

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose amendments to §2.3 relating to General Provisions 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 and B, 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 §2.3 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

115601    OCT 31 '19  
Minute    Date  
Number    Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes  
3 amendments to §2.3, concerning environmental review and public  
4 participation requirements for certain transportation projects.

5  
6 EXPLANATION OF PROPOSED AMENDMENTS

7 Amendments to §2.3, Applicability; Exceptions, revise the  
8 applicability of the department's Chapter 2 environmental review  
9 rules to more closely align with the applicable state statutes.

10  
11 Existing §2.3, states that the department's environmental review  
12 rules apply not only to the department's own projects, but also  
13 to private or public entities' projects if such a project  
14 receives state funding distributed by the department or requires  
15 any kind of approval by the department, even if the project has  
16 no FHWA funding and is not on the state highway system. The  
17 department believes that this broad application is not required  
18 by statute.

19  
20 The original statute requiring the department to have  
21 environmental review rules was enacted in 1991 (S.B. 352, 72nd  
22 Legislature, Regular Session) and was codified in 1995 as  
23 Transportation Code, §201.604. Section 201.604 directs the  
24 Texas Transportation Commission (commission) by rule to "provide  
25 for the commission's environmental review of the department's  
26 transportation projects that are not subject to review under the

1 National Environmental Policy Act (42 U.S.C. Section 4321 et  
2 seq.)." The statute calls for environmental review of "the  
3 department's transportation projects," not other private or  
4 public entities' transportation projects.

5  
6 In 2011, the Texas Legislature enacted Transportation Code 201,  
7 Subchapter I-1. Subchapter I-1 established deadlines and other  
8 requirements for the department's environmental review of  
9 highway projects, and instructed the commission to implement the  
10 new requirements through rulemaking. The Legislature specified  
11 that the new environmental review requirements applied to (1)  
12 projects that are "part of the state highway system," and (2)  
13 projects that are not part of the state highway system, but are  
14 federally funded. (Transportation Code, §§201.752(a) and  
15 201.751(3).) Off-system projects that are not federally funded,  
16 such as county road or city street projects undertaken by local  
17 governments with or without some form of state funding, were not  
18 included. However, off-system projects that are not federally  
19 funded but receive state funding are nonetheless required to  
20 undergo the department's environmental review procedures under  
21 the department's current rules.

22  
23 Amendments to §2.3(a) specify that the department's  
24 environmental review rules apply only to (1) an FHWA  
25 transportation project, or (2) any portion of a state  
26 transportation project that will take place on the state highway

1 system or other real property owned by the department. The  
2 department believes that this change to §2.3(a) more accurately  
3 implements the legislative mandates in Transportation Code,  
4 §201.604 and Transportation Code, §§201.752(a). Non-federally  
5 funded projects undertaken by local governments or other  
6 entities with the assistance of state funding would not be  
7 subject to the department's environmental review process. Such  
8 a project would not require a project scope, which is now done  
9 electronically using the department's Environmental Compliance  
10 Oversight System, and would not require the department's  
11 issuance of a categorical exclusion determination, environmental  
12 assessment/finding of no significant impact, or environmental  
13 impact statement/record of decision. Of course, local  
14 governments or other entities would still be legally required to  
15 comply with all applicable environmental laws, such as the Clean  
16 Water Act and Endangered Species Act, when undertaking a  
17 transportation project.

18

19 The department believes that the change is appropriate for  
20 reasons beyond alignment with the underlying statutes. When a  
21 local government or other entity undertakes a non-federally  
22 funded transportation project on its own property, the local  
23 government or entity, not the department, should be responsible  
24 for evaluating the environmental impacts of the project and  
25 determining whether and how to proceed. Currently, local  
26 governments must comply with all applicable environmental laws

1 plus the department's environmental review process. Allowing  
2 local governments and other entities to develop off-system, non-  
3 federally funded projects according to their own procedures, and  
4 using their own expertise and knowledge of local conditions,  
5 without having to also comply with the department's  
6 environmental review requirements, will provide greater  
7 flexibility and autonomy for those entities. This change will  
8 also reduce the administrative burden on department  
9 environmental staff, allowing for a higher level of focus on the  
10 environmental review of the department's own projects.

11  
12 The amendments also remove the exceptions in §2.3(b) and (d).  
13 The revised statement of applicability in amended §2.3(a), makes  
14 these exceptions unnecessary because the excepted projects are  
15 no longer described by the revised statement.

