

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose the repeal of §2.21 and §2.22, and the simultaneous replacement of the repealed sections with new Subchapter G, Memorandum of Understanding with the Texas Parks and Wildlife Department, §§2.201-2.214, relating to coordination of environmental review of transportation projects by the Texas Parks and Wildlife Department, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed repeals and new sections, attached to this minute order as Exhibits A - C, 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 repeal of §2.21 and §2.22 and new §§2.201-2.214 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

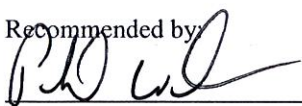
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



Director, Environmental Affairs Division

Recommended by:



Executive Director

113436 JAN 31 13

Minute Number Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes the
3 repeal of §2.21, Purpose, and §2.22, Memorandum of Understanding
4 with the Texas Parks and Wildlife Department. The department
5 proposes the simultaneous replacement of the repealed sections
6 with new Subchapter G, §§2.201-2.214, Memorandum of
7 Understanding with the Texas Parks and Wildlife Department.

8

9 EXPLANATION OF PROPOSED REPEALS AND NEW SECTIONS

10 Transportation Code, §201.607 requires the department to adopt a
11 memorandum of understanding (MOU) with each state agency that
12 has responsibilities for the protection of the natural
13 environment or for the preservation of historic or archeological
14 resources. Transportation Code, §201.607 also requires the
15 department to adopt the MOU and all revisions to it by rule, and
16 to periodically evaluate and revise the MOU. In order to meet
17 the legislative intent and to ensure that natural resources are
18 given full consideration in accomplishing the department's
19 activities, the department has evaluated its MOU with the Texas
20 Parks and Wildlife Department (TPWD) adopted in 1999, and finds
21 it necessary to repeal existing §§2.21 and 2.22 and
22 simultaneously adopt new Subchapter G, §§2.201-2.214.

23

24 The proposed new MOU between TPWD and the department satisfies
25 the statutory requirements for reviewing and revising MOUs with

1 resource agencies. It is intended to replace the existing MOU,
2 which has been in effect since March 21, 1999, with an MOU that
3 more effectively streamlines TPWD's review of the department's
4 projects, and simultaneously better allows TPWD to focus on
5 those projects most likely to affect natural resources. The
6 proposed MOU has several new provisions and procedures that were
7 developed based on experience gained from numerous projects that
8 the department has submitted and TPWD has reviewed since the
9 1999 MOU was executed. It is also better organized than the
10 existing MOU, with different subject areas broken into separate
11 sections. Additionally, the proposed MOU reflects changes made
12 by the department's recent revision of its environmental review
13 rules, published in the March 9, 2012 issue of the *Texas*
14 *Register* (37 TexReg 1727).

15

16 SECTION BY SECTION EXPLANATION OF PROPOSED MOU

17 Section 2.201 sets out the purpose of the MOU, and explains that
18 it supersedes various other MOUs previously entered into by the
19 department and TPWD. Section 2.201 also requires the MOU to be
20 updated within five years of its effective date, as required by
21 Transportation Code, §201.607.

22

23 Section 2.202 sets forth the applicability of the MOU by
24 identifying the types of transportation projects that must be
25 evaluated under the MOU. Maintenance projects for which a

1 programmatic environmental review is conducted under 30 TAC
2 §2.133 are not required to be evaluated under the MOU.

3
4 Section 2.203 contains definitions of various terms used in the
5 MOU.

6
7 Section 2.204 sets parameters on the department's use of the
8 Texas Natural Diversity Database (TXNDD) maintained by TPWD, a
9 database of information about listed and proposed threatened and
10 endangered species and other features of Texas natural history.
11 The section also requires the department to report observations
12 of certain species to TPWD using TXNDD reporting forms.

13
14 Section 2.205 sets forth procedures for determining whether the
15 department is required to coordinate a given transportation
16 project with TPWD. It requires the department to perform a Tier
17 I site assessment on each project to which the MOU applies as
18 set forth in §2.202. The department then compares the results
19 of the Tier I site assessment to triggers listed in §2.206, and
20 thresholds identified in a programmatic agreement developed
21 under §2.213, to determine whether coordination is required.

22
23 Section 2.206 contains triggers for determining when
24 coordination is required using the procedures identified in
25 §2.205. For example, coordination is required if a project will

1 directly impact known isolated wetlands outside the existing
2 department right-of-way. Use of these triggers, and the
3 thresholds identified in a programmatic agreement developed
4 under §2.213, will allow TPWD to focus its resources on
5 reviewing those projects most likely to adversely affect natural
6 resources.

7
8 Section 2.207 explains the process for early coordination of a
9 project between TPWD and the department. It is the intention of
10 the department and TPWD that early coordination, as opposed to
11 administrated coordination under §2.208, will be the primary
12 mechanism for coordination of projects between the agencies. In
13 conducting early coordination, the department provides project
14 documentation to TPWD, and TPWD provides determinations and
15 recommendations to the department. The results of early
16 coordination are then summarized in the project's environmental
17 review document. The process for early coordination is less
18 formal than the process for administrated coordination,
19 explained in the following section.

20
21 Section 2.208 explains the process for administrated
22 coordination, which must be conducted for projects subject to
23 coordination under §2.205, but for which early coordination
24 under §2.207 is not conducted. Administrated coordination
25 requires the department to submit to TPWD a coordination package

1 consisting of a cover letter, a Tier II site assessment, and
2 other studies or reports the department believes are relevant.
3 TPWD then has 45 days to comment on any aspect of the project it
4 determines may have adverse impacts to fish and wildlife
5 resources. Within 90 days of making a decision related to a
6 written comment made by TPWD, the department must provide TPWD
7 with a written explanation of the department's decision or other
8 action. Also, as with early coordination, the results of
9 administrated coordination must be summarized in the project's
10 environmental review document.

11
12 Section 2.209 explains Tier II site assessments, which are the
13 primary environmental reports prepared by the department and
14 reviewed by TPWD during administrated coordination, and provides
15 the minimum required elements of a Tier II site assessment.

16
17 Section 2.210 requires the department to communicate with TPWD
18 when unforeseen impacts are identified during construction of a
19 project.

20
21 Section 2.211 requires the department to maintain records of
22 projects that are subject to the MOU, and to respond within 30
23 days to any request made by TPWD to review project records.

24
25 Section 2.212 allows TPWD to make site visits to department

1 project sites.

2

3 Section 2.213 requires the department and TPWD to develop
4 certain programmatic agreements addressing issues not covered in
5 the MOU. The section describes six specific programmatic
6 agreements that must be developed by the department and TPWD.

7

8 Section 2.214 requires the department and TPWD to appoint an
9 interagency MOU implementation team to fulfill various functions
10 related to implementing the MOU, such as developing the
11 programmatic agreements required by §2.213, preparing
12 recommendations for the next update of the MOU, and developing
13 metrics for tracking the effectiveness of the MOU.

