

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Commission (commission) finds it necessary to propose the repeal of §2.24, and the simultaneous replacement of the repealed sections with new Subchapter H, Memorandum of Understanding with the Texas Historical Commission, §§2.251-2.278, relating to coordination of environmental review of transportation projects by the Texas Historical Commission, 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 §2.24 and new §§2.251-2.278 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

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Minute Number Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes the
3 repeal of §2.24, Memorandum of Understanding with the Texas
4 Historical Commission. The department proposes the simultaneous
5 replacement of the repealed section with new Subchapter H,
6 §§2.251-2.278, Memorandum of Understanding with the Texas
7 Historical Commission.

8

9 EXPLANATION OF PROPOSED REPEAL 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 historic and
18 archeological resources are given full consideration in
19 accomplishing the department's activities, the department has
20 evaluated its MOU with the Texas Historical Commission (THC)
21 adopted in 2004, and finds it necessary to repeal existing §2.24
22 and simultaneously propose new Subchapter H, §§2.251-2.278.

23

24 The proposed new MOU between THC 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 May 20, 2004, with an MOU that
3 more effectively streamlines THC's review of the department's
4 projects, and simultaneously better allows THC to focus on those
5 projects most likely to affect historic or archeological
6 resources. The proposed MOU has several new provisions and
7 procedures that were developed based on experience gained from
8 numerous projects that the department has submitted and THC has
9 reviewed since the 2004 MOU was executed. It is also better
10 organized than the existing MOU, with different subject areas
11 broken into separate sections. Additionally, the proposed MOU
12 reflects changes made by the department's recent revision of its
13 environmental review rules, published in the March 9, 2012 issue
14 of the *Texas Register* (37 TexReg 1727).

15

16 SECTION BY SECTION EXPLANATION OF PROPOSED MOU

17 Section 2.251 sets out the purpose of the MOU, identifies the
18 statutory provisions under which the MOU is adopted, and
19 explains that the MOU supersedes the 2004 MOU.

20

21 Section 2.252 sets forth the applicability of the MOU by
22 explaining that it applies to any transportation project for
23 which an environmental review is performed under the
24 department's environmental review rules, and any other project
25 coordinated at the department's request. Whether coordination

1 for a given project is required under the MOU is addressed in
2 §2.255, concerning Coordination Responsibilities, §2.257,
3 concerning Projects Excluded from Review for Archeology
4 Resources and Cemeteries, and §2.270, concerning Projects
5 Excluded from Review for Non-Archeological Historic Properties.
6 Section 2.252 also clarifies that federally funded, licensed, or
7 permitted projects may follow the procedures set forth in the
8 MOU only if doing so would not conflict with the lead federal
9 agency's environmental rules.

10

11 Section 2.253 explains that, for federally funded projects, the
12 terms of a programmatic agreement among the department, the
13 Federal Highway Administration, the Texas State Historic
14 Preservation Officer, and the Advisory Council on Historic
15 Preservation, if applicable, will control rather than terms of
16 the MOU. The section also obligates the department and THC to
17 seek to revise the existing programmatic agreement to reflect
18 the procedures of the MOU.

19

20 Section 2.254 contains definitions of various terms used in the
21 MOU.

22

23 Section 2.255 sets forth the department's and THC's coordination
24 responsibilities under the MOU. It explains that the department
25 shall coordinate with THC on all transportation projects for

1 which the department is the project sponsor under 43 TAC §2.7
2 unless the project is of a type that is exempt from coordination
3 under another section of the MOU. Section 2.255 also specifies
4 that coordination required by the MOU must be conducted by or
5 through the department's Environmental Affairs Division, unless
6 otherwise agreed to by THC. The section also clarifies that
7 coordination of work in department right-of-way associated with
8 a project for which the department is not the project sponsor
9 under 43 TAC §2.7 is the responsibility of the project sponsor,
10 and not the department, unless the department and THC agree that
11 the department will coordinate the project. Finally, the
12 section generally describes THC's coordination responsibilities
13 under the MOU, such as to conduct any required review in an
14 efficient manner.

15
16 Section 2.256 sets parameters on staff qualifications and the
17 use of consultants for cultural resource investigations
18 undertaken in accordance with the MOU. For example, all staff
19 conducting such an investigation must meet certain professional
20 standards detailed in the section.

21
22 Section 2.257 exempts certain types of routine projects from the
23 requirement to conduct a project-specific review for impacts to
24 archeological resources or cemeteries. Examples of exempt
25 project types include installation, repair, or replacement of

1 fencing, resurfacing, and replacement, upgrade, or repair of
2 safety barriers. The section further explains that project
3 types exempted from review under the MOU are also exempt from
4 other THC rules regarding project-specific investigations or
5 coordination for potential impacts to cemeteries, unless certain
6 conditions are present.

7
8 Section 2.258 sets forth the procedures for project coordination
9 when review for archeological resources and cemeteries is
10 required. If, after conducting an evaluation of the area for
11 potential effects for a given project, the department determines
12 that the project will not affect archeological historic
13 properties and that the area of potential effects contains no
14 cemeteries, the department may approve the project to proceed to
15 construction without review by THC. The department must submit
16 to THC a quarterly report of projects so evaluated and
17 internally approved.

18
19 If the department determines that a given project may affect
20 archeological historic properties, or that the area of potential
21 effects contains a cemetery, the department must submit to the
22 THC a request for review of the project. Section 2.258 explains
23 the different types of findings, determinations, and
24 recommendations that the department must include in its request
25 for review. If the project will have an adverse effect on an

1 archeological historic property or cemetery within the area of
2 potential effects, the department must recommend to THC
3 appropriate means by which to resolve the potential adverse
4 effect. The section specifies the various forms the resolution
5 of adverse effects may take, and prescribes various requirements
6 for cases in which data recovery is the selected means for
7 resolving adverse effects. Finally, §2.258 sets parameters on
8 when and how THC must respond to a request for review submitted
9 by the department.

10

11 Section 2.259 contains provisions governing the department's
12 investigations of a projects' area of potential effects,
13 including provisions for determining when field investigations
14 are required, and when background information such as maps and
15 project-area photographs may be used.

16

17 Section 2.260 sets forth procedures for THC's issuance of
18 antiquities permits to the department. Under these procedures,
19 the department is not required to submit an antiquities permit
20 application provided that certain conditions are satisfied, such
21 as that the department provides THC with notification of the
22 work, and that the work is overseen by the archeological staff
23 of the department's Environmental Affairs Division. The section
24 also includes provisions allowing the department to initiate
25 work under an emergency permit when conditions of natural

1 disasters, man-made disasters, or post-review discovery
2 necessitate immediate action. Provisions governing the
3 department's work under permits issued by THC, such as
4 provisions explaining when work under a permit will be
5 considered complete, are also included in §2.260.

6
7 Section 2.261 contains provisions governing the department's
8 conduct of surveys to investigate archeological resources and
9 cemeteries. For example, the section explains that subsurface
10 investigation is not required where it can be demonstrated that
11 the portion of the site to be affected is not likely to have
12 sufficient integrity to be eligible for designation as a State
13 Antiquities Landmark.

14
15 Section 2.262 prescribes methods to be used by the department
16 when conducting test excavations. The section allows the
17 department to depart from the specified methods in cases where
18 it is deemed appropriate, but requires the department to justify
19 deviations in the resulting written report. Section 2.262 also
20 requires data from test excavation projects to be made available
21 to qualified researchers.

22
23 Section 2.263 requires the department, under certain conditions,
24 to develop public educational outreach projects for significant
25 data recovery investigations. Section 2.263 requires data from

1 data recovery projects to be made available to qualified
2 researchers.

3
4 Section 2.264 concerns exhumation, which is a form of
5 investigation to resolve a project's adverse effects on a
6 cemetery. The section explains when exhumation efforts may
7 begin, and identifies tasks that represent a sufficient,
8 reasonable, and good faith effort to identify remains and any
9 next of kin associated with burials in unknown or abandoned
10 cemeteries.

11
12 Section 2.265 prescribes the procedures the department must
13 follow when it discovers an archeological site discovered after
14 it has awarded a construction contract. The department must
15 immediately suspend construction or any other activities that
16 would affect the site, and perform various specified tasks
17 before resuming.

18
19 Section 2.266 concerns standard treatments for particular
20 resource types. It sets forth standards to be followed by the
21 department when encountering isolated wells or cisterns
22 unassociated with other remains, or burnt rock midden features
23 that have not been obviously destroyed by modern disturbances.

24
25 Section 2.267 sets standards for the department's recovery and

1 curation of artifacts. For example, while the department may
2 temporarily house artifacts and samples during laboratory
3 analysis and research, it must transfer them to a permanent
4 curatorial facility upon completion of the analysis.

5
6 Section 2.268 establishes minimum documentation requirements for
7 projects subject to review for archeological resources and
8 cemeteries under the MOU.

9
10 Section 2.269 requires the department to submit to THC quarterly
11 reports listing all projects for which the department documented
12 that no historic properties are present in the area of potential
13 effects, or that the project will have no adverse effects on
14 archeological historic properties or cemeteries.

15
16 Section 2.270 pertains to review for impacts to non-
17 archeological historic properties. It lists a number of project
18 types that pose limited potential to affect historic properties,
19 and provides that, for listed project types, if qualified
20 department staff determine that no evaluation of a given project
21 is needed, then none is required under the MOU or under other
22 THC rules.

23
24 Section 2.271 explains the procedure for review of a project for
25 impacts to non-archeological historic properties when an

1 evaluation is required. The section sets forth two different
2 levels of review: internal review and coordinated review. For a
3 project subject to review for impacts to non-archeological
4 historic resources, if department personnel determine that the
5 project will have no effect or no adverse effect on historic
6 properties, then only internal review is required. Such a
7 project is required to be recorded on a quarterly report.

8

9 If a project is determined by department personnel to have an
10 adverse effect on a historic property, then coordinated review
11 is required. Under the §2.271 procedures, THC must respond
12 within 20 calendar days of the department's request for review
13 by indicating whether an affected historic property will require
14 a historic structures permit, or whether THC intends to initiate
15 a State Antiquities Landmark nomination for the affected
16 property. If THC does not respond within 20 days, the
17 department may assume THC's concurrence with its determinations,
18 and proceed with construction of the project. Section 2.271
19 also contains provisions governing notification of work
20 affecting a county courthouse, projects that may subsequently
21 require a federal permit or change to federal funding and that
22 involve a direct taking of an historic property, and required
23 documentation both for projects internally reviewed and for
24 projects for which coordinated review is conducted.