16  
17 FISCAL NOTE  
18 Brian Ragland, Chief Financial Officer, has determined, in  
19 accordance with Government Code, §2001.024(a)(4), that for each  
20 of the first five years in which the proposed rules are in  
21 effect, there will be a reduction in costs for state and local  
22 governments as a result of enforcing or administering the rules.  
23 For off-system, non-federally funded projects, local governments  
24 will avoid costs associated with preparation of a project scope,  
25 the collection and provision of certain project information for  
26 the department's review, and other actions related to complying

1 with the department's Chapter 2 environmental review process.  
2 For such projects the department will avoid the administrative  
3 burden associated with reviewing project information provided by  
4 the local governments, processing the projects in the  
5 department's environmental clearance operating system, and  
6 issuing an environmental decision. The number of projects that  
7 would otherwise be subject to the department's Chapter 2 rules  
8 would vary from year to year and is not known. The local  
9 government's costs of complying with the department's Chapter 2  
10 rules, and the amount of time spent by department staff  
11 reviewing such projects, would vary depending on project-  
12 specific factors and the local government's familiarity with the  
13 department's environmental review process. For these reasons,  
14 the fiscal impact is expected to be positive but the amount of  
15 cost reductions for state and local governments cannot be  
16 calculated.

17

#### 18 LOCAL EMPLOYMENT IMPACT STATEMENT

19 Carlos Swonke, Director, Environmental Affairs Division, has  
20 determined that there will be no significant impact on local  
21 economies or overall employment as a result of enforcing or  
22 administering the proposed rules and therefore, a local  
23 employment impact statement is not required under Government  
24 Code, §2001.022.

25

#### 26 PUBLIC BENEFIT

1 Mr. Swonke has determined, as required by Government Code,  
2 §2001.024(a)(5), that for each year of the first five years in  
3 which the proposed rules are in effect, the public benefit  
4 anticipated as a result of enforcing or administering the rules  
5 will be increased efficiency and a reduction in the potential  
6 for delays in distributing state funding for off-system, non-  
7 federally funded projects.

8

#### 9 COSTS ON REGULATED PERSONS

10 Mr. Swonke has also determined, as required by Government Code,  
11 §2001.024(a)(5), that for each year of that period there are no  
12 anticipated economic costs for persons, including a state  
13 agency, special district, or local government, required to  
14 comply with the proposed rules and therefore, Government Code,  
15 §2001.0045, does not apply to this rulemaking.

16

#### 17 ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

18 There will be no adverse economic effect on small businesses,  
19 micro-businesses, or rural communities, as defined by Government  
20 Code, §2006.001, and therefore, an economic impact statement and  
21 regulatory flexibility analysis are not required under  
22 Government Code, §2006.002.

23

#### 24 GOVERNMENT GROWTH IMPACT STATEMENT

25 The proposed rules limit an existing regulation. Mr. Swonke has  
26 considered the requirements of Government Code, §2001.0221 and

1 has determined that for the first five years in which the  
2 proposed rules are in effect, the number of transportation  
3 projects that will be required to comply with the department's  
4 environmental review rules, in addition to other applicable  
5 environmental laws, will be reduced. The rules will not create  
6 or eliminate a government program, or change the fees paid to  
7 the agency. The rules will not require a change in the  
8 legislative appropriations to the agency. The change does not  
9 create a new regulation, but rather limits an existing  
10 regulation and decreases the number of individuals subject to  
11 the rule's applicability. Although the rules will reduce the  
12 administrative burden on the department, due to the department's  
13 existing workload the change is not anticipated to require the  
14 elimination of existing employee positions, nor it is  
15 anticipated to require a change in future legislative  
16 appropriations. The improved efficiency of local government  
17 projects could positively affect this state's economy.

18

#### 19 TAKINGS IMPACT ASSESSMENT

20 Mr. Swonke has determined that a written takings impact  
21 assessment is not required under Government Code, §2007.043.

22

#### 23 COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

24 The proposed amendment of §2.3 is subject to the Texas Coastal  
25 Management Program (CMP) and must be consistent with all  
26 applicable CMP policies.

1

2 The department has historically reviewed projects within the  
3 coastal boundary for consistency with the CMP as part of its  
4 environmental review process under Chapter 2. See 43 TAC  
5 §2.134. Under amended §2.3, off-system, non-federally funded  
6 projects proposed and undertaken by other entities, such as  
7 local governments, will no longer be required to comply with the  
8 department's environmental review process, even if receiving  
9 state funding for the project. Therefore, the department would  
10 no longer review such a project for consistency with the CMP.  
11 The department concludes that this amendment is consistent with  
12 applicable CMP policies, as the CMP does not require the  
13 department to conduct a consistency review of such projects.