14

15 FISCAL NOTE

16 James Bass, Chief Financial Officer, has determined that for
17 each of the first five years in which the new subchapter as
18 proposed is in effect, there will be fiscal implications for
19 state government as a result of enforcing or administering the
20 new subchapter. New §2.213 requires the department and TPWD to
21 develop a programmatic agreement concerning department-funded
22 positions at TPWD. The goal of this programmatic agreement will
23 be to reduce the number of projects referred to TPWD for
24 coordination by 50 percent, reduce average project review times,
25 and increase the environmental value of project mitigation.

1 Reasonably assuming for the purpose of this analysis that this
2 programmatic agreement would result in the department's funding
3 of two full-time employees at TPWD, this would require an
4 expenditure of approximately \$167,797 annually from the State
5 Highway Fund. This expenditure is expected to be offset by the
6 benefit of more efficient and timely environmental review of the
7 department's projects by TPWD. There are no anticipated fiscal
8 implications for local governments as a result of enforcing or
9 administering the new subchapter. There are no economic costs
10 for persons required to comply with the new subchapter.

11
12 Carlos Swonke has certified that there will be no significant
13 impact on local economies or overall employment as a result of
14 enforcing or administering the new subchapter.

15
16 PUBLIC BENEFIT AND COST

17 Mr. Swonke has also determined that for each year of the first
18 five years in which the new subchapter is in effect, the public
19 benefit anticipated as a result of enforcing or administering
20 the new subchapter will be increased efficiency in completing
21 the environmental review of the department's projects, and more
22 effective coordination with TPWD on the department's projects.
23 There are no anticipated economic costs for persons required to
24 comply with the sections as proposed. There will be no adverse
25 economic effect on small businesses.

1

2 COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

3 The department determined that this rulemaking relates to
4 actions subject to the Texas Coastal Management Program (CMP)
5 under the Coastal Coordination Act of 1991, as amended (Natural
6 Resources Code, §§33.201 et seq.), and must be consistent with
7 all applicable CMP policies, because it concerns the
8 department's environmental review of transportation projects.

9 The department reviewed this action for consistency with the CMP
10 goals and policies under the rules promulgated by the Coastal
11 Coordination Council, which remain in effect until superseded by
12 rules of the General Land Office. The department has determined
13 that the action is consistent with applicable CMP goals and
14 policies.

15
16 A CMP policy applicable to this rulemaking is that
17 transportation projects shall comply with certain practices
18 concerning the siting of a project to lessen the impacts on
19 coastal natural resources (see 31 TAC §501.31). The proposed
20 rules concern the method by which to evaluate the environmental
21 impacts of a transportation project, and do not dictate the
22 siting of a project. However, the purpose of the proposed rules
23 is to establish procedures for identifying the impacts of
24 transportation projects on certain resources, and for
25 coordination of projects with the relevant state resource

1 agency. This provides an additional mechanism for avoiding,
2 minimizing, or mitigating, where practicable, adverse effects of
3 department projects on coastal natural resource areas that serve
4 as habitat, on coastal preserves, and on threatened and
5 endangered species. For these reasons, the rulemaking action is
6 consistent with the CMP goal of protecting, preserving,
7 restoring, and enhancing the diversity, quality, quantity,
8 functions, and values of coastal natural areas.

9
10 A copy of this rulemaking will be submitted to the General Land
11 Office for its comments on the consistency of the proposed
12 rulemaking with the CMP. The department requests that the
13 public also give comment on whether the proposed rulemaking is
14 consistent with the CMP.

15
16 PUBLIC HEARING

17 Pursuant to the Administrative Procedure Act, Government Code,
18 Chapter 2001, the Texas Department of Transportation will
19 conduct a public hearing to receive comments concerning the
20 proposed rules. The public hearing will be held at 1:30 p.m. on
21 March 7, 2013, in the Ric Williamson Hearing Room, First Floor,
22 Dewitt C. Greer State Highway Building, 125 East 11th Street,
23 Austin, Texas and will be conducted in accordance with the
24 procedures specified in 43 TAC §1.5. Those desiring to make
25 comments or presentations may register starting at 1:00 p.m.

1 Any interested persons may appear and offer comments, either
2 orally or in writing; however, questioning of those making
3 presentations will be reserved exclusively to the presiding
4 officer as may be necessary to ensure a complete record. While
5 any person with pertinent comments will be granted an
6 opportunity to present them during the course of the hearing,
7 the presiding officer reserves the right to restrict testimony
8 in terms of time and repetitive content. Organizations,
9 associations, or groups are encouraged to present their commonly
10 held views and identical or similar comments through a
11 representative member when possible. Comments on the proposed
12 text should include appropriate citations to sections,
13 subsections, paragraphs, etc. for proper reference. Any
14 suggestions or requests for alternative language or other
15 revisions to the proposed text should be submitted in written
16 form. Presentations must remain pertinent to the issues being
17 discussed. A person may not assign a portion of his or her time
18 to another speaker. Persons with disabilities who plan to
19 attend this meeting and who may need auxiliary aids or services
20 such as interpreters for persons who are deaf or hearing
21 impaired, readers, large print or Braille, are requested to
22 contact Government and Public Affairs Division, 125 East 11th
23 Street, Austin, Texas 78701-2483, (512) 463-6086 at least five
24 working days prior to the hearing so that appropriate services
25 can be provided.

1

2 SUBMITTAL OF COMMENTS

3 Written comments on the proposed repeal of §§2.21 and 2.22 and
4 simultaneous replacement of the repealed sections with new
5 Subchapter G, §§2.201-2.214 may be submitted to Robin Carter,
6 Office of General Counsel, Texas Department of Transportation,
7 125 East 11th Street, Austin, Texas 78701-2483 or to
8 RuleComments@txdot.gov with the subject line "TPWD MOU." The
9 deadline for receipt of comments is 5:00 p.m. on March 18, 2013.
10 In accordance with Transportation Code, §201.811(a)(5), a person
11 who submits comments must disclose, in writing with the
12 comments, whether the person does business with the department,
13 may benefit monetarily from the proposed rules, or is an
14 employee of the department.

15

16 STATUTORY AUTHORITY

17 The repeals and new sections are proposed under Transportation
18 Code, §201.101, which provides the Texas Transportation
19 Commission with the authority to establish rules for the conduct
20 of the work of the department, and more specifically,
21 Transportation Code, §201.607(b), which requires the department
22 to adopt memoranda of understanding with each agency that has
23 responsibility for the protection of the natural environment or
24 for the preservation of historical or archeological resources,
25 and to adopt all revisions to these memoranda by rule.

- 1
- 2 CROSS REFERENCE TO STATUTE
- 3 Transportation Code, §201.607.

1 SUBCHAPTER G. MEMORANDUM OF UNDERSTANDING WITH THE TEXAS PARKS
2 AND WILDLIFE DEPARTMENT

3 §2.201. Purpose.