25

1 Section 2.272 explains that, in cases in which the department
2 cannot gain access to private land needed to complete an
3 investigation under the MOU prior to approval of the
4 environmental review document, it must complete the
5 investigation once access is obtained, but prior to any
6 construction-related impacts.

7
8 Section 2.273 provides that if the department utilizes the
9 procedures set forth in the MOU, then it will be considered to
10 be in compliance with any other applicable THC requirements. In
11 other words, with respect to department projects, the terms of
12 the MOU control over THC's generally applicable rule
13 requirements.

14
15 Section 2.274 specifies that any project-specific agreements
16 reached between the department and THC will supersede the
17 requirements of the MOU.

18
19 Section 2.275 obligates the department and THC to collaborate on
20 improvements to their programs and development of innovative
21 solutions for expedited review procedures, such as using project
22 outcomes to refine approaches to resource identification,
23 evaluation, treatment methods, programmatic mitigation measures
24 and interagency agreements that facilitate early coordination,
25 streamlining, and expedited review of the department's

1 transportation projects.

2

3 Section 2.276 allows THC to review department project files for
4 specific undertakings carried out under the MOU, and recommend
5 process improvements based on issues identified during the
6 review.

7

8 Section 2.277 provides that THC and department staff will be
9 responsible for attempting to resolve any conflict between THC
10 and the department that results from the implementation of this
11 subchapter before elevating to agency management.

12

13 Section 2.278 provides that THC and the department will convene
14 every four years to review, update, or extend this agreement.
15 This review cycle is shorter than the five-year review cycle
16 prescribed by Transportation Code, §201.607(a).

17

18 FISCAL NOTE

19 James Bass, Chief Financial Officer, has determined that for
20 each of the first five years in which the new subchapter as
21 proposed is in effect, there will be no fiscal implications for
22 state or local governments as a result of enforcing or
23 administering the new subchapter.

24

25 Carlos Swonke has certified that there will be no significant

1 impact on local economies or overall employment as a result of
2 enforcing or administering the new subchapter.

3

4 PUBLIC BENEFIT AND COST

5 Mr. Swonke has also determined that for each year of the first
6 five years in which the new subchapter is in effect, the public
7 benefit anticipated as a result of enforcing or administering
8 the new subchapter will be increased efficiency in completing
9 the environmental review of the department's projects, and more
10 effective coordination with THC on the department's projects.

11 There are no anticipated economic costs for persons required to
12 comply with the sections as proposed. There will be no adverse
13 economic effect on small businesses.

14

15 COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

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

22

23 The department reviewed this action for consistency with the CMP
24 goals and policies under the rules promulgated by the Coastal
25 Coordination Council, which remain in effect until superseded by

1 rules of the General Land Office. Because this MOU relates to
2 review of impacts to historic or archeological resources, rather
3 than impacts to natural resources, the department has not
4 identified any CMP goals and policies applicable to this MOU.

5
6 A copy of this rulemaking will be submitted to the General Land
7 Office for its comments on the consistency of the proposed
8 rulemaking with the CMP. The department requests that the
9 public also give comment on whether the proposed rulemaking is
10 consistent with the CMP.

11
12 PUBLIC HEARING

13 Pursuant to the Administrative Procedure Act, Government Code,
14 Chapter 2001, the Texas Department of Transportation will
15 conduct a public hearing to receive comments concerning the
16 proposed rules. The public hearing will be held at 1:30 p.m. on
17 Thursday, March 7, 2013, in the Ric Williamson Hearing Room,
18 First Floor, Dewitt C. Greer State Highway Building, 125 East
19 11th Street, Austin, Texas and will be conducted in accordance
20 with the procedures specified in 43 TAC §1.5. Those desiring to
21 make comments or presentations may register starting at 1:00
22 p.m. Any interested persons may appear and offer comments,
23 either orally or in writing; however, questioning of those
24 making presentations will be reserved exclusively to the
25 presiding officer as may be necessary to ensure a complete

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

22

23 SUBMITTAL OF COMMENTS

24 Written comments on the proposed repeal of §2.24 and
25 simultaneous replacement of the repealed section with new

1 Subchapter H, §§2.251-2.278 may be submitted to Robin Carter,
2 Office of General Counsel, Texas Department of Transportation,
3 125 East 11th Street, Austin, Texas 78701-2483 or to
4 RuleComments@txdot.gov with the subject line "THC MOU." The
5 deadline for receipt of comments is 5:00 p.m. on March 18, 2013.
6 In accordance with Transportation Code, §201.811(a)(5), a person
7 who submits comments must disclose, in writing with the
8 comments, whether the person does business with the department,
9 may benefit monetarily from the proposed rules, or is an
10 employee of the department.

11

12 STATUTORY AUTHORITY

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

22

23 CROSS REFERENCE TO STATUTE

24 Transportation Code, §201.607.

1 follow the procedures of this subchapter only if doing so would
2 not conflict with environmental rules promulgated by the lead
3 federal agency.

4

5 §2.253. Programmatic Agreements.

6 (a) Provisions of this MOU may be implemented, in part,
7 through a Programmatic Agreement (PA) among the Federal Highway
8 Administration (FHWA), the Texas State Historic Preservation
9 Officer (TSHPO), the Advisory Council on Historic Preservation
10 (Council), and TxDOT.

11 (b) With respect to federally funded projects, instead of
12 the procedures set forth in this MOU, THC and TxDOT shall use
13 the applicable procedures outlined in their First Amended
14 Programmatic Agreement Among the Federal Highway Administration,
15 the Texas Department of Transportation, the Texas State Historic
16 Preservation Officer, and the Advisory Council on Historic
17 Preservation Regarding the Implementation of Transportation
18 Undertakings (PA-TU) and its successors to provide for
19 innovation and efficiency in the timely development of TxDOT's
20 transportation projects considerate of their impacts on cultural
21 resources.

22 (c) TxDOT and THC will seek to revise the existing PA,
23 amended in 2005, to reflect the streamlined procedures contained

1 in this MOU.

2

3 §2.254. Definitions. The following words and terms, when used
4 in this subchapter, shall have the following meanings, unless
5 the context clearly indicates otherwise.

6 (1) Antiquities permit--A permit issued by the Texas
7 Historical Commission in order to regulate the taking,
8 alteration, damage, exhumation, destruction, salvage,
9 archeological survey, testing, excavation and study of state
10 antiquities landmarks including prehistoric and historic
11 archeological sites, and the preservation, protection,
12 stabilization, conservation, rehabilitation, restoration,
13 reconstruction, or demolition of historic structures and
14 buildings designated as a State Antiquities Landmark (or listed
15 in the National Register of Historic Places).

16 (2) Area of potential effects (APE)--The geographic space
17 or spaces within which an undertaking may cause changes in the
18 character or use of historic properties, if any such properties
19 exist.

20 (A) the area of potential effects for archeological
21 properties will be confined to the limits of the proposed
22 project right of way (including permanent and temporary
23 easements), utility relocations designated by TxDOT, and

1 project-specific locations designated by TxDOT. The area of
2 potential effects also extends to the depth of impacts caused by
3 the undertaking.

4 (B) the area of potential effects for non-archeological
5 historic properties for all non-federal undertakings will be
6 confined to the limits of the proposed project right of way
7 (including permanent and temporary easements), utility
8 relocations, and project-specific locations specifically
9 designated by TxDOT.

10 (3) Cultural resources--A general term referring to
11 buildings, structures, shipwrecks, objects, sites, and districts
12 more than 50 years of age with the potential to have
13 significance in local, state, or national history.

14 (4) Effect--Alteration to the characteristics of a
15 historic property qualifying it for formal designation as a
16 State Antiquities Landmark.

17 (5) Eligibility--A property's eligibility for designation
18 as a State Antiquities Landmark, as set forth in 13 TAC Chapter
19 26.

20 (6) Emergency permit--A permit that may be used by TxDOT
21 under certain emergency circumstances for the purposes of
22 performing investigations prior to formal application for an
23 antiquities permit.

1 (7) Historic property--Any prehistoric or historic
2 district, site, building, structure, or object that meets the
3 requirements for designation as a State Antiquities Landmark as
4 set forth in 13 TAC Chapter 26.

5 (8) Minor widening--Roadway projects resulting in
6 pavement profile widened to less than double their original
7 width, resulting from adding travel/center-turn lanes or paved
8 shoulders.

9 (9) Project-specific location--The location of specific
10 material sources (e.g., base material, borrow, and sand pits)
11 and other sites used by a construction contractor for a specific
12 project.

13 (10) State Antiquities Landmark (SAL)--Both Archeological
14 and Non-archeological historic properties that are designated or
15 eligible for designation as landmarks as defined in Subchapter D
16 of the Antiquities Code of Texas (Natural Resources Code,
17 Chapter 191) and identified in accordance with 13 TAC Chapter
18 26.

19 (11) THC--Texas Historical Commission.

20 (12) Transportation enhancement--An activity that is
21 listed under 23 United States Code §101(a)(35), relates to a
22 transportation project, and is eligible for federal funding
23 under 23 United States Code §133.

1 (13) Transportation project--A project to construct,
2 maintain or improve a highway, rest area, toll facility,
3 aviation facility, public transportation facility, rail
4 facility, ferry, or ferry landing. A transportation enhancement
5 is also a transportation project.

6 (14) TxDOT--Texas Department of Transportation.

7

8 §2.255. Coordination Responsibilities.

9 (a) Texas Department of Transportation. The coordination
10 responsibilities of TxDOT under this MOU are defined as follows.

11 (1) Except as provided in §2.257 of this subchapter
12 (relating to Projects Excluded from Review for Archeology
13 Resources and Cemeteries), §2.270 of this subchapter (relating
14 to Projects Excluded from Review for Non-Archeological Historic
15 Properties), or other provisions of this subchapter that exclude
16 projects from coordination requirements, TxDOT shall coordinate
17 review of transportation projects for which TxDOT is the project
18 sponsor under §2.7 of this chapter (relating to Project Sponsor)
19 with THC for both archeological resources and cemeteries, and
20 non-archeological historic properties, as described in this MOU.

21 (2) All coordination required by this MOU shall be
22 conducted by or through TxDOT's Environmental Affairs Division,
23 or its successor as established by TxDOT administration, unless

1 the division (or its successor) and THC agree in writing to
2 allow other appropriate organizational units of TxDOT or other
3 entities approved by the respective agencies to conduct the
4 coordination.