14

15 Rules implementing the CMP provide that "[a]n agency, when  
16 proposing an action listed in §505.11(a) of this chapter  
17 (relating to Actions and Rules Subject to the Coastal Management  
18 Program) that may adversely affect a coastal natural resource  
19 area (CNRA), shall comply with the CMP goals and policies." (31  
20 TAC §505.30(a).) Section 505.11 contains an "exclusive list" of  
21 individual agency actions that must be consistent with the CMP  
22 goals and policies. (31 TAC §505.11(a).) Subsection (a)(4) of  
23 that rule is applicable to the department: "for the Texas  
24 Transportation Commission when approving: (A) an acquisition of  
25 a site for the placement or disposal of dredge material from, or  
26 the expansion, relocation, or alteration of, the Gulf

1 Intracoastal Waterway; or (B) an environmental document for a  
2 transportation construction project or maintenance program." As  
3 explained above, state statutes do not require the department to  
4 approve an environmental document for off-system, non-federally  
5 funded projects proposed and undertaken by local governments or  
6 other entities. Therefore, the department is not required to  
7 conduct a CMP consistency review for such a project.

8  
9 Additionally, under 31 TAC §501.31(b), the underlying CMP  
10 policies for transportation projects specifically apply only to  
11 approvals under certain statutes relating to public  
12 transportation (Transportation Code §§455.001-455.004, 456.001-  
13 456.008, and 456.021-456.026) and projects on the state highway  
14 system (Transportation Code, §221.001, et seq.). Off-system  
15 projects are not included.

16  
17 The department will continue to conduct a CMP consistency review  
18 for Gulf Intracoastal Waterway disposal site acquisitions and  
19 projects subject to the department's environmental review  
20 process in accordance with 43 TAC §2.134, Coastal Management  
21 Program, which is not affected by this rulemaking.

22  
23 A copy of this rulemaking will be submitted to the General Land  
24 Office for its comments on the consistency of the proposed  
25 rulemaking with the CMP. The department requests that the  
26 public also give comment on whether the proposed rulemaking is

1 consistent with the CMP.

2

3 PUBLIC HEARING

4 Pursuant to the Administrative Procedure Act, Government Code,  
5 Chapter 2001, the Texas Department of Transportation will  
6 conduct a public hearing to receive comments concerning the  
7 proposed rules. The public hearing will be held at 1:30 p.m. on  
8 December 4, 2019, in the Ric Williamson Hearing Room, First  
9 Floor, Dewitt C. Greer State Highway Building, 125 East 11th  
10 Street, Austin, Texas and will be conducted in accordance with  
11 the procedures specified in 43 TAC §1.5. Those desiring to make  
12 comments or presentations may register starting at 1:00 p.m.  
13 Any interested persons may appear and offer comments, either  
14 orally or in writing; however, questioning of those making  
15 presentations will be reserved exclusively to the presiding  
16 officer as may be necessary to ensure a complete record. While  
17 any person with pertinent comments will be granted an  
18 opportunity to present them during the course of the hearing,  
19 the presiding officer reserves the right to restrict testimony  
20 in terms of time and repetitive content.

21

22 Organizations, associations, or groups are encouraged to present  
23 their commonly held views and identical or similar comments  
24 through a representative member when possible. Comments on the  
25 proposed text should include appropriate citations to sections,  
26 subsections, paragraphs, etc. for proper reference. Any

1 suggestions or requests for alternative language or other  
2 revisions to the proposed text should be submitted in written  
3 form. Presentations must remain pertinent to the issues being  
4 discussed. A person may not assign a portion of his or her time  
5 to another speaker. Persons with disabilities who plan to  
6 attend this meeting and who may need auxiliary aids or services  
7 such as interpreters for persons who are deaf or hearing  
8 impaired, readers, large print or Braille, are requested to  
9 contact the General Counsel Division, 125 East 11th Street,  
10 Austin, Texas 78701-2483, (512) 463-8630 at least five working  
11 days before the date of the hearing so that appropriate services  
12 can be provided.

13

#### 14 SUBMITTAL OF COMMENTS

15 Written comments on the proposed amendments to §2.3 may be  
16 submitted to Rule Comments, General Counsel Division, Texas  
17 Department of Transportation, 125 East 11th Street, Austin,  
18 Texas 78701-2483 or to RuleComments@txdot.gov with the subject  
19 line "Applicability of Chapter 2." The deadline for receipt of  
20 comments is 5:00 p.m. on December 16, 2019. In accordance with  
21 Transportation Code, §201.811(a)(5), a person who submits  
22 comments must disclose, in writing with the comments, whether  
23 the person does business with the department, may benefit  
24 monetarily from the proposed amendments, or is an employee of  
25 the department.