4 (a) Transportation Code, §201.607, requires the Texas
5 Department of Transportation (TxDOT) to adopt a memorandum of
6 understanding (MOU) with each state agency that has
7 responsibilities for the protection of the natural environment
8 or for the preservation of historical or archeological
9 resources, and requires TxDOT and each of the agencies to adopt
10 the memoranda and all revisions by rule. This subchapter
11 contains the memorandum of understanding between TxDOT and the
12 Texas Parks and Wildlife Department (TPWD) that implements that
13 section.

14 (b) This subchapter furthers the environmental policy of
15 TxDOT to protect, preserve, and when possible, enhance the
16 environment, and the responsibility of TPWD for protecting the
17 state's fish and wildlife resource.

18 (c) This MOU supersedes the MOU that was adopted to be
19 effective March 21, 1999; the Memoranda of Agreement for the
20 Finalization of 1998 MOU Concerning Habitat Descriptions and
21 Mitigation that was signed August 2, 2001; the MOU Regarding
22 Mitigation Banking that was signed December 7, 2005; and the
23 Memorandum of Agreement for Sharing and Maintaining Natural

1 Diversity Database Information that was signed April 11, 2007.
2 Nothing in this subchapter supersedes, modifies, or nullifies
3 any other agreement entered into by TxDOT and TPWD.

4 (d) TxDOT and TPWD shall review and by rule shall update
5 this MOU not later than the fifth anniversary of its effective
6 date, as required by Transportation Code, §201.607.

7

8 §2.202. Applicability.

9 (a) Except as provided in subsection (b) of this section,
10 this subchapter applies to:

11 (1) a state transportation project or Federal Highway
12 Administration (FHWA) transportation project conducted by the
13 Texas Department of Transportation (TxDOT);

14 (2) a state transportation project or FHWA transportation
15 project of a private or public entity that is funded in whole or
16 in part by TxDOT;

17 (3) a state transportation project or FHWA transportation
18 project of a private or public entity that requires Texas
19 Transportation Commission or TxDOT approval;

20 (4) a maintenance program for which a programmatic
21 environmental review is conducted under §2.133 of this chapter
22 (relating to Maintenance Projects and Programs); or

23 (5) any other type of project coordinated at TxDOT's

1 request.

2 (b) This subchapter does not apply to individual
3 maintenance projects for which a programmatic environmental
4 review is conducted under §2.133 of this chapter.

5

6 §2.203. Definitions. The following words and terms, when used
7 in this subchapter, or in documents prepared by the Texas
8 Department of Transportation (TxDOT) or Texas Parks and Wildlife
9 Department (TPWD) pursuant to this subchapter, have the
10 following meanings.

11 (1) Coordination--Actions between TxDOT and TPWD that
12 relate to and facilitate TPWD's review of and comments on the
13 potential environmental effects of a transportation project.
14 The goal of coordination is to minimize adverse impacts of
15 transportation projects on the fish and wildlife resources of
16 Texas while maximizing efficient use of each agency's resources.

17 (2) Best management practices (BMPs)--Actions taken to
18 minimize the adverse effects of transportation projects on fish
19 and wildlife resources.

20 (3) Ecological Mapping Systems of Texas (EMST)--An on-
21 going effort to map vegetation of Texas at high resolution using
22 multi-spectral aerial imagery and intensive on-ground
23 verification.

1 (4) Environmental report--A report, form, checklist, or
2 other documentation analyzing an environmental issue in the
3 context of a specific transportation project or presenting a
4 thorough summary of an environmental study conducted in support
5 of an environmental review document, or demonstrating compliance
6 with a specific environmental requirement. The term does not
7 include a permit or other approval outside the scope of the
8 environmental review process.

9 (5) Environmental review document--An environmental
10 assessment, an environmental impact statement, a reevaluation, a
11 supplemental environmental impact statement, or, for an FHWA
12 transportation project, a document prepared to demonstrate that
13 it qualifies as a categorical exclusion when FHWA requires a
14 narrative document as opposed to a checklist. An environmental
15 review document includes any attached environmental reports.

16 (6) Federal Highway Administration (FHWA)--The United
17 States Department of Transportation Federal Highway
18 Administration.

19 (7) FHWA transportation project--A transportation project
20 for which FHWA's approval is required by law to comply with
21 NEPA, FHWA is the lead federal agency, and FHWA agrees TxDOT may
22 act as the joint lead agency under 23 Code of Federal
23 Regulations §771.109.

1 (8) Important remnant vegetation--A type of vegetation
2 that is considered by TPWD to be rare, have local value, or to
3 have substantially declined in recent times. This includes
4 vegetation communities listed in the TCAP as of special
5 conservation concern, or as S3 or rarer, and communities listed
6 as suitable habitat and within the range of any Species of
7 Greatest Conservation Need (SGCN). For the purposes of this
8 MOU, in the event there is a range rank (e.g. S3S4) the lower
9 rank should be used in determining the rarity of the community.

10 (9) Mitigation--For the purpose of this MOU, the actions
11 taken to reduce the adverse impacts to the natural environment
12 that result directly from a transportation project. The term
13 includes actions taken to avoid, minimize, or to compensate for
14 impacts.

15 (10) NEPA--The National Environmental Policy Act,
16 codified at 42 United States Code §§4321, et seq.

17 (11) Plant community association--A plant community of
18 definite floristic composition (dominant/diagnostic species),
19 uniform habitat conditions, and uniform physiognomy.

20 (12) Qualified biologist--A qualified biologist must
21 have, at a minimum, a successful completion of a full 4-year
22 course of study in an accredited college or university leading
23 to a bachelor's or higher degree with a major in biological

1 sciences, natural resource management, wildlife science or
2 management, ecology, zoology, botany, conservation biology, or a
3 closely related field and have experience relevant to the
4 species, habitat, or ecosystems that are being studied or
5 described.

6 (13) Range--The general area where a species would be
7 expected to occur as listed by county on the TPWD website or
8 where available, as shown in range maps provided in or
9 referenced by the TCAP.

10 (14) Right of way--Property acquired for the purpose of a
11 transportation project.

12 (15) Riparian vegetation--River- or creek-dependent
13 habitats which rely on periodic flooding or flushing, sub-
14 irrigated substrates, and other influences of the ephemeral or
15 perennial rivers or creeks to which they are adjacent, including
16 floodplains, wet woodlands, gallery riverine forests, oxbows,
17 swamps, and vegetated islands.

18 (16) Species of Greatest Conservation Need (SGCN)--
19 Species of plants or animals that are identified in the TCAP.

20 (17) State threatened or endangered species--A species of
21 wildlife listed as threatened in 31 TAC §65.175 (relating to
22 Threatened Species) or as endangered in 31 TAC §65.176 (relating
23 to Endangered Species), or a plant species listed as threatened

1 or endangered in 31 TAC §69.8 (relating to Endangered and
2 Threatened Plants).

3 (18) State transportation project--A transportation
4 project that is not a major federal action for the purpose of
5 NEPA.