5 (3) Work in TxDOT right-of-way that is not associated
6 with a project for which TxDOT is the project sponsor under §2.7
7 of this chapter is the responsibility of the project sponsor and
8 not of TxDOT (see Natural Resources Code, §191.0525), except as
9 provided under paragraph (5) of this subsection. The project
10 sponsor is responsible for coordinating directly with THC for
11 such work, using the terms of this MOU to the extent THC
12 determines appropriate. Examples of projects that will be
13 coordinated by the non-TxDOT project sponsor directly with THC
14 include but are not limited to:

15 (A) on-system highway projects funded entirely with
16 local funds;

17 (B) utility relocations or installations within TxDOT
18 right-of-way sponsored by other entities; and

19 (C) driveway and access connections sponsored by other
20 entities.

21 (4) TxDOT shall not be a signatory to any permit issued
22 by THC to another entity for work on a project funded or
23 sponsored by such other entity.

1 (5) In accordance with §2.12(g)(1) of this chapter
2 (relating to Project Coordination), TxDOT may coordinate
3 projects sponsored or funded by another entity under this MOU by
4 agreement with the non-TxDOT project sponsor, and TxDOT will
5 provide notice to THC when it coordinates such projects.

6 (b) Texas Historical Commission. The coordination
7 responsibilities of THC under this MOU are to conduct any review
8 required by this subchapter in an efficient manner, to provide
9 timely feedback to TxDOT about projects coordinated under this
10 subchapter, and to apply any funding provided by TxDOT solely to
11 the review of TxDOT's projects in a manner that most efficiently
12 streamlines THC's effective review and early coordination.

13

14 §2.256. Qualifications of Staff and Use of Consultants.

15 (a) All cultural resource investigations executed under the
16 terms of this MOU shall be implemented by staff who meet the
17 requirements for professional personnel set forth in 13 TAC
18 Chapter 26 or the Secretary of the Interior's Professional
19 Qualification Standards (36 C.F.R. Part 61, Appendix A).

20 (b) TxDOT has the right to perform cultural resource
21 investigations using staff or consultants who meet the
22 professional standards cited in subsection (a) of this section.

23 (c) Cultural resource surveys, investigations, permit

1 applications, and other work performed by consultants shall be
2 coordinated with THC by or through TxDOT's Environmental Affairs
3 Division, or its successor as established by TxDOT
4 administration, unless it and THC agree in writing to allow
5 other appropriate organizational units of TxDOT or other
6 entities approved by the respective agencies to coordinate the
7 work.

8

9 §2.257. Projects Excluded from Review for Archeological
10 Resources and Cemeteries.

11 (a) Routine roadway maintenance projects and projects with
12 minor levels of ground disturbance, by their nature and
13 definition, do not have the potential to affect historic
14 properties, and do not require review of their potential project
15 impacts on archeological resources or cemeteries by THC under 13
16 TAC Chapter 26 or under this MOU. Such projects include
17 vegetation control, traffic control, routine painting and
18 striping, and other activities with less than 100 cubic yards of
19 ground disturbance below the original grade. The following
20 activities also do not require review of their potential impacts
21 on archeological resources or cemeteries under 13 TAC Chapter 26
22 or under this MOU:

23 (1) installation, repair, or replacement of fencing,

1 signage, traffic signals, railroad warning devices, safety end
2 treatments, cameras, and intelligent highway system equipment;

3 (2) projects involving purchase or acquisition of land
4 without associated ground-disturbing activities;

5 (3) routine structural maintenance and repair of bridges,
6 highways, railroad crossings, picnic areas, and rest areas;

7 (4) in-kind repair, replacement of lighting, signals,
8 curbs and gutters, and sidewalks;

9 (5) crack seal, overlay, milling, grooving, resurfacing,
10 and restriping;

11 (6) replacement, upgrade, and repair of safety barriers,
12 ditches, storm drains, and culverts;

13 (7) intersection improvements, including repair or
14 replacement of overpasses, that require less than 0.5 acres of
15 additional right of way at each intersection;

16 (8) placement of riprap to prevent erosion of waterway
17 banks and bridge piers provided no ground disturbance is
18 required;

19 (9) all maintenance work between a highway and an
20 adjacent frontage road;

21 (10) installation of noise barriers or alterations to
22 existing publicly owned buildings less than 50 years old, to
23 provide for noise reduction except in potential or listed

1 National Register districts;

2 (11) driveway and street connections;

3 (12) all work within interchanges and within medians of
4 divided highways;

5 (13) all work between the flowlines of the ditches and
6 channels and above the original line and grade;

7 (14) ditch and channel maintenance, provided removal of
8 fill is above the original line and grade;

9 (15) repairs needed as a result of an event, natural or
10 man-made, which causes damage to a designated state highway,
11 resulting in an imminent threat to life or property of the
12 traveling public or which substantially disrupts or may disrupt
13 the orderly flow of traffic and commerce;

14 (16) the installation and modification of sidewalks
15 (including the addition of American with Disabilities Act (ADA)
16 ramps) except:

17 (A) sidewalk installations where the depth of impact
18 exceeds one foot;

19 (B) sidewalk and ADA ramp projects within the historic
20 districts in the following cities or towns: Goliad, Rio Grande
21 City, Roma, San Antonio, San Elizario, and San Ygnacio; and

22 (C) sidewalk or ADA ramp projects within the limits of
23 the following cities or towns: Anahuac, Nacogdoches, San

1 Patricio, and Socorro;

2 (17) design changes for projects that have completed all
3 applicable review and consultation where the new project
4 elements comprise only one or more of the activities listed in
5 this section; or

6 (18) other kinds of undertakings jointly agreed to in
7 writing by THC and TxDOT.

8 (b) Projects that are exempt from project-specific review
9 for compliance with 13 TAC Chapter 26 and review under this MOU,
10 as specified in subsection (a) of this section, are also exempt
11 from compliance with other THC rules regarding project-specific
12 investigations or coordination for potential impacts to
13 cemeteries promulgated under Health and Safety Code,
14 §711.012(c), unless one of the following two conditions is
15 present:

16 (1) pavement would be extended to within 15 feet of the
17 boundary of a known cemetery founded earlier than 1955; or

18 (2) another project element would directly affect known
19 burials.

20

21 §2.258. Procedures for Project Coordination when the Project
22 Requires Review for Archeological Resources and Cemeteries.

23 (a) For projects subject to review for archeological

1 resources and cemeteries under this MOU, TxDOT will evaluate the
2 APE for potential project effects to archeological historic
3 properties and to determine whether the APE contains cemeteries.
4 TxDOT must make reasonable efforts and act in good faith when
5 complying with this requirement.

6 (b) TxDOT may approve projects to proceed to construction
7 without review by THC when TxDOT staff finds that the project
8 will not affect archeological historic properties and the
9 project APE will not contain cemeteries.

10 (c) TxDOT will submit a quarterly report of projects
11 evaluated and approved internally to THC.

12 (d) TxDOT will submit projects to THC for review when TxDOT
13 staff finds the project may affect archeological historic
14 properties or the project APE contains cemeteries. TxDOT may,
15 at its discretion, submit projects for THC review in cases where
16 TxDOT staff finds that the project will not affect archeological
17 historic properties, and the project APE does not contain
18 cemeteries.

19 (e) In its request for review, TxDOT will make one or more
20 of the following findings, determinations, and recommendations:

21 (1) in cases where no archeological sites or cemeteries
22 occur or are likely to occur in some or all of the APE, TxDOT
23 will propose a finding of no effect in those portions of the APE

1 and recommend that the project proceed to construction in those
2 portions;

3 (2) in cases where an archeological site occurs within
4 the APE but the portion of the site within the APE does not have
5 characteristics that qualify it as an archeological historic
6 property or is not likely to have such characteristics, TxDOT
7 will propose a determination that the portion of the site in the
8 APE is not an archeological historic property, find that the
9 project will have no effect on archeological historic properties
10 at the site location, and recommend that the project proceed to
11 construction at the location of the site;

12 (3) in cases where the portion of a site within the APE
13 has characteristics that qualify it as an archeological historic
14 property, TxDOT will propose a determination that an
15 archeological historic property occurs within the APE;

16 (4) in cases where the APE contains an archeological
17 historic property or cemetery, TxDOT will either propose a
18 finding that the project will have no adverse effect on the site
19 or propose a finding that the project will have an adverse
20 effect on the site; or

21 (5) if a project will have an adverse effect on an
22 archeological historic property or cemetery within the APE,
23 TxDOT will also recommend to THC an appropriate means by which

1 to resolve the potential adverse effect.

2 (f) The resolution of adverse effects may take one of the
3 following forms:

4 (1) the avoidance of the site during construction;

5 (2) an alternative mitigation strategy, such as the
6 preservation of a comparable site or the re-analysis of an
7 existing collection;

8 (3) data recovery excavation or exhumation; or

9 (4) another form of resolution approved by THC.

10 (g) In cases where data recovery is the selected means for
11 resolving adverse effects, TxDOT will coordinate with THC at
12 several stages during the data recovery process according to the
13 following procedures, unless TxDOT and THC agree in writing to
14 different procedures:

15 (1) TxDOT will submit an initial data recovery plan as
16 part of a permit application for data recovery to THC for
17 review;

18 (2) TxDOT will submit a brief report, documenting whether
19 the fieldwork met the terms of the initial data recovery plan
20 and justifying any deviation, to THC for review. When
21 appropriate, TxDOT will recommend that the project be approved
22 to proceed to construction and destruction of any remaining
23 portion of the site within the APE;

1 (3) TxDOT will submit a revised data recovery plan, based
2 on a preliminary review of field data and recovered materials,
3 to THC for review. When appropriate, TxDOT will recommend that
4 the revised plan be adopted for the completion of data recovery
5 analysis and reporting;

6 (4) TxDOT will submit a draft data recovery report to THC
7 for review. When appropriate, TxDOT will recommend that the
8 report be accepted in partial satisfaction of the terms of the
9 permit and in satisfaction of TxDOT's obligations for resolving
10 the adverse effects of the project on the site; or

11 (5) TxDOT will ensure that data recovery investigations
12 do not begin before the State of Texas' legal right to ownership
13 of the artifacts to be recovered has been secured.

14 (h) THC will respond within 20 calendar days of receipt of
15 the TxDOT request for review. The response will include:

16 (1) a statement of concurrence or nonconcurrence with
17 TxDOT's findings and recommendations;

18 (2) a determination of site eligibility for all evaluated
19 sites; and

20 (3) any other comments relevant to the archeological
21 resources or cemeteries which could be affected by the project.