26

1 STATUTORY AUTHORITY

2 The amendments are proposed under Transportation Code, §201.101,  
3 which provides the commission with the authority to establish  
4 rules for the conduct of the work of the department, and more  
5 specifically, Transportation Code, §201.604, which requires the  
6 commission to adopt rules to provide for the environmental  
7 review of the department's transportation projects that are not  
8 subject to review under the National Environmental Policy Act  
9 (42 U.S.C. Section 4321 et seq.), and §201.752, which requires  
10 the commission to establish standards for processing an  
11 environmental review document for a highway project.

12

13 CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING

14 Transportation Code, §§201.604 and 201.752.

1 SUBCHAPTER A. GENERAL PROVISIONS

2 §2.3. Applicability; Exceptions.

3 (a) Application of chapter. This chapter prescribes the  
4 environmental review and public participation requirements for:

5 (1) an ~~[a state transportation project or]~~ FHWA  
6 transportation project ~~[conducted by the department];~~ or

7 (2) any portion of a state transportation project that  
8 will take place on the state highway system or other real  
9 property owned by the department ~~[or FHWA transportation project~~  
10 ~~of a private or public entity that is funded in whole or in part~~  
11 ~~by the department; or]~~

12 ~~[(3) a state transportation project or FHWA~~  
13 ~~transportation project of a private or public entity that~~  
14 ~~requires commission or department approval].~~

15 ~~[(b) Exceptions.]~~

16 ~~(1) Notwithstanding subsection (a) of this section,~~  
17 ~~this chapter does not apply to:]~~

18 ~~[(A) a transportation project that is not on the~~  
19 ~~state highway system and that the department funds solely with~~  
20 ~~money held in a project subaccount created under Transportation~~  
21 ~~Code, §228.012;]~~

22 ~~[(B) a transportation project that is developed~~  
23 ~~by a county under Transportation Code, §228.011, or developed by~~  
24 ~~a local toll project entity under Transportation Code, Chapter~~  
25 ~~373, and that is not on the state highway system and for which~~  
26 ~~the department does not use funds other than funds derived~~

NOTE: Additions underlined

Deletions in [ ]

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Exhibit B

1 ~~solely from money held in a project subaccount created under~~  
2 ~~Transportation Code, §228.012; or]~~

3 ~~[(C) a state transportation project that is~~  
4 ~~covered by an interagency cooperation contract between the~~  
5 ~~department and the Texas Parks and Wildlife Department for the~~  
6 ~~design, construction, or maintenance of a road or parking area~~  
7 ~~or facility within or adjacent to a facility of the Texas Parks~~  
8 ~~and Wildlife Department, and that is on a park road that is~~  
9 ~~owned and operated by the Texas Parks and Wildlife Department~~  
10 ~~and not on the state highway system.]~~

11 ~~[(2) An agreement entered into by the department for a~~  
12 ~~transportation project excepted under paragraph (1) of this~~  
13 ~~subsection must require that the entity responsible for~~  
14 ~~implementing the project will comply with all environmental~~  
15 ~~review and public participation requirements applicable to that~~  
16 ~~entity under other state and federal law in connection with the~~  
17 ~~project.]~~

18 ~~[(3) Notwithstanding subsection (a) of this section~~  
19 ~~only §2.132 of this chapter (relating to Gulf Intracoastal~~  
20 ~~Waterway Projects) applies to a project concerning the Gulf~~  
21 ~~Intracoastal Waterway.]~~

22 (b) ~~[(e)]~~ Compliance with rules of federal transportation  
23 agency other than FHWA. For transportation projects conducted  
24 or supported by a federal transportation agency other than FHWA,  
25 and for transportation projects conducted or supported by  
26 multiple federal transportation agencies and for which FHWA is

NOTE: Additions underlined

Deletions in [ ]

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Exhibit B

1 not the lead federal agency, the department delegate and project  
2 sponsor will comply with the environmental review rules of the  
3 lead federal agency, and not the rules in this chapter.

4 [~~(d) Transportation project developed by a local~~  
5 ~~governmental entity or private entity. This chapter does not~~  
6 ~~apply to a transportation project that:~~]

7 [~~(1) is developed by a local governmental entity or~~  
8 ~~private entity;~~]

9 [~~(2) is not on the state highway system or on other~~  
10 ~~department owned property;~~]

11 [~~(3) is funded with no state or federal funds; and]~~

12 [~~(4) does not require department approval.~~]

13 (c) [~~(e)~~] Excepted activities. For the purposes of this  
14 chapter:

15 (1) a contractor activity that is not directed or  
16 directly controlled by the department and that is in an area  
17 outside of the right-of-way, including a staging area, disposal  
18 site, equipment storage site, or borrow site selected by a  
19 contractor, is not part of a transportation project; and

20 (2) the relocation of an individual, family, business,  
21 farm operation, nonprofit organization, or utility to a location  
22 outside of the right-of-way is not part of a transportation  
23 project.