6 (19) Suitable habitats--Habitats that provide a species
7 or community with the specific physical location and conditions
8 needed to survive and persist. These may include terrestrial
9 and aquatic vegetation communities; a particular watershed,
10 waterbody or stream segment; water quantity or quality
11 thresholds; particular geologic substrates (such as limestone,
12 granite, and sands) or formations (such as karst and caves); or
13 a species host.

14 (20) Texas Conservation Action Plan (TCAP)--The natural
15 resources conservation plan for the State of Texas. The TCAP
16 identifies fish and wildlife resources of the state, including
17 SGCN and their habitats, outlines activities to improve SGCN
18 status and prevent federal threatened or endangered species
19 listings where possible, and articulates conservation needs.
20 The TCAP is stewarded by TPWD and implemented across the state
21 by TPWD and conservation partners. The TCAP provides
22 definitions for ecological systems, plant community
23 associations, and habitats which are important for SGCN.

1 (21) Tier I site assessment--A preliminary site
2 assessment to determine impacts and coordination requirements
3 with TPWD.

4 (22) Tier II site assessment--An environmental report
5 that demonstrates quantitative (acres) and qualitative (high,
6 medium, or low) determination of ecological systems and plant
7 community associations affected by a transportation project.
8 Tier II site assessments require an on-site verification by a
9 qualified biologist to the extent access to new right of way is
10 available.

11 (23) TPWD--Texas Parks and Wildlife Department.

12 (24) TxDOT--Texas Department of Transportation.

13 (25) Transportation enhancement--An activity that is
14 listed under 23 United States Code §101(a)(35), relates to a
15 transportation project, and is eligible for federal funding
16 under 23 United States Code §133.

17 (26) Transportation project--A project to construct,
18 maintain, or improve a highway, rest area, toll facility,
19 aviation facility, public transportation facility, rail
20 facility, ferry, or ferry landing. A transportation enhancement
21 is also a transportation project.

22 (27) Wetland--An area (including a swamp, marsh, bog,
23 prairie pothole, or similar area) having a predominance of

1 hydric soils that are inundated or saturated by surface or
2 groundwater at a frequency and duration sufficient to support,
3 and that under normal circumstances does support, the growth and
4 regeneration of hydrophytic vegetation.

5

6 §2.204. Texas Natural Diversity Database (TXNDD).

7 (a) TPWD maintains the TXNDD. The TXNDD contains
8 information on listed and proposed threatened and endangered
9 species, both state and federal, SGCN, important remnant native
10 vegetation, and other features of Texas natural history. TPWD
11 will continue to provide TXNDD information to TxDOT.

12 (b) This MOU authorizes certain limited use and
13 distribution of this information, and specifies security
14 requirements. The mechanisms established for transferring
15 electronic TXNDD information from TPWD to TxDOT will be used to
16 transfer electronic information relevant to this subchapter,
17 such as TCAP data and EMST data.

18 (c) The TXNDD is the property of TPWD.

19 (d) Except as provided in subsection (e) of this section,
20 TxDOT will not release the TXNDD or any portion of it to outside
21 parties unless TxDOT receives a request under the Texas Public
22 Information Act for the TXNDD or information contained therein,
23 in which case TxDOT will notify TPWD of the request.

1 (e) Texas Public Information Act requests for copies of
2 approved environmental review documents and environmental
3 reports that contain information from the TXNDD do not require
4 TPWD notification.

5 (f) TxDOT will conduct training on access and use of the
6 TXNDD as it relates to transportation projects. The training
7 will be developed jointly by TxDOT and TPWD.

8 (g) TxDOT will provide completed TXNDD reporting forms for
9 observations of tracked SGCN occurrences within TxDOT project
10 areas.

11 (h) TXNDD reporting requirements shall be incorporated into
12 the site assessment protocol.

13

14 §2.205. Determining Need for TPWD Coordination.

15 (a) TxDOT will perform a Tier I site assessment for all
16 projects subject to this subchapter.

17 (1) A Tier I site assessment is used to determine impacts
18 and the need for coordination with TPWD. The Tier I site
19 assessment will define the type and amount of habitat impacted
20 using information from TCAP, EMST, TXNDD, county lists of Rare
21 and Protected Species of Texas maintained by TPWD; county lists
22 of endangered, threatened, and candidate species maintained by
23 the U.S. Fish and Wildlife Service; and the most current aerial

1 photography available. The results of a Tier 1 assessment will
2 be recorded in the Texas ECOS project file.

3 (2) TxDOT will compare the results of a Tier I site
4 assessment to the triggers in §2.206 of this subchapter
5 (relating to Coordination Triggers) and thresholds found in the
6 Threshold Table Programmatic Agreement developed under §2.213 of
7 this subchapter (relating to Programmatic Agreements) to
8 determine the need for coordination with TPWD.

9 (3) Tier I site assessments may require a field visit by
10 a TxDOT qualified biologist to resolve the level of impact and,
11 therefore, the requirement to coordinate a project with TPWD.

12 (b) TxDOT will coordinate with TPWD under §2.207 of this
13 subchapter (relating to Early Project Coordination) or §2.208 of
14 this subchapter (relating to Administrated Project Coordination)
15 concerning a proposed transportation project if a trigger under
16 §2.206 is met or a threshold found in the Threshold Table
17 Programmatic Agreement developed under §2.213 is exceeded, and
18 one of the following conditions is also met:

19 (1) the project has not previously completed
20 coordination;

21 (2) the project has been previously reviewed by TPWD but
22 is the subject of a reevaluation or revision and the scope of
23 the reevaluation or revision relates to an issue on which TPWD

1 commented; or

2 (3) the project has been previously reviewed by TPWD but
3 is the subject of a reevaluation or revision and the change
4 proposed in the reevaluation or revision, considered as a stand-
5 alone transportation project, is a substantial change to the
6 project from the previous coordination.

7 (c) For the purposes of subsection (b) of this section, a
8 change is substantial if it is equal to or greater than at least
9 one of the factors listed in §2.206 of this subchapter, or the
10 proposed new impacts would be greater than had previously been
11 coordinated or now exceed a threshold found in the Threshold
12 Table Programmatic Agreement developed under §2.213 of this
13 subchapter. These changes can include, but are not limited to,
14 increased impacts to fish and wildlife resources or rare
15 vegetation series identified in the TCAP, changes in the status
16 of such resources since the previous coordination, or the
17 identification of a new TXNDD record or records of rare or
18 protected species or managed areas that may be impacted and that
19 are different than those identified when coordination was
20 previously conducted.

21 (d) No coordination under this MOU is required for a
22 project that is not described by subsection (b) of this section.

23

1 §2.206. Coordination Triggers. The triggers described in this
2 section shall be used to determine whether coordination is
3 required as provided by §2.205 of this subchapter (relating to
4 Determining Need for TPWD Coordination).

5 (1) The project is within the range of a state threatened
6 or endangered species or SGCN as identified by the TPWD County
7 list of Rare and Protected Species, and there is suitable
8 habitat, unless BMPs as defined in this MOU are implemented as
9 provided by a programmatic agreement developed under §2.213 of
10 this subchapter (relating to Programmatic Agreements).

11 (2) The project may adversely impact important remnant
12 vegetation based on the judgment of a qualified biologist or as
13 mapped in the TXNDD.

14 (3) The project requires a nationwide permit with pre-
15 construction notification or an individual permit, issued by the
16 United States Army Corps of Engineers.

17 (4) The project includes in the TxDOT right of way or
18 conservation, construction, or drainage easement more than 200
19 linear feet of stream channel for each single and complete
20 crossing of one or more of the following that is not already
21 channelized or otherwise maintained:

22 (A) channel realignment; or

23 (B) stream bed or stream bank excavation, scraping,

1 clearing, or other permanent disturbance.

2 (5) The project contains known isolated wetlands outside
3 existing TxDOT right of way that will be directly impacted by
4 the project.

5 (6) The project may impact 0.10 acre of riparian
6 vegetation based on the judgment of a qualified biologist or as
7 mapped in the EMST.

8 (7) The project disturbs habitat in an area equal to or
9 greater than the area of disturbance indicated in the Threshold
10 Table Programmatic Agreement developed under §2.213 of this
11 subchapter.

12
13 §2.207. Early Project Coordination.

14 (a) It is the intention of TxDOT and TPWD that coordination
15 during early project development will be the primary mechanism
16 for coordination of projects between the agencies.

17 (b) To request early project coordination, TxDOT will
18 provide available and relevant project information to TPWD.
19 TxDOT and TPWD will work cooperatively to identify any
20 additional documentation appropriate for review and comment on
21 the project.

22 (c) TPWD will notify TxDOT when documentation is sufficient
23 to conduct early project coordination. Upon completion of the

1 review, TPWD will provide determinations and recommendations to
2 TxDOT. Upon TPWD submission of determinations and
3 recommendations and TxDOT written response in accordance with
4 Parks and Wildlife Code, §12.0011(c), early project coordination
5 is complete.

6 (d) TPWD determinations and recommendations must be issued
7 by the TPWD Wildlife Habitat Assessment Program, and TxDOT
8 written responses must be issued by TxDOT's Environmental
9 Affairs Division. All other communications during early project
10 coordination may be made by other appropriate organizational
11 units of the respective agencies or other entities approved by
12 the respective agencies. TxDOT's Environmental Affairs Division
13 and the TPWD Wildlife Habitat Assessment Program are each
14 responsible for identifying its respective agency's rules and
15 requirements.

16 (e) TxDOT may make project modifications and request
17 additional TPWD comment. TPWD may review final project
18 documents and final environmental review documents.

19 (f) Projects for which early project coordination is
20 completed do not require additional coordination unless project
21 modifications warrant re-coordination under §2.205(b)(2) or (3)
22 of this subchapter (relating to Determining Need for TPWD
23 Coordination).

1 (g) The TxDOT department delegate for the project will
2 ensure that the results of any coordination with TPWD, including
3 efforts made by TxDOT during project planning and design to
4 avoid and minimize impacts to natural resources, shall be
5 summarized in the project's environmental review document.

6

7 §2.208. Administrated Project Coordination.

8 (a) Administrated project coordination will be conducted
9 for projects subject to coordination under this MOU, but for
10 which early project coordination is not completed.

11 (b) Administrated project coordination will occur between
12 TxDOT's Environmental Affairs Division and the TPWD Wildlife
13 Habitat Assessment Program, unless those two units agree in
14 writing to allow other appropriate organizational units of the
15 respective agencies or other entities approved by the respective
16 agencies to conduct the coordination. TxDOT's Environmental
17 Affairs Division and the TPWD Wildlife Habitat Assessment
18 Program are each responsible for identifying its respective
19 agency's rules and requirements.

20 (c) To initiate administrated project coordination, TxDOT
21 will submit the coordination package to TPWD for review and
22 comment. The coordination package consists of a cover letter
23 that requests review pursuant to this MOU, the Tier II site

1 assessment, and any other environmental studies or reports that
2 TxDOT believes are relevant to TPWD's review of the project.
3 This coordination package is prepared and submitted to TPWD
4 prior to the environmental document being produced.

5 (d) Texas ECOS is a web-based relational database for
6 electronic communication and tracking of environmental
7 coordination. TPWD will be provided access with user privileges
8 to Texas ECOS with the intention of making information exchange
9 paperless and real time. Until TPWD has provided written
10 agreement that Texas ECOS is adequate for TPWD coordination
11 review, all administrated coordination will be conducted in
12 writing and transmitted on agency letterhead.

13 (e) TPWD will comment on any aspect of the project it
14 determines may have adverse impacts to fish and wildlife
15 resources.

16 (f) For written communications, TPWD shall have 45 days
17 from the date TxDOT receives written confirmation that TPWD has
18 received the coordination package for its review, or five
19 business days after the date of transmittal of the coordination
20 package, whichever occurs first, to provide its comments on the
21 project. Once Texas ECOS is accepted as the means for
22 communicating and tracking project coordination, the 45-day
23 clock will start on the first business day after notification to

1 TPWD that the coordination information is available in ECOS.

2 (g) TPWD may request additional information during the 45-
3 day review period, in which case TxDOT will provide the
4 requested information if the information is available or can be
5 reasonably obtained. If the requested information cannot be
6 provided, then TxDOT will inform TPWD and explain why in
7 writing.

8 (h) TxDOT will consider and implement when mutually
9 agreeable, the comments that are submitted by TPWD within the
10 45-day review period. TxDOT will provide TPWD with a written
11 explanation of TxDOT's decisions or other action within 90 days
12 of making a decision related to the comment.

13 (i) If TPWD submits comments after the end of the 45-day
14 review period, TxDOT will consider the comments in making
15 decisions on the project to the extent practicable, and provide
16 a written response in the same manner indicated in subsection
17 (e) of this section.

18 (j) The TxDOT department delegate for the project will
19 ensure that the results of any coordination with TPWD, including
20 efforts made by TxDOT during project planning and design to
21 avoid and minimize impacts to natural resources, shall be
22 summarized in the project's environmental review document.

23

1 §2.209. Tier II Site Assessment.

2 (a) Tier II site assessments are the basis for evaluating
3 project impacts and are the primary environmental report used
4 for administrated coordination under this subchapter. A
5 programmatic agreement will be developed and approved to provide
6 implementation requirements for site assessments.

7 (b) A Tier II site assessment will be prepared for those
8 projects that are subject to coordination under this MOU and for
9 which early project coordination is not completed.

10 (c) A Tier II site assessment must include a review of the
11 TCAP and documentation of the direct impacts from the project to
12 ecosystems, plant community associations, preferred habitat for
13 SGCN that are within range, easements, and land set aside for
14 environmental mitigation. Additionally, a TxDOT qualified
15 biologist will provide field verification to confirm potential
16 direct and indirect impacts, assess the quality of impacted fish
17 and wildlife resources, and determine the areal extent of
18 ecological systems and plant community associations for the
19 entire project area, and whether any or all of the project may
20 result in adverse impacts to fish and wildlife resources.

21 (d) At a minimum, Tier II site assessments will include:

22 (1) a description of the project, including the natural
23 setting in which the project occurs, the existing conditions,

1 and the proposed action;

2 (2) a description of the quantity and quality of any
3 habitat that occurs for species on the county list within or
4 abutting the right of way; and

5 (3) any proposed steps to be taken to mitigate potential
6 adverse impacts on resources.

7 (e) Protocols for review of TXNDD information and an
8 interpretation of the data will be included in the site
9 assessment programmatic agreement.

10 (f) It is understood that a lack of access to the new right
11 of way may limit the amount of information available for the
12 habitat description. Existing data shall be used to provide a
13 best estimate in these circumstances.

14

15 §2.210. Communication during Construction.

16 (a) TxDOT will communicate with TPWD when unforeseen
17 impacts on species that are included on TPWD county lists or
18 their habitat are identified during construction of a project.

19 (b) TPWD and TxDOT will conduct site visits at the request
20 of either party and upon scheduling agreement of both parties.

21

22 §2.211. Project Tracking. TxDOT will maintain records of all
23 projects subject to this subchapter. TPWD may request

1 information electronically from TxDOT until Texas ECOS is
2 operational at TPWD offices. The information request should
3 specify time ranges and geographic areas for the records. TxDOT
4 will respond within 30 days of the request.

5

6 §2.212. Site Access. TPWD may make site visits to any TxDOT
7 construction or maintenance site. TPWD must provide TxDOT
8 timely notification of its intention to conduct an on-site visit
9 to an ongoing construction site and must comply with all safety
10 requirements identified in TxDOT's response or as instructed by
11 the on-site responsible person.

12

13 §2.213. Programmatic Agreements.

14 (a) The Interagency MOU Implementation Team created under
15 §2.214 of this subchapter (relating to Interagency MOU
16 Implementation Team) will develop programmatic agreements to
17 address issues not specifically identified in this subchapter.
18 Programmatic agreements must be approved by the Executive
19 Director of each agency prior to their effective date.

20 (b) At a minimum, the Interagency MOU Implementation Team
21 will develop programmatic agreements described in this
22 subsection.

23 (1) A programmatic agreement detailing the information

1 required to be included in a Tier II site assessment will be
2 developed. This programmatic agreement will set forth the Tier
3 II site assessment requirements in greater detail than that
4 provided in §2.209 of this subchapter (relating to Tier II Site
5 Assessment).

6 (2) A threshold table programmatic agreement will be
7 developed to establish thresholds to be used in making the
8 determination required by §2.205 of this subchapter (relating to
9 Determining Need for TPWD Coordination).

10 (3) A programmatic agreement concerning TxDOT-funded
11 positions at TPWD will be developed. The goal of this
12 programmatic agreement will be to reduce the number of projects
13 referred to TPWD for coordination by 50 percent, reduce average
14 project review times, and increase the environmental value of
15 project mitigation.

16 (4) A programmatic agreement for updating and supporting
17 the TXNDD to be a best in class resource will be developed.

18 (5) A programmatic agreement concerning conservation
19 projects will be developed.

20 (6) A programmatic agreement concerning BMPs will be
21 developed. The interagency team will develop new BMPs for
22 adoption by TxDOT and TPWD to reduce the number of projects
23 referred to TPWD as a result of meeting triggers for state

1 threatened or listed species, and other triggers as appropriate,
2 and to further mitigate the adverse impacts of transportation
3 projects.

4 (c) Programmatic agreements may be changed at any time by
5 the written concurrence of the Executive Directors of TxDOT and
6 TPWD.

7

8 §2.214. Interagency MOU Implementation Team.

9 (a) The Executive Directors of TxDOT and TPWD or their
10 delegates shall mutually appoint an interagency team which will
11 be formed within two months of the effective date of this MOU
12 and will meet, at a minimum, quarterly for the first two years
13 of implementation of this MOU, and on a semi-annual basis
14 thereafter, unless a majority of the team deems it necessary to
15 meet more frequently.

16 (b) The interagency team will prepare recommendations for
17 the next update of this MOU.

18 (c) The interagency team will develop metrics for tracking
19 the effectiveness of this MOU and will provide an annual report
20 to the leadership of TxDOT and TPWD. This report will include,
21 at a minimum, the actual number of projects coordinated, the
22 reduction in the number of projects coordinated as a result of
23 changes to the environmental review process effectuated by this

1 MOU, an analysis of the time to complete project coordination,
2 the adverse impacts of transportation projects by habitat type,
3 the conservation of habitat resulting from mitigation,
4 evaluation of the value of any TxDOT-funded positions at TPWD,
5 and recommendations regarding continuation of those positions.

6 (d) The interagency team will evaluate and make
7 recommendations to improve the usefulness and applicability of
8 TPWD comments.

9 (e) The interagency team will facilitate reviews and
10 comments on agency guidance and protocols developed to implement
11 this MOU.

12 (f) The interagency team shall review the early project
13 coordination process periodically and make recommendations for
14 improving process efficiency and usefulness. The interagency
15 team will be responsible for attempting to resolve any conflict
16 between TPWD and TxDOT that results from the implementation of
17 this subchapter before elevating to agency management.

1 SUBCHAPTER B. MEMORANDA OF UNDERSTANDING WITH
2 NATURAL RESOURCE AGENCIES

3 §2.21. Purpose. Transportation Code, §201.607, requires the
4 Texas Department of Transportation (TxDOT) to adopt a memorandum
5 of understanding with each state agency that has
6 responsibilities for the protection of the natural environment
7 or for the preservation of historical or archeological
8 resources, and requires the department and each of the agencies
9 to adopt the memoranda and all revisions by rule. This
10 subchapter contains memoranda of understanding adopted by TxDOT
11 to implement that section.

12
13 §2.22. Memorandum of Understanding with the Texas Parks and
14 Wildlife Department.

15 (a) Purpose.

16 (1) It is the policy of the Texas Department of
17 Transportation (TxDOT) to:

18 (A) investigate fully the environmental impacts of
19 TxDOT transportation projects, coordinate these projects with
20 applicable state and federal agencies, and reflect these
21 investigations and coordinations in the environmental
22 documentation for each project;

23 (B) base project decisions on a balanced consideration

1 of the need for a safe, efficient, economical, and
2 environmentally sound transportation system;

3 (C) receive input from the public through the public
4 involvement process; and

5 (D) utilize a systematic interdisciplinary approach as
6 an essential part of the development process for transportation
7 projects.

8 (2) In order to pursue this policy, TxDOT and the Texas
9 Parks and Wildlife Department (TPWD) have agreed to develop this
10 Memorandum of Understanding (MOU) that will supersede the MOU
11 which became effective on October 15, 1992.

12 (3) Transportation Code, §201.607, directs TxDOT to adopt
13 memoranda of understanding with appropriate environmental
14 resource agencies, including TPWD.

15 (4) The rules for coordination of state-assisted
16 transportation projects found in §§2.40-2.51, of this title
17 (relating to Environmental Review and Public Involvement for
18 Transportation Projects), underline the need for and importance
19 of comprehensive environmental coordination for all
20 transportation projects.

21 (5) It is the purpose of this MOU to provide a formal
22 mechanism by which the TPWD may review TxDOT transportation
23 projects, including those that have the potential to affect

1 natural resources within facilities owned or managed by TPWD.
2 This review will promote the mutually beneficial sharing of
3 information between TxDOT and TPWD, which will assist TxDOT in
4 making environmentally sound decisions.

5 (b) Definitions. The following words and terms, when used
6 in this section shall have the following meanings, unless the
7 context clearly indicates otherwise.

8 (1) Construction--Activities which involve the building
9 of transportation facilities on a new location, or the
10 expansion, rehabilitation, or reconstruction of an existing
11 facility.

12 (2) Early project development--The phase of project
13 development that includes, but is not limited to, project
14 planning, field surveys, database searches, in-house
15 coordination, initial resource agency coordination, and scoping,
16 if necessary prior to selection of alternatives.

17 (3) Environmental document--A decision-making document
18 which incorporates the results of environmental studies,
19 coordination and consultation efforts, and engineering elements.
20 Types of documents include categorical exclusions, environmental
21 assessments, and environmental impact statements.

22 (4) Habitat--Areas of intrinsic biological resource
23 value, the disturbance of which would not require: a U.S. Army

1 Corps of Engineers permit; a U.S. Coast Guard permit;
2 coordination under the Endangered Species Act, Fish and Wildlife
3 Coordination Act, or the Migratory Bird Treaty Act.

4 (5) Maintenance--Activities which involve the repair or
5 preservation of an existing facility to prevent that facility's
6 degradation to an unsafe or irreparable state, or which involve
7 the treatment of an existing facility or its environs to meet
8 acceptable standards of operations or aesthetic quality. Such
9 activities generally do not require the acquisition of
10 additional right of way.

11 (6) Maintenance programs--A collection of maintenance
12 activities performed singularly or collectively on the state
13 highway system. The following categories have been established
14 as maintenance programs: bridge maintenance; customer service;
15 debris and spills; drainage; ferry maintenance; maintenance
16 enhancement; pavement maintenance; roadside appurtenances;
17 traffic pavement markings; and vegetation management.

18 (7) Memorandum of Understanding (MOU) --A formal document
19 which outlines the relationship between agencies or parties,
20 including the responsibilities and jurisdiction of each party.

21 (8) Mitigation--A means of addressing adverse impacts to
22 the natural environment including, in general order of
23 preference, avoidance, minimization, and compensation, the

1 commitment for which will be included in the environmental
2 document wherever the need is mutually agreed upon by TxDOT and
3 TPWD, including detailed plans where practicable.

4 (9) National Environmental Policy Act of 1969 (NEPA)--The
5 basic national charter for protection of the environment which
6 establishes policy, sets goals, and provides means for carrying
7 out the policies. NEPA is binding upon federal agencies,
8 including the Federal Highway Administration, and is usually
9 followed as an environmental guideline by state and local
10 agencies. In this document, NEPA includes the Act itself, its
11 subsequent amendments, and implementing regulations.

12 (10) Project development--The planning process of a
13 transportation project which includes early project development,
14 environmental studies including the development of the
15 appropriate environmental documentation, public involvement,
16 engineering design, and right of way acquisition.

17 (11) Public involvement--An important, ongoing phase of
18 the project planning process which encourages and solicits
19 public input and seeks to provide the public the opportunity to
20 become fully informed regarding project development.

21 (12) Right of way--The land provided for a transportation
22 facility, for example, the roadway itself (including shoulders),
23 and areas between the roadway and adjacent properties (including

1 drainage facilities).

2 (13) Transportation projects--All surface transportation
3 projects designed, constructed, and maintained by TxDOT,
4 excluding toll projects.

5 (c) Responsibilities.

6 (1) Texas Department of Transportation. The
7 responsibilities of TxDOT pertain primarily to:

8 (A) planning and designing safe, efficient, effective,
9 and environmentally sound transportation facilities, while
10 avoiding, minimizing, or compensating for anticipated
11 environmental impacts to the fullest extent practicable;

12 (B) timely and efficient construction of transportation
13 facilities in a manner consistent with approved plans or
14 agreements that TxDOT has executed regarding the protection of
15 the natural environment to provide safe, efficient, and
16 environmentally sound transportation facilities for the
17 traveling public;

18 (C) the ongoing maintenance of these facilities to
19 provide safe, efficient, and environmentally sound
20 transportation facilities for the traveling public, and
21 dedication to the protection of natural resources within the
22 jurisdiction of TxDOT; and

23 (D) as directed by House Bill 1359, 74th Legislature,

1 1995 which amended House Bill 9, 72nd Legislature, 1991, the
2 construction, repair, and maintenance of roads in and adjacent
3 to state parks, state fish hatcheries, state wildlife management
4 areas, and support facilities for parks, fish hatcheries, and
5 wildlife management areas. (These items have been implemented
6 under a separate memorandum of agreement between TxDOT and TPWD
7 dated September 1, 1998.)

8 (2) Texas Parks and Wildlife Department.

9 (A) The responsibilities of TPWD relate primarily to
10 its functions as a natural resource agency, including its
11 resource protection functions, designated by Parks and Wildlife
12 Code, Chapters 67, 68, 88, and §12.001 and §12.0011, and
13 include:

14 (i) acting as the state agency with primary
15 responsibility to protect the state's fish and wildlife
16 resources;

17 (ii) providing recommendations that will promote fish
18 and wildlife resources to local, state, and federal agencies
19 that approve, permit, license, or construct developmental
20 projects;

21 (iii) providing information on fish and wildlife
22 resources to any local, state, or federal agencies or private
23 organizations that make decisions affecting those resources; and

1 (iv) maintaining a listing of endangered and
2 threatened species and providing these listings to local, state,
3 and federal agencies that make decisions affecting those
4 species.

5 (B) TPWD will identify and appoint appropriate staff to
6 coordinate with TxDOT staff on transportation projects and to
7 review project-specific information and documentation.

8 (d) Provisions. For the purpose of this MOU, the
9 activities of TxDOT are divided into the following categories.

10 (1) Early project development. TxDOT may coordinate the
11 potential impacts with TPWD Wildlife Habitat Assessment Program
12 staff or the appropriate selected regional staff. TPWD will
13 provide a list of regional director contacts for district use.
14 TPWD staff may provide information concerning the occurrence of
15 unique or important wildlife travel or activity areas, sensitive
16 habitats, important vegetative communities or ecosystems,
17 suitability of habitat for threatened or endangered species, or
18 other natural resource information that could identify potential
19 undesirable impacts and associated planning constraints before
20 completion of a project design, and selection of a preferred
21 project alternative. The level of information provided by TPWD
22 will be consistent with protocol established to protect
23 confidentiality of site-specific data collected on private lands

1 pursuant to Parks and Wildlife Code, §12.0251 and §12.103.
2 TxDOT will provide project-specific information, as available,
3 to TPWD regional contacts. Following appropriate early
4 coordination that may involve TPWD regional staff, TxDOT may
5 solicit written concurrence from TPWD of a proposed project's
6 potential impacts and mitigation during early project
7 development. However, initially, written concurrence must be
8 coordinated through the Wildlife Habitat Assessment Program of
9 TPWD. Eventually, projects successfully coordinated with TPWD
10 regional staff during early project development may not require
11 additional coordination with TPWD as required under paragraph
12 (2) of this subsection, as determined by mutual agreement
13 between TPWD and TxDOT.

14 (2) Project development. Upon completion of TxDOT's
15 preliminary project review, a copy of the environmental
16 documentation shall be furnished to TPWD for all projects
17 meeting the criteria for coordination unless previously
18 documented as shown in paragraph (1) of this subsection.

19 Coordination will be conducted for projects that:

20 (A) involve more than 1.0 acre (0.4 hectares) of new
21 right of way within floodplains or creek drainages in rural or
22 undeveloped urban areas;

23 (B) require channel modifications to streams, rivers,

1 or water bodies;

2 (C) involve a channel realignment involving the
3 creation of new drainage ways or other excavation impacting more
4 than 1.0 acre (0.4 hectares) of mature woody vegetation;

5 (D) require any excavation (scraping, clearing, or
6 other surface disturbance) of the existing channel outside of
7 TxDOT's existing right of way or of the channel inside TxDOT's
8 existing right of way which is not routinely maintained and
9 exhibits native vegetation;

10 (E) might affect mature woody vegetation, dense mature
11 brush, including any significant remnant native vegetation
12 (e.g., undisturbed native prairie or bottomland hardwood, etc.);

13 (F) are within the range and in suitable habitat of any
14 state or federally listed threatened or endangered species;

15 (G) involve mitigation plans, or otherwise involve
16 proposals to redress project impacts on fish, wildlife, or plant
17 resources;

18 (H) have previous environmental documentation but where
19 three years have passed without major action(s) (i.e., final
20 design, acquisition of right of way, approval of plans,
21 specifications, or estimates) and the project has not been
22 reviewed by TPWD, but meets the above listed criteria; or

23 (I) have previous environmental documentation but where

1 three years have passed with major action(s) and the project may
2 or may not have been reviewed by TPWD, but meets the above
3 listed criteria.

4 (3) Elements of documentation. The level of
5 environmental documentation prepared and provided to TPWD will
6 be of sufficient detail to allow determination of the kinds of
7 vegetation communities that will be affected and areal extent of
8 vegetation impacted. The biological and natural resource
9 information contained in the environmental documentation will be
10 interpreted and verified by a qualified biologist prior to
11 coordination with TPWD. When available, environmental
12 documentation may be supported by aerial photography or on-
13 ground photography taken by a hand-held camera.

14 (4) Interagency team. An interagency team consisting of
15 staff from both TxDOT and TPWD will be established within 60
16 days from the signature date of this MOU.

17 (A) This team will:

18 (i) develop procedures and methodologies for
19 providing habitat characterizations and impact descriptions, and
20 develop supporting information for the environmental
21 documentation; and

22 (ii) establish criteria for the appropriateness,
23 planning, and implementation of compensatory mitigation when

1 TxDOT has identified a need, or when TxDOT and TPWD mutually
2 have identified the need, for compensation (Because mitigation
3 planning or implementation may be completed after the contract
4 for the project is awarded, no project shall be delayed pending
5 mitigation.).

6 (B) In addition, TxDOT has the final decision on the
7 implementation of a given mitigation plan. However, if TxDOT
8 determines that mitigation is not feasible, an explanation of
9 why it will not be undertaken shall be provided to TPWD.

10 (5) Review period. TPWD shall have a period of 45 days
11 from the date of the transmittal letter to review project
12 environmental documentation. Any comments submitted by TPWD
13 shall be considered by TxDOT in making project decisions. If
14 additional information is requested by TPWD it shall be provided
15 by TxDOT, if such information is available or reasonably can be
16 obtained. In such case, TPWD shall have an additional 30 days
17 from the date of TxDOT's second transmittal letter that will
18 accompany the additional information forwarded to TPWD to review
19 documentation.

20 (6) Final disposition of projects. TxDOT reserves the
21 right to determine the final disposition of proposed
22 transportation projects, based on a considered analysis of TPWD
23 comments and practical alternatives as they relate to TxDOT's

1 responsibilities as described in this document.

2 (7) Ongoing coordination. When necessary, construction
3 activities coordination between TxDOT and TPWD shall continue
4 through the construction phase to provide for the protection of
5 natural resources. Mitigation proposals agreed upon by TxDOT and
6 TPWD relating to construction activities will be included in the
7 project construction plans.

8 (8) Unforeseen protected species impacts. In the event
9 that unforeseen impacts to endangered or threatened species or
10 their habitat under TPWD jurisdiction are identified after
11 construction has commenced, TxDOT will coordinate with TPWD
12 regarding such resources.

13 (9) Maintenance program review. TPWD will be provided
14 the opportunity to review TxDOT maintenance programs prior to
15 implementation of each program or plan. TPWD will be provided an
16 opportunity to comment and make suggested revisions to the
17 programs, and TxDOT will give consideration to these suggested
18 revisions. If TxDOT does not fully implement the revisions
19 suggested by TPWD, TxDOT will provide a written explanation to
20 TPWD.

21 (10) TPWD document commentary. Comments received by TxDOT
22 from TPWD in the coordination process shall, when applicable,
23 include:

1 (A) guidance as to what species may be present within
2 the project area that may require special considerations in
3 terms of those species and their habitat;

4 (B) suggested mitigation measures; and

5 (C) recommendations for protection of natural resources
6 under TPWD jurisdiction, as defined in Parks and Wildlife Code,
7 §12.001 and §12.0011.

8 (e) Special provisions relating to information exchange.

9 (1) TxDOT and TPWD shall cooperate in the maintenance and
10 enhancement of a computer-based information system detailing the
11 distribution of species listed as threatened or endangered
12 (including state and federal listings), or those which are of
13 concern and are being considered for listing.

14 (2) TxDOT and TPWD shall cooperate to develop a protocol
15 addressing the transfer of the computer-based information on
16 locations of protected species and/or habitats of concern, the
17 use and distribution of this information, and the security of
18 the information. The level of information provided by TPWD will
19 be consistent with protocol established to protect
20 confidentiality of site specific data collected on private lands
21 pursuant to Parks and Wildlife Code, §12.0251 and §12.103.

22 (f) Review of MOU. This MOU shall be reviewed and updated,
23 at a minimum, every fifth year beginning January 1, 2002, and

- 1 TxDOT and TPWD by rule shall adopt the MOU and all revisions to
- 2 the MOU.

Repeals