. Additional Notice and Comment [~~Public Participation~~]
22 for Projects Affected by Significant Changes.

23 (a) Purpose. This section describes when additional notice
24 and opportunity to comment must be provided to owners of
25 adjoining property, and affected local governments and public

1 officials, [~~additional public participation is required~~]
2 following project approval.

3 (b) When to provide additional notice and opportunity to
4 comment [~~conduct additional public participation~~]. Under
5 Transportation Code, §203.022(b), the project sponsor will
6 provide an additional notice and opportunity to comment
7 [~~opportunity for public participation in the form of an~~
8 ~~opportunity for public hearing~~] for a project that has received
9 project approval if:

10 (1) the project adds capacity or involves [~~the addition~~
11 ~~of one or more vehicular lanes to an existing highway, or to~~]
12 the construction of a highway at a new location; and

13 (2) conditions relating to land use, traffic volumes, and
14 traffic patterns have changed significantly since the project
15 was originally subject to public review and comment.

16 (c) Comment deadline. The notice required by subsection
17 (b) will specify a comment deadline of no sooner than 15 days
18 after the date that such notice is provided. If the notice is
19 sent by United States mail, the minimum comment period begins on
20 the third day after the date that the notice is mailed.

21 (d) Documentation requirements. The project sponsor will
22 maintain records of all notices made and written comments
23 received. [~~Notice and documentation requirements. An~~
24 ~~opportunity for public hearing under this section will conform~~
25 ~~to the same notice and documentation requirements for an~~

1 ~~opportunity under §2.106 of this subchapter (relating to~~
2 ~~Opportunity for Public Hearing).]~~

3

4 §2.110. Notice of Impending Construction.

5 (a) Purpose. A notice of impending construction informs
6 individuals affected by certain projects that construction will
7 begin.

8 (b) Notice Requirements under Transportation Code,
9 §203.022(c). For a project that adds capacity or involves the
10 ~~[either the addition of at least one travel lane or]~~
11 construction of a highway at ~~[on]~~ a new location, the project
12 sponsor must provide owners of adjoining property and affected
13 local governments and public officials with notice of impending
14 construction by any means approved by the department's
15 Environmental Affairs Division. The means of providing notice
16 may include a sign or signs posted in the right-of-way, mailed
17 notice, printed notice distributed by hand, or notice via
18 website when the recipient has previously been informed of the
19 relevant website address. The notice must be provided after a
20 CE determination or issuance of a FONSI or ROD for the project,
21 but before earthmoving or other activities requiring the use of
22 heavy equipment begin.

1 SUBCHAPTER F. REQUIREMENTS FOR SPECIFIC PROJECTS AND PROGRAMS

2 §2.131. Advance Acquisition of Right-of-Way.

3 (a) Advance acquisition. Nothing in this chapter prevents
4 the department from acquiring real property for corridor
5 preservation, access management, or other purposes before the
6 completion of the environmental review process for a
7 transportation project, subject to the requirements of this
8 section.

9 (b) Certain public land. The department will not make an
10 advance acquisition if it requires relocation or the use or
11 taking of public land that is designated and used as a park,
12 recreation area, scientific area, wildlife refuge, or historic
13 site.

14 (c) No influence on environmental decision. Advance
15 acquisitions shall not influence any aspect of the final
16 environmental decision, including any evaluation of build or no-
17 build alternatives or alternative alignments for the
18 transportation project.

19 (d) Due diligence report. Prior to finalizing advance
20 acquisition of any real property, or purchasing an option to
21 acquire real property prior to completion of the environmental
22 review process, the department will complete a due diligence
23 report. The report will assess the presence or likelihood of
24 contamination and any other undesirable conditions on the real
25 property, and whether the real property consists of any public

1 land that is designated and used as a park, recreation area,
2 scientific area, wildlife refuge, or historic site. The
3 department will consider the information in the due diligence
4 report prior to determining whether to acquire the real
5 property.

6 (e) FHWA transportation project. For an FHWA
7 transportation project, in addition to the requirements of
8 subsections (a) - (d) of this section, the department delegate
9 and project sponsor must comply with any federal laws, including
10 FHWA's rules applicable to advance acquisitions. If federal
11 law, including FHWA's rules, conflicts with this chapter,
12 federal law controls to the extent of the conflict.