22 (i) If THC does not respond within 20 calendar days, TxDOT
23 may assume that THC concurs with TxDOT's findings,

1 determinations, and recommendations and may proceed with the
2 project in accordance with the procedures required in this MOU.

3

4 §2.259. Background Studies for Archeological Resources and
5 Cemeteries.

6 (a) For projects subject to review for archeological
7 resources and cemeteries under this MOU, based on the results of
8 background research, TxDOT will identify projects or portions of
9 projects' APEs that require archeological field investigation.

10 (b) Eligibility determinations that TxDOT performs under
11 this MOU will not require field investigations if sufficient
12 background information exists to demonstrate that the portion of
13 the site to be affected does not have potential research value.

14 (c) Determinations that TxDOT makes under this MOU
15 regarding the presence of cemeteries in project APEs may be made
16 through the use of maps, project-area photographs, or other
17 background research.

18

19 §2.260. Permits for Archeological Resources and Cemeteries.

20 (a) THC shall issue antiquities permits for reconnaissance
21 survey, intensive survey, monitoring, eligibility testing,
22 exhumations, and emergencies to archeological staff at TxDOT
23 under the following terms:

1 (1) the archeological staff of TxDOT's Environmental
2 Affairs Division, or its successor as established by TxDOT
3 administration, oversees the work;

4 (2) the work shall be completed in accordance with the
5 provisions of the MOU; and

6 (3) THC shall not require TxDOT to submit an antiquities
7 permit application.

8 (b) In lieu of a permit application, TxDOT archeological
9 staff shall notify THC in writing (by email or letter) of:

10 (1) the principal investigator;

11 (2) the investigation type and scope of work;

12 (3) the county in which the project will occur;

13 (4) the project name or identifier (site trinomial, if
14 applicable); and

15 (5) the period of time for which the permit is desired.

16 (c) TxDOT staff may initiate work following notification of
17 THC.

18 (d) THC shall issue a permit number within five business
19 days of receiving the notification.

20 (e) TxDOT may revise the type of investigation based on
21 observations made during the conduct of work as long as TxDOT
22 provides to THC notification of the change prior to submission
23 of the report.

1 (f) When conditions of natural disasters, man-made
2 disasters, or post-review discovery necessitate immediate
3 action, TxDOT may initiate work under an emergency permit
4 without having first requested and received the permit number
5 subject to the following conditions:

6 (1) TxDOT staff shall only conduct work under an
7 emergency permit when archeological deposits are discovered
8 during development or other construction projects or under
9 conditions of natural or man-made disasters that necessitate
10 immediate action to deal with the situation and findings;

11 (2) TxDOT will provide notification to THC to obtain the
12 permit number within five working days of initiating the work;
13 and

14 (3) all categories of investigations can be authorized
15 under an emergency permit, but an emergency permit will only be
16 issued under emergency conditions where the investigations must
17 be initiated or performed prior to notification under subsection
18 (b) of this section.

19 (g) THC shall consider the work conducted under the permit
20 completed upon receipt of:

21 (1) one unbound report;

22 (2) two tagged .pdf format reports on an archival quality
23 CD or DVD, one containing all maps and locational information

1 and one with maps and locational information redacted;

2 (3) a shape file of the project area subject to

3 investigation; and

4 (4) a completed abstract form.

5 (h) The number of defaulted permits accrued by particular

6 TxDOT staff while working for TxDOT shall not affect the

7 issuance of additional permits to other TxDOT staff by THC for

8 TxDOT projects.

9 (i) The inspection of a project APE or proposed APE for
10 purposes of evaluating the kind of archeological investigation
11 that may be required (scoping) shall not constitute an activity
12 that requires a permit from THC when that activity does not
13 result in a report to be coordinated under the terms of the MOU.

14 (j) All types of archeological investigations conducted by
15 TxDOT but not covered by this section shall require submission
16 of an antiquities permit application and adhere to the terms of
17 the permit and 13 TAC Chapter 26.

18

19 §2.261. Surveys for Archeological Resources and Cemeteries.

20 (a) Surveys may be limited to an evaluation of existing
21 impacts or stratigraphic integrity when these activities are
22 sufficient to determine that any sites present are unlikely to
23 be eligible.

1 (b) Eligibility determinations that TxDOT performs under
2 this MOU do not require subsurface investigation if it can be
3 demonstrated that the portion of the site to be affected is not
4 likely to have sufficient integrity to be eligible.

5 (c) For portions of the APE where deposits may retain
6 sufficient integrity for sites to be eligible, TxDOT survey
7 methods will conform with THC's Archeological Survey Standards
8 or with other appropriate methods, except as provided in
9 paragraphs (1) and (2) of this subsection:

10 (1) TxDOT reserves the right to depart from published
11 survey standards in cases where it deems appropriate; and

12 (2) THC reserves the right to review non-standard
13 procedures for their adequacy.

14 (d) Survey methods will be considered adequate for the
15 identification of burials and cemetery boundaries when the
16 portions of the APE within 25 feet of a known cemetery have been
17 investigated and the survey included scraping to a depth
18 adequate to determine whether grave shafts or burials occur in
19 the APE.

20 (e) A survey to identify burials does not comprise an
21 activity with the potential to cause an adverse effect to a
22 historic property.

23

1 §2.262. Archeological Eligibility Testing Phase.

2 (a) The following methods will be employed for test
3 excavations:

4 (1) mechanical trenches will be excavated and profiles
5 documented in order to characterize the area's potential for
6 archeological deposits with sufficient integrity to be eligible
7 to occur at the site;

8 (2) the extent of the site within the APE will be sampled
9 through some combination of shovel-testing, column sampling,
10 augering, surface collection, and geophysical prospection in
11 order to characterize the distribution of archeological
12 materials across the site;

13 (3) additional units will be excavated and screened to
14 evaluate site areas that appear to have the best potential for
15 yielding important data with good integrity, based on the
16 results of previous work; and

17 (4) the materials analyzed will comprise those materials
18 most likely to contribute important information about prehistory
19 or history.

20 (b) TxDOT reserves the right to depart from these methods
21 in cases where it deems appropriate and shall justify deviations
22 in the report.

23 (c) Data from test excavation projects shall be made

1 available to qualified researchers.

2

3 §2.263. Archeological Excavation and Data Recovery.

4 (a) When appropriate and established in the final research
5 design approved by THC, TxDOT will develop public educational
6 outreach projects for significant data recovery investigations.

7 (b) Data from data recovery projects shall be made
8 available to qualified researchers.

9

10 §2.264. Exhumation.

11 (a) Exhumation is a form of investigation to resolve the
12 adverse effects of a project on a cemetery.

13 (b) Exhumation efforts may be staged as a separate phase of
14 work from burial identification. Following procedures set forth
15 in Health and Safety Code, Chapter 711, exhumation may begin
16 once any required notifications of next of kin or other
17 procedures required by Health and Safety Code, Chapter 711 have
18 been conducted.

19 (c) The following tasks represent a sufficient, reasonable,
20 and good faith effort to identify remains and any next of kin
21 associated with burials in unknown or abandoned cemeteries:

22 (1) making inquiries through the local County Historical
23 Commission;

1 (2) posting notices with local news outlets; and

2 (3) posting notices with local churches.

3 (d) An exhumation project is itself not a type of
4 investigation that requires an outreach effort or curation of
5 materials at a state-certified facility.

6

7 §2.265. Archeological Sites found after Award of Contract.

8 (a) When previously unknown archeological remains are
9 encountered after award of a construction contract, TxDOT will
10 immediately suspend construction or any other activities that
11 would affect the site.

12 (b) TxDOT will inform THC of the discovery of previously
13 unknown archeological remains and invite THC to accompany TxDOT
14 staff (or consultants) to the location within ten business days
15 of the discovery.

16 (c) TxDOT, in consultation with THC, will evaluate the
17 need, if any, for further investigations.

18 (d) If TxDOT determines that the discovery is an unrecorded
19 archeological site, then TxDOT or its consultants shall complete
20 an electronic TexSite archeological site survey form.

21 (e) If TxDOT determines that the site does not warrant
22 further investigations because it is not a historic property,
23 construction will resume. TxDOT will document its findings.

1 (f) If TxDOT determines that the site warrants further
2 investigation because the site may be a historic property, TxDOT
3 will take one of the following three actions, as appropriate:

4 (1) a permit amendment will be sent to THC for the
5 additional work, if an existing permit for the project is still
6 open;

7 (2) a notification for a new permit will be sent to THC;
8 or

9 (3) TxDOT will perform necessary investigations under an
10 emergency permit.

11 (g) Upon completion of the investigation in accordance with
12 any applicable permit terms, construction may proceed as
13 planned.

14

15 §2.266. Standard Treatments for Particular Resource Types.

16 (a) Isolated wells or cisterns unassociated with other
17 remains will be treated as follows:

18 (1) isolated wells or cisterns that post-date 1900 A.D. do
19 not warrant notification of THC or additional investigation.
20 Removal or sealing of these features does not constitute an
21 adverse effect; and

22 (2) isolated wells or cisterns that pre-date 1900 A.D.
23 require documentation of their location, construction, and

1 condition. Upon completion of the documentation, these features
2 may be backfilled and capped. These activities do not
3 constitute an adverse effect.

4 (b) Burnt rock midden features that have not been obviously
5 destroyed by modern disturbances will be treated as follows:

6 (1) the feature will be trenched to expose a cross-
7 section;

8 (2) the exposed profiles will be documented, focusing on
9 the identification of any internal structure;

10 (3) column samples will be taken from the exposed profile
11 in order to collect samples for flotation and dating from each
12 deposit recognized in the profile;

13 (4) deviations from this standard approach may be
14 undertaken if TxDOT coordinates an alternate approach with THC;
15 and

16 (5) any additional work on the feature will be determined
17 in consultation between TxDOT and THC, based on the results of
18 the trenching.

19

20 §2.267. Artifact Recovery and Curation.

21 (a) Artifact recovery.

22 (1) Artifacts or analysis samples (such as soil samples)
23 that are recovered from survey, testing, or data recovery

1 investigations by TxDOT or their contracted agents that address
2 the research questions must be cleaned, labeled, and processed
3 in preparation for long-term curation unless the artifacts or
4 samples are approved by THC for discard under 13 TAC Chapters 26
5 and 29.

6 (2) To ensure proper care and curation, recovery methods
7 must conform to the applicable requirements of 13 TAC Chapters
8 26 and 29.

9 (b) Artifact curation.

10 (1) TxDOT or its permitted contractor may temporarily
11 house artifacts and samples during laboratory analysis and
12 research, but upon completion of the analysis, artifacts and
13 accompanying documentation must be transferred to a permanent
14 curatorial facility in accordance with the terms of the
15 antiquities permit.

16 (2) Artifacts and samples will be placed at an
17 appropriate artifact curatorial repository which fulfills the
18 applicable requirements of 13 TAC Chapter 29 as approved by THC.
19 When appropriate, TxDOT will consult with THC to identify for
20 disposal collections or portions of collections that do not have
21 identifiable value for future research or public interpretation.
22 Final approval regarding the disposition of collections will be
23 made by THC.

1 (3) TxDOT is responsible for the curatorial preparation
2 of all artifacts to be submitted for curation so that they are
3 acceptable to the receiving curatorial repository and fulfill
4 the applicable requirements of 13 TAC Chapters 26 and 29, as
5 approved by THC.

6

7 §2.268. Documentation for Archeological Resources and
8 Cemeteries.

9 (a) Projects subject to review for archeological resources
10 and cemeteries under this MOU will be documented by TxDOT in the
11 manner described in this section. Documentation for each such
12 project will include, at a minimum:

13 (1) a description of the project, defining the APE or the
14 investigated portion of the APE in three dimensions;

15 (2) a project location map, plotting the project location
16 on 7.5' Series USGS quadrangle maps;

17 (3) information regarding the setting that is relevant
18 for the assessment of the integrity of any archeological sites
19 within the APE;

20 (4) information on previously recorded archeological
21 sites in the project location;

22 (5) description and justification of the level of effort
23 undertaken for the investigation; and

1 (6) results and recommendations.

2 (b) All TxDOT survey and testing reports will also include:

3 (1) description and justification of field methods,
4 including the sampling strategy;

5 (2) description and quantification of any archeological
6 materials identified;

7 (3) accurate plotting of any sites found on 7.5' Series
8 USGS quadrangle maps;

9 (4) submission of electronic TexSite archeological site
10 survey forms to the Texas Archeological Research Laboratory; and

11 (5) recommendations regarding whether any site merits
12 further investigation.

13

14 §2.269. Quarterly Reports for Archeological Resources and
15 Cemeteries. Quarterly reports will be submitted by TxDOT to THC
16 within 60 business days after the end of the calendar quarter,
17 listing all projects for which TxDOT has documented that no
18 historic properties or cemeteries are present in the project's
19 area of potential effect, and those projects that will have no
20 adverse effects on archeological historic properties or
21 cemeteries.

22

23 §2.270. Projects Excluded from Review for Non-Archeological

1 Historic Properties.

2 (a) For the purposes of this section, the term historic
3 properties will refer only to non-archeological historic
4 properties.

5 (b) Based on previous coordination outcomes, TxDOT and THC
6 agree that the following types of routine roadway projects pose
7 limited potential to affect historic properties:

8 (1) maintenance, repair, installation, or replacement, of
9 transportation-related features, including fencing, signage,
10 traffic signals, railroad warning devices, safety end
11 treatments, cameras and intelligent highway system equipment,
12 bridges, railroad crossings, picnic areas, rest areas, roadside
13 parks, lighting, curbs and gutters, safety barriers, ditches,
14 storm drains, culverts, overpasses, channels, rip rap, and noise
15 barriers;

16 (2) maintenance, repair, or replacement of roadway
17 surfacing, including crack seal, overlay, milling, grooving,
18 resurfacing, and restriping;

19 (3) maintenance, repair, reconfiguration, or correction
20 of roadway geometrics, including intersection improvements and
21 driveway and street connections;

22 (4) maintenance, repair, installation or modification of
23 pedestrian and cycling-related features, including American with

1 Disabilities Act ramps, trails, sidewalks, and bicycle and
2 pedestrian lanes;

3 (5) maintenance, repair, relocation, addition, or minor
4 widening of roadway, highway, or freeway features, including
5 turn bays, center turn lanes, shoulders, U-turn bays, right turn
6 lanes, travel lanes, interchanges, medians, and ramps;

7 (6) maintenance, repair, replacement, or relocation of
8 features at crossings of irrigation canals, including bridges,
9 new vehicle crossings, bank reshaping, pipeline and standpipe
10 components, canal conversion to below-grade siphons, and
11 utilities;

12 (7) repairs needed as a result of an event, natural or
13 man-made, which causes damage to a designated state highway,
14 resulting in an imminent threat to life or property of the
15 traveling public, or which substantially disrupts or may disrupt
16 the orderly flow of traffic and commerce;

17 (8) design changes for projects that have completed all
18 applicable review and consultation where the new project
19 elements comprise only one or more of the activities listed in
20 this subsection; and

21 (9) other kinds of undertakings jointly agreed to in
22 writing by THC and TxDOT as not requiring review.

23 (c) For projects described by subsection (b) of this

1 section, TxDOT qualified professional staff shall determine
2 whether additional evaluation is required due to direct effects
3 to historic properties. If no such evaluation is deemed
4 necessary, such projects are determined to pose no effect on
5 historic properties and do not require review by THC under 13
6 TAC Chapter 26 or under this MOU.

7 (d) For review-exempt projects, documentation shall be
8 limited to that maintained in TxDOT's official project files.
9 THC may audit TxDOT files for specific projects upon request.

10

11 §2.271. Procedures for Project Coordination when the Project
12 Requires Review for Non-Archeological Historic Properties.

13 (a) Historic properties. For the purposes of this section,
14 the term historic properties will refer only to non-
15 archeological historic properties.

16 (b) Internal review projects. For projects subject to
17 review for historic properties under this MOU, TxDOT qualified
18 professional staff shall determine the presence or absence of
19 historic properties in the area of potential effects. Such
20 efforts should focus on the types of historic properties within
21 public rights-of-way and other sensitive areas, including but
22 not limited to historic bridges, historic road corridors,
23 historic roadside parks and rest areas, historic Depression Era

1 masonry culverts, historic districts, historic courthouse
2 squares and other historic commercial zones. Project activities
3 that TxDOT determines will have no effect or no adverse effect
4 on historic properties may be internally reviewed by TxDOT and
5 are approved for construction. Documentation for such projects
6 will be maintained in official TxDOT project files and regularly
7 reported to THC in accordance with subsection (d)(1) of this
8 section.

9 (c) Coordinated projects. Projects subject to review for
10 historic properties under this MOU that are determined by TXDOT
11 qualified professional staff to pose an adverse effect on
12 historic properties shall require individual THC review
13 according to the following procedures:

14 (1) THC will respond within 20 calendar days of receipt
15 of TxDOT's request for review by indicating whether an affected
16 historic property will require a historic structures permit for
17 an SAL, or whether THC intends to initiate an SAL nomination for
18 the affected property. If THC does not respond within 20
19 calendar days, TxDOT may assume THC's concurrence with its
20 determinations, and TXDOT may proceed with the project to
21 construction;

22 (2) in accordance with Government Code, §442.008 and 13
23 TAC §17.2 (relating to Review of Work on County Courthouses),

1 TxDOT will notify THC of any work affecting a county courthouse
2 or its surrounding site, up to and including the curb. THC will
3 respond within 20 calendar days of receipt of TxDOT's
4 notification by indicating whether a historic structures permit
5 for an SAL or additional consultation pursuant to a preservation
6 covenant or easement will be required; and

7 (3) state-funded projects coordinated under this MOU that
8 may subsequently require a federal permit or change to federal
9 funding, and that involve a direct taking of a historic
10 property, must be individually coordinated with THC in order to
11 satisfy federal regulations under 23 C.F.R. Part 774 and 36
12 C.F.R. Part 800. Procedures outlined in the 2005 PA-TU or
13 subsequent agreements will govern such coordination.

14 (d) Documentation. For projects that are internally
15 reviewed or individually coordinated under subsections (b) and
16 (c) of this section, TxDOT will comply with the following
17 project documentation requirements:

18 (1) for projects that are internally reviewed under
19 subsection (b) of this section, TxDOT will submit to THC a
20 quarterly report of internally approved projects within 60
21 business days after the end of the calendar quarter. THC may
22 audit TxDOT files for specific projects submitted in the
23 quarterly report. Quarterly report documentation will include:

- 1 (A) project description and scope;
- 2 (B) project location map with delineation of the APE
3 and location of historic properties;
- 4 (C) methodology used to identify historic properties;
- 5 (D) photographic and descriptive information for each
6 identified property;
- 7 (E) description of public involvement activities;
- 8 (F) justification for findings of historic properties,
9 including setting, integrity, and contextual information; and
- 10 (G) justification of effects on historic properties,
11 including evaluations, reports, and other information relevant
12 to the findings by TxDOT; and
- 13 (2) for projects that are individually coordinated under
14 subsection (c) of this section, documentation submitted to THC
15 will include the items listed in subsection (d)(1)(A)-(G) of
16 this section, and a description of efforts to avoid or minimize
17 harm, mitigation, and commitments.

18

19 §2.272. Denial of Access. In cases where access to private
20 land for conducting investigations is denied prior to the
21 approval of the environmental review document, TxDOT will make a
22 commitment to complete appropriate investigations once access is
23 obtained, but prior to any construction related impacts.

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§2.273. MOU to Govern TxDOT Procedures. TxDOT satisfies applicable THC requirements if it utilizes the procedures of this MOU in lieu of other THC procedures. In cases where TxDOT is utilizing this MOU in lieu of other THC procedures, TxDOT must follow the requirements of this MOU.

§2.274. Project-Specific Agreements. Any project-specific agreement reached between TxDOT and THC regarding the evaluation or treatment of project effects shall be honored by both parties and shall supersede the requirements of this MOU. TxDOT and THC may deviate from the terms of the agreement only when both parties concur that the agreement requires revision.

§2.275. Continuous Improvement Agreement. TxDOT and THC agree to collaborate on improvements to their programs and development of innovative solutions for expedited review procedures. Such mechanisms may include using project outcomes to refine approaches to resource identification, evaluation, treatment methods, programmatic mitigation measures and interagency agreements that facilitate early coordination, and streamlining and expedited review of TxDOT's transportation projects.

1 §2.276. THC Review of TxDOT Project Files. THC may review
2 TxDOT project files for specific undertakings carried out under
3 this MOU. THC may recommend process improvements based on
4 issues identified during the review.

5

6 §2.277. Dispute Resolution. THC and TxDOT staff will be
7 responsible for attempting to resolve any conflict between THC
8 and TxDOT that results from the implementation of this
9 subchapter before elevating to agency management.

10

11 §2.278. Review of MOU. This memorandum of understanding shall
12 be reviewed and updated as provided by law or by agreement
13 between the parties. THC and TxDOT agree to convene every four
14 years to review, update, or extend this agreement.

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

3 §2.24. Memorandum of Understanding with the Texas Historical
4 Commission.

5 (a) Purpose.

6 (1) It is the policy of the Texas Department of
7 Transportation (TxDOT) to:

8 (A) identify the environmental impacts of TxDOT
9 transportation projects, to coordinate these projects with
10 applicable state and federal agencies, and reflect these
11 investigations and coordination in the environmental
12 documentation for each project;

13 (B) base project decisions on a balanced consideration
14 of the need for a safe, efficient, economical, and
15 environmentally sound transportation system;

16 (C) receive input from the public through the public
17 involvement process;

18 (D) utilize a systematic interdisciplinary approach as
19 an essential part of the development process for transportation
20 projects; and

21 (E) strive for environmentally sound transportation
22 activities through appropriate avoidance, treatment or
23 mitigation, where feasible and prudent, in coordination with

1 appropriate resource agencies.

2 (2) In order to pursue this policy, the Texas Department
3 of Transportation and the Texas Historical Commission (THC) have
4 agreed to adopt this new Memorandum of Understanding (MOU),
5 which will supersede the MOU which became effective on December
6 13, 1998.

7 (3) This MOU is entered into by THC and TxDOT in
8 accordance with Government Code, §442.005 and §442.007, Natural
9 Resources Code, §191.0525(f), and Transportation Code, §201.607,
10 to adequately provide for coordination of projects with THC. It
11 is the intent of this MOU to provide a formal mechanism for THC
12 review of TxDOT projects that have the potential to adversely
13 affect cultural resources in order to assist TxDOT in making
14 environmentally sound decisions, and to develop with TxDOT a
15 system by which information developed by TxDOT and THC may be
16 exchanged to their mutual benefit. This MOU also provides for
17 an efficient and streamlined review of TxDOT projects in keeping
18 with state and national initiatives for environmental
19 streamlining.

20 (b) Authority.

21 (1) Transportation Code, §201.607, directs TxDOT to adopt
22 MOUs with appropriate environmental resource agencies, including
23 THC. The rules for coordination of state-assisted

1 transportation projects found in Subchapter C of this chapter
2 (relating to Environmental Review and Public Involvement for
3 Transportation Projects), underline the need for and importance
4 of comprehensive environmental coordination for transportation
5 projects.

6 (2) Transportation Code, §201.607(a)(5) also authorizes
7 and contemplates other agreements necessary for the effective
8 coordination of the review of the historic or archeological
9 effect of highway projects.

10 (3) Provisions of this MOU may in part be implemented
11 through a Programmatic Agreement (PA) among the Federal Highway
12 Administration (FHWA), the Texas State Historic Preservation
13 Officer (TSHPO), the Advisory Council on Historic Preservation
14 (Council), and TxDOT. TxDOT and THC will seek to revise the
15 existing PA, executed in 1995, to reflect the streamlined
16 procedures contained in this MOU.

17 (c) Definitions. The following words and terms, when used
18 in this section, shall have the following meanings, unless the
19 context clearly indicates otherwise.

20 (1) Antiquities Code of Texas (ACT)--The state statute
21 (Natural Resources Code, Chapter 191) that designates the Texas
22 Historical Commission as the legal custodian of all cultural
23 resources, historic or prehistoric, within the public domain of

1 the state, and as the body that issues antiquities permits, in
2 accordance with Title 13, Part 2, TAC, concerning the Texas
3 Historical Commission.

4 (2) Antiquities permit--A permit issued by the Texas
5 Historical Commission in order to regulate the taking,
6 alteration, damage, destruction, salvage, archeological survey,
7 testing, excavation and study of state archeological landmarks
8 including prehistoric and historic archeological sites, and the
9 preservation, protection, stabilization, conservation,
10 rehabilitation, restoration, reconstruction, or demolition of
11 historic structures and buildings designated as a State
12 Archeological Landmark or listed in the National Register of
13 Historic Places.

14 (3) Area of potential effects--The geographic area or
15 areas within which an undertaking may cause changes in the
16 character or use of historic properties, as that term is defined
17 in 36 CFR Part 800, if any such properties exist.

18 (A) The area of potential effects for archeological
19 properties on federal undertakings will be confined to the
20 limits of the proposed project right of way (including permanent
21 and temporary easements), utility relocations, and project-
22 specific locations designated by TxDOT.

23 (B) Unless TxDOT and THC in consultation determine a

1 need for a wider area of potential effects, the area of
2 potential effects for other properties on federal undertakings
3 will be:

4 (i) 300 feet beyond the proposed right of way for
5 projects constructed on new locations;

6 (ii) 150 feet beyond the proposed right of way for
7 projects constructed in existing transportation corridors,
8 including abandoned railroad lines.

9 (C) The area of potential effects for all non-federal
10 undertakings will be confined to the limits of the proposed
11 project right of way (including permanent and temporary
12 easements), utility relocations, and project-specific locations
13 specifically designated by TxDOT.

14 (4) Cultural resources--A general term referring to
15 buildings, structures, objects, sites, and districts more than
16 50 years of age with the potential to have significance in
17 local, state, or national history.

18 (5) Eligibility--A property's eligibility for the
19 National Register of Historic Places as set forth in 36 CFR Part
20 60 and 36 CFR Part 800, or for designation as a State
21 Archeological Landmark, as set forth in 13 TAC Chapter 26.

22 (6) Environmental document--a decision-making document
23 that incorporates environmental studies, coordination,

1 documentation, consultation efforts, and engineering elements,
2 and may include categorical exclusion documentation,
3 environmental assessment, and environmental impact statements.

4 (7) Historic property--Any prehistoric or historic
5 district, site, building, structure, or object which is included
6 or eligible for inclusion in the National Register of Historic
7 Places, as defined in 36 CFR Part 800 and 36 CFR Part 60, or
8 meets the requirements for designation as a State Archeological
9 Landmark as set forth in 13 TAC Chapter 26.

10 (8) Historic-age property--Any site, building, structure,
11 or object that will be 50 years old or older in age at the time
12 of the award of the construction contract.

13 (9) Impact evaluation--Field inspection by a qualified
14 archeologist to determine the extent to which physical
15 conditions affect the eligibility of known or unknown
16 archeological deposits within the area of potential effects of
17 the proposed project.

18 (10) National Register--The National Register of Historic
19 Places (NRHP), which is the nation's inventory of historic
20 places maintained by the U.S. Secretary of the Interior.

21 (Historic properties included in or eligible for inclusion must
22 meet National Register criteria for evaluation, as defined in 36
23 CFR Part 60.)

1 (11) Project specific location--The location of specific
2 material sources (base material, borrow, sand pits, etc.) and
3 other sites used by a construction contractor for a specific
4 project.

5 (12) Quarterly report--A report that TxDOT submits to THC
6 20 days after the end of each quarter listing all projects for
7 which TxDOT has documented that no historic properties are
8 present in the project's area of potential effect, and those
9 where the projects will have no adverse effects on historic
10 properties as determined by background research and/or field
11 investigation, and project review, as appropriate, that is used
12 to fulfill TxDOT's reporting requirements under this MOU.

13 (13) State Archeological Landmark (SAL)--Archeological
14 and historic-age properties that are designated or eligible for
15 designation as landmarks as defined in Subchapter D of the
16 Antiquities Code of Texas (ACT) and identified in accordance
17 with 13 TAC Chapter 26.

18 (14) State Historic Bridge Inventory (SHBI)--An ongoing
19 evaluation effort to determine the eligibility of historic-age
20 bridges in Texas.

21 (d) Responsibilities.

22 (1) Texas Department of Transportation. The
23 responsibilities of TxDOT pertain primarily to its functions as

1 a transportation agency, and include:

2 (A) planning and designing safe, efficient, effective,
3 and environmentally sensitive transportation facilities while
4 avoiding, minimizing, or compensating for impacts to cultural
5 resources to the fullest extent practicable;

6 (B) the timely and efficient construction of
7 transportation facilities, in a manner consistent with approved
8 plans, agreements and commitments that TxDOT has executed
9 regarding the protection of historic properties;

10 (C) ongoing maintenance to provide safe, efficient, and
11 environmentally sound transportation facilities for the
12 traveling public;

13 (D) coordinating projects with THC through TxDOT's
14 Environmental Affairs Division or its successor as established
15 by TxDOT administration; and

16 (E) provide funding to THC to enable THC to implement
17 measures to facilitate early coordination, streamlining and
18 expedited review of TxDOT's transportation projects.

19 (2) Texas Historical Commission. The responsibilities of
20 THC relate primarily to its functions as a cultural resource
21 agency, and include:

22 (A) serving as the State Historic Preservation Office
23 in Texas with responsibility under 36 CFR Part 800--the

1 regulations implementing §106 of the National Historic
2 Preservation Act (16 U.S.C. 470f);

3 (B) reviewing federally assisted, licensed, or
4 permitted undertakings with the potential to affect properties
5 included in or eligible for inclusion in the National Register
6 of Historic Places;

7 (C) providing assistance to agencies in their efforts
8 to comply with the §106 process;

9 (D) regulating the identification, disposition and
10 management of State Archeological Landmarks which are affected
11 by non-federal undertakings, as described in the Antiquities
12 Code of Texas and 13 TAC Chapter 26;

13 (E) issuing permits for the taking, excavation,
14 restoration, rehabilitation or study of State Archeological
15 Landmarks as provided in ACT, §191.054 and §191.091-191.098; and

16 (F) applying TxDOT's funding solely to the review of
17 TxDOT's projects in a manner that most efficiently streamlines
18 THC's effective review and early coordination.

19 (e) Early project planning for cultural resources.

20 (1) TxDOT and THC agree that routine roadway maintenance
21 projects, by their nature and definition, do not require review
22 by THC under 36 CFR Part 800 or 13 TAC Chapter 26. Such
23 projects include activities (such as vegetation control, traffic

1 control, and routine painting and striping) that do not have the
2 potential to affect State Archeological Landmarks or properties
3 listed or eligible for listing on the National Register. TxDOT
4 and THC agree that the following activities do not require
5 review:

6 (A) installation, repair, or replacement of fencing,
7 signage, traffic signals, railroad warning devices, safety end
8 treatments, cameras and intelligent highway system equipment;

9 (B) earthmoving projects involving less than 100 cubic
10 yards of excavation below the original grade;

11 (C) routine structural maintenance and repair of non-
12 historic bridges, highways, railroad crossings, picnic areas,
13 and rest areas;

14 (D) in-kind repair, replacement of non-historic
15 lighting, signals, curbs and gutters, and sidewalks;

16 (E) crack seal, overlay, milling, grooving,
17 resurfacing, and restriping;

18 (F) replacement, upgrade, and repair of safety
19 barriers, ditches, storm drains, and culverts constructed after
20 the depression-era period (i.e. after 1939) except in
21 association with historic bridges;

22 (G) intersection improvements that require no
23 additional right of way;

1 (H) placement of riprap to prevent erosion of waterway
2 banks and bridge piers provided no ground disturbance is
3 required;

4 (I) all maintenance work between a highway and an
5 adjacent frontage road;

6 (J) installation of noise barriers or alterations to
7 existing publicly owned buildings less than 50 years old, to
8 provide for noise reduction except in potential or listed
9 National Register districts;

10 (K) driveway and street connections;

11 (L) all work within interchanges and within medians of
12 divided highways except where graves are present;

13 (M) all work between the flowlines of the ditches and
14 channels and above the original line and grade;

15 (N) ditch and channel maintenance provided removal of
16 fill is above the original line and grade;

17 (O) repairs needed as a result of an event, natural or
18 man-made, that causes damage to a designated state highway,
19 resulting in an imminent threat to life or property or that
20 substantially disrupts or may disrupt the orderly flow of
21 traffic and commerce; or

22 (P) other kinds of undertakings jointly agreed to in
23 writing by THC and TxDOT.

1 (2) TxDOT is committed to performing early identification
2 efforts for cultural resources located within the area of
3 potential effects of proposed transportation projects and
4 initiating THC coordination during the early planning stages of
5 these projects, when the widest range of alternatives is open
6 for consideration.

7 (3) TxDOT is committed to implementing, in appropriate
8 cases and as a part of early project planning and coordination,
9 alternative methods, techniques, and other strategies that are
10 reasonable and feasible and that will enhance efficiency in
11 complying with cultural resource laws. These include, but are
12 not limited to, programmatic approaches to coordination of
13 selected types of cultural resources, evaluation of existing
14 conditions affecting the integrity of cultural resources,
15 geoarcheological research to assist in early planning and to
16 reduce archeological liabilities, development of significance
17 eligibility standards with THC, and development and
18 implementation of alternative mitigation strategies. TxDOT may
19 seek to utilize alternative strategies for procedures set forth
20 in this MOU. Upon the written concurrence of THC, TxDOT may
21 implement the alternative strategy in lieu of the procedures
22 specified in this MOU.

23 (4) TxDOT is also committed to providing the public and

1 interested parties with opportunities to provide input and
2 express their views concerning potential project impacts to
3 historic properties.

4 (A) TxDOT will ensure that cultural resource issues are
5 incorporated into its regular public participation programs
6 carried out under the National Environmental Policy Act (42 USC
7 4321-4347 et seq.), and §2.42 and §2.43 of this chapter
8 (relating to Highway Construction Projects-Federal Aid, and
9 Highway Construction Projects-State Funds), as far as
10 practicable.

11 (B) TxDOT will also ensure that federally recognized
12 Indian tribes (as specified in 36 CFR 800) are provided early
13 project information and information on Native American sites
14 that will be affected by TxDOT projects in order to provide
15 comments.

16 (C) If concerns related to historic and archeological
17 issues arise after the NEPA public involvement process is
18 complete, or if new information about historic or archeological
19 issues is found, TxDOT and THC shall independently re-evaluate
20 their findings.

21 (5) Cultural resource investigations by consultants.

22 (A) TxDOT has the right to perform cultural resource
23 investigations using staff or consultants who meet the

1 professional standards of 13 TAC Chapter 26, and as required by
2 36 CFR Part 800.

3 (B) Cultural resource surveys, investigations, permit
4 applications, and other work performed by consultants shall be
5 coordinated with THC through TxDOT's Environmental Affairs
6 Division or its successor as established by TxDOT
7 administration.

8 (f) Procedures for coordination regarding archeological
9 resources. Provided the work is completed in accordance with
10 the provisions of this MOU, survey and eligibility testing of
11 archeological resources performed by the archeological staff of
12 TxDOT's Environmental Affairs Division is authorized under this
13 MOU and will not be considered an operation that might require
14 an antiquities permit under ACT, §191.054 or §191.131. All
15 other archeological investigations shall require an antiquities
16 permit.

17 (1) Identification.

18 (A) TxDOT will undertake sufficient background research
19 to determine which proposed projects require archeological
20 surveys. Background research may include a search of records
21 and files at THC and/or the Texas Archeological Research
22 Laboratory (TARL), gathering information on soils, a geomorphic
23 history of the projects, Texas Historic Sites Atlas, and impact

1 evaluations.

2 (B) Based on the results of background research, TxDOT
3 will identify projects requiring archeological investigation for
4 archeological resources.

5 (C) TxDOT will prepare a list of projects which do not
6 require individual coordination for archeological sites, and
7 will provide THC with a list of such projects, including those
8 where impact evaluations were performed, on a quarterly basis or
9 upon request by THC.

10 (D) Eligibility determinations that TxDOT performs
11 under this MOU may not require field investigations if
12 sufficient background information exists to demonstrate that the
13 portion of the site to be affected does not have potential
14 research value.

15 (E) Eligibility determinations that TxDOT performs
16 under this MOU may be based on impact evaluation if it can be
17 demonstrated that the portion of the site to be affected does
18 not have sufficient integrity to be eligible.

19 (2) Archeological surveys.

20 (A) All projects, and portions of projects, recommended
21 for survey by TxDOT during background research will be subjected
22 to archeological survey using the methods in conformance with 36
23 CFR Part 800 and THC's Archeological Survey Standards, or with

1 other appropriate methods. TxDOT reserves the right to depart
2 from published survey standards in cases where it deems
3 appropriate. THC reserves the right to review non-standard
4 procedures for their adequacy.

5 (B) An archeological survey will be conducted by a
6 TxDOT professional archeological staff member or other
7 archeologist who meets the state and federal standards. Surveys
8 may be limited to an evaluation of existing impacts or
9 stratigraphic integrity when these are sufficient to determine
10 that any sites present are unlikely to be eligible.

11 (C) When the archeological survey has been completed,
12 TxDOT will submit the results of the survey to THC:

13 (i) as part of a quarterly list of investigations
14 where no sites were found, where sites were found but were not
15 recommended for further work, or upon request by THC;

16 (ii) as an individual report when sites are present
17 and recommended for further work; or

18 (iii) as an individual report when no further work is
19 recommended, but THC comment is a desirable element of TxDOT's
20 NEPA compliance.

21 (D) All TxDOT survey reports will include:

22 (i) details of the results of the survey, including
23 project description, anticipated project impact, and existing

1 disturbance in the project area;

2 (ii) environmental data on topography, soils, land
3 use, survey methodology, survey results, and recommendations;

4 (iii) the project location plotted on 7.5' Series
5 USGS quadrangle maps;

6 (iv) descriptions of any sites found;

7 (v) submission of electronic and paper copies of
8 archeological site survey forms to TARL; and

9 (vi) recommendations regarding whether the site(s)
10 merit archeological testing or archeological monitoring.

11 (E) THC will respond within 20 days of receipt of the
12 TxDOT request for review of any survey results and
13 recommendations. The response will include:

14 (i) a statement of concurrence or nonconcurrence with
15 the results of the survey and its recommendations; and

16 (ii) any other comments relevant to the archeological
17 resources which could be affected by the project.

18 (F) TxDOT will summarize the results of the
19 archeological survey and recommendations in the environmental
20 document for the project, to the extent completed to date.

21 (3) Archeological eligibility testing phase.

22 (A) All sites and portions of sites recommended for
23 eligibility testing by THC will be subject to archeological

1 testing, using the methods agreed upon in writing by TxDOT and
2 THC.

3 (B) THC may send a representative to observe any or all
4 of the testing procedures.

5 (C) At the completion of testing, TxDOT will prepare a
6 formal report of the results of testing.

7 (i) For sites affected by federal undertakings, the
8 report will include recommendations regarding eligibility for
9 the NRHP, as described in 36 CFR Part 60 and 36 CFR Part 800.

10 (ii) For sites affected by non-federal undertakings,
11 the report will include recommendations regarding the
12 eligibility of the site for designation as a State Archeological
13 Landmark, in accordance with ACT, §191.091 and §191.092, and 13
14 TAC Chapter 26.

15
16 (iii) TxDOT may submit interim reports on testing to
17 expedite project review, provided such reports contain
18 sufficient information on which to base recommendations of
19 eligibility and, if relevant, additional work. Interim reports
20 shall not be substituted for final reports.

21 (D) TxDOT will send the testing report to THC with a
22 request for review.

23 (E) THC will respond to the report within 20 days of

1 receipt of TxDOT's request for review and in accordance with 36
2 CFR Part 800. The response will include:

3 (i) a statement of concurrence or nonconcurrence with
4 the results of the archeological testing and recommendations
5 contained in the TxDOT request for review; and

6 (ii) a determination of the site's eligibility for
7 listing in the National Register of Historic Places, or for
8 designation as a State Archeological Landmark, and

9 (iii) if THC does not respond within 20 days, TxDOT
10 may assume that THC concurs with TxDOT's determination regarding
11 a site's eligibility and may proceed with the project in
12 accordance with the procedures required in this MOU.

13 (F) When appropriate, TxDOT will work with THC to
14 develop public educational outreach projects associated with
15 significant test level investigations.

16 (4) Archeological excavation/data recovery.

17 (A) All sites and portions of sites determined to be
18 eligible for the NRHP (for federal undertakings) or eligible for
19 designation as a State Archeological Landmark (for non-federal
20 undertakings) based on consultation with THC, will be subjected
21 to data recovery in conformance with a data recovery plan that
22 has the concurrence of THC when avoidance is not feasible and
23 provided that they are not eligible for preservation in place.

1 (B) TxDOT, in consultation with THC, will develop a
2 data recovery plan for each eligible site on a case-by-case
3 basis, in accordance with 36 CFR Part 800 for federal
4 undertakings and ACT for non-federal undertakings. Final data
5 recovery plans must be approved by THC prior to their
6 implementation.

7 (C) Results of data recovery will be published as
8 required by 36 CFR Part 800 and/or ACT. To expedite
9 transportation project planning, design, and construction,
10 interim reports on data recovery may be used for consultation to
11 determine whether field work commitments have been fulfilled.
12 Interim reports shall not be substituted for final reports.

13 (D) All data recovery will be performed under an
14 antiquities permit.

15 (E) When appropriate, TxDOT and THC may agree to
16 substitute alternative mitigation in lieu of data recovery.

17 (F) When appropriate, TxDOT will work with THC to
18 develop public educational outreach projects associated with
19 significant data recovery investigations.

20 (G) THC will respond to the report within 20 days of
21 receipt of TxDOT's request for review and will comment on
22 whether field work commitments have been fulfilled. TxDOT shall
23 take THC comments into account prior to proceeding with the

1 project. If THC does not respond within 20 days, TxDOT may
2 assume that THC concurs that the field work commitments have
3 been fulfilled.

4 (5) Archeological sites found after award of contract.

5 (A) When previously unknown archeological remains are
6 encountered after award of contract, TxDOT will immediately
7 suspend construction or any other activities that would affect
8 the site.

9 (B) TxDOT will inform THC, and, if appropriate,
10 federally recognized tribes, of discovery of previously unknown
11 archeological remains and invite them to accompany TxDOT staff
12 (or consultants) to the location within 48 hours of the
13 discovery.

14 (C) TxDOT will evaluate the need, if any, for further
15 investigations upon visiting the location of the discovery.

16 (D) If TxDOT determines that the discovery is an
17 unrecorded archeological site, then TxDOT shall complete a State
18 of Texas Archeological Site Data Form.

19 (E) If TxDOT determines that the site does not warrant
20 further investigations, TxDOT will write to THC and, if
21 appropriate, federally recognized tribes outlining its reasons
22 and requesting concurrence within one business day of the visit
23 to the discovery location. THC and, if appropriate, federally

1 recognized tribes, will have two business days to respond. No
2 response will be deemed to represent concurrence and
3 construction will resume.

4 (F) If TxDOT determines that the site warrants further
5 investigation, a scope of work for investigations will be
6 developed within 24 hours of the visit to the site. The scope
7 of work will be submitted to THC and appropriate federally
8 recognized tribes who will have one business day to review and
9 comment on the scope of work. No response will be deemed to
10 represent concurrence and the scope shall be implemented. If
11 comments are received, TxDOT and, if appropriate, FHWA shall
12 take into account those comments and carry out the final scope
13 of work. Upon completion of the approved work, construction may
14 proceed as planned. A report of the investigations will be
15 completed within the timeframe established by the scope of work
16 and copies provided to all consulting parties.

17 (G) The procedures in this subsection shall be used to
18 satisfy the permitting requirements of 13 TAC Chapter 26 for
19 emergency permitting under 13 TAC §26.20(13) when conditions of
20 natural or man-made disasters necessitate immediate action.

21 (6) Artifact recovery and curation.

22 (A) Artifact recovery.

23 (i) The type and quantity of artifacts to be

1 recovered during testing and data recovery will be detailed in
2 the scope of work and will be selected to address the research
3 questions.

4 (ii) Artifacts or analysis samples (such as soil
5 samples) that are recovered from survey, testing, or data
6 recovery investigations by TxDOT or their contracted agents that
7 address the research questions, must be cleaned, labeled, and
8 processed in preparation for long-term curation unless the
9 artifacts or samples are approved by THC for discard under 13
10 TAC Chapter 26.

11 (iii) To ensure proper care and curation, recovery
12 methods must conform to 36 CFR Part 800, and 13 TAC Chapter 26.

13 (B) Artifact curation.

14 (i) TxDOT or its permitted contractor may temporarily
15 house artifacts and samples during laboratory analysis and
16 research, but upon completion of the analysis, artifacts and
17 accompanying documentation must be transferred to a permanent
18 curatorial facility in accordance with the terms of the
19 antiquities permit.

20 (ii) Artifacts and samples will be placed at an
21 appropriate artifact curatorial repository which fulfills 36 CFR
22 Part 79, or the ACT, as approved by THC. When appropriate,
23 TxDOT will consult with THC to identify for disposal collections

1 or portions of collections that do not have identifiable value
2 for future research or public interpretation. Final approval
3 regarding the disposition of collections will be made by THC.

4 (iii) TxDOT is responsible for the curatorial
5 preparation of all artifacts to be submitted for curation so
6 that they are acceptable to the receiving curatorial repository
7 and fulfill 36 CFR Part 79 and 13 TAC Chapter 26, as approved by
8 THC.

9 (g) Early project development procedures for coordination
10 regarding non-archeological historic properties. For purposes
11 of this subsection and subsections (h), (i) and (j) of this
12 section, the term historic properties will refer only to non-
13 archeological historic properties.

14 (1) TxDOT and THC agree (for federal and non-federal
15 projects) that certain types of undertakings do not require
16 individual coordination. These undertakings are projects where
17 no historic properties are present, or where the undertakings
18 will have a minimal potential to affect historic properties if
19 such are present in the area of potential effects. TxDOT will
20 document these undertakings and include them in a quarterly
21 report to THC unless they are the subject of individual
22 coordination with THC. Examples of such undertakings include:

23 (A) Construction of bicycle and pedestrian lanes,

1 paths, and facilities if not located in a listed or eligible
2 National Register historic district;

3 (B) road widening within existing or minimal new right
4 of way if not located in a listed or eligible National Register
5 historic district;

6 (C) correction of roadway geometric and intersections
7 within existing or minimal new right of way;

8 (D) bridge deck rehabilitation and stabilization; and

9 (E) other classes of undertakings jointly agreed to in
10 writing by THC and TxDOT.

11 (2) Early in the project development process, TxDOT will
12 determine whether federally assisted, licensed, or permitted
13 transportation projects (federal projects) constitute
14 undertakings with the potential to affect historic properties.
15 In consultation with THC, it has been determined that individual
16 coordination with THC is not necessary for projects where
17 background research indicates that no historic properties are
18 present or where they are present but the project will not have
19 the potential to affect them. TxDOT will maintain documentation
20 of efforts taken to reach this conclusion, and will include
21 these projects in the quarterly report, or provide documentation
22 upon request by THC.

23 (3) Early in the project development process, TxDOT will

1 review its non-federal transportation improvements occurring on
2 any lands of the State of Texas (non-federal projects) to
3 determine whether they have the potential to affect historic
4 properties under the terms of the ACT, and 13 TAC Chapter 26.
5 Effects include the removal, alteration, or renovation of one or
6 more contributing elements to a historic property. TxDOT and
7 THC agree that individual coordination with THC is not necessary
8 when no historic properties are present or when the project does
9 not have the potential to adversely affect historic properties,
10 provided TxDOT has complied with the provisions of this MOU.
11 TxDOT will maintain documentation of efforts taken to reach this
12 conclusion, and will include these projects in the quarterly
13 report, or provide documentation upon request by THC.

14 (4) If TxDOT determines that a project has the potential
15 to affect a historic property, TxDOT will then individually
16 coordinate the project with THC in accordance with the
17 provisions provided in this MOU.

18 (h) Identification and evaluation of historic properties.

19 (1) For non-federal and federal projects requiring
20 individual THC coordination, TxDOT will identify historic
21 properties within the project's area of potential effects.
22 TxDOT will conduct a search of available records, including
23 listings of the Texas Historic Sites Atlas, Recorded Texas

1 Historic Landmarks, State Archeological Landmarks, and
2 properties listed in the National Register. THC will render all
3 reasonable assistance to TxDOT in performing record searches on
4 historic properties.

5 (2) TxDOT will conduct field surveys for all projects
6 that may have historic-age properties within their area of
7 potential effects. These surveys will be conducted in order to
8 determine if historic properties are present.

9 (3) If the identification efforts reveal historic-age
10 properties, TxDOT will evaluate the eligibility of each property
11 to determine if the property:

12 (A) qualifies as a SAL as defined by ACT, §191.092(f),
13 for non-federal projects; or

14 (B) is eligible for inclusion or listed in the National
15 Register, for federal projects.

16 (4) If a non-federal or federal project has the potential
17 to affect a historic-age bridge-class structure, the following
18 procedures apply unless the structure is of a categorically
19 excluded type as defined by SHBI criteria. Categorically
20 excluded structures are generally not eligible bridges that have
21 been widened, non-depression era simple span concrete box
22 culverts and timber stringer bridges. There are exceptions to
23 these exclusions and other categorically excluded structures may

1 be added by written agreement between TxDOT and THC in the
2 future.

3 (A) If a non-federal or federal project has the
4 potential to affect a historic-age bridge-class structure that
5 has not been included in the SHBI, as formally accepted by THC,
6 TxDOT will assess the eligibility of the structure in
7 consultation with THC.

8 (B) If a historic-age bridge-class structure has been
9 determined not eligible, either under the SHBI or in individual
10 consultation with THC, TxDOT will coordinate with appropriate
11 local entities to determine if the structure has local interest
12 or significance.

13 (i) If no local interest or significance is
14 identified, TxDOT will add the project to the quarterly report.

15 (ii) If TxDOT or THC identifies local interest or
16 significance in a structure, TxDOT will reassess the eligibility
17 with THC. If TxDOT and THC concur that the bridge-class
18 structure is still not eligible, TxDOT will document the project
19 in the quarterly report.

20 (C) If a historic-age bridge-class structure has been
21 determined eligible, either under the SHBI or in individual
22 consultation with THC, TxDOT shall follow the procedures
23 outlined in subsection (i) of this section, regarding assessing

1 and mitigating effects on historic properties.

2 (D) If TxDOT has reason to believe that a bridge-class
3 structure is no longer eligible, TxDOT will consult with THC to
4 reassess the eligibility.

5 (E) If TxDOT and THC concur that the bridge-class
6 structure is no longer eligible, TxDOT will document the project
7 in the quarterly report.

8 (i) Assessing and mitigating effects on historic
9 properties. TxDOT will assess the effects of projects on
10 properties that qualify as SALs for non-federal projects and on
11 properties determined to be listed or eligible for inclusion in
12 the National Register for federal projects. TxDOT will then
13 consult with THC using the following procedures.

14 (1) For a non-federal project, TxDOT will consult with
15 THC to determine if a historic structures permit is required for
16 any proposed removals, alterations, or renovations to state
17 archeological landmarks or to properties for which THC will
18 initiate an SAL nomination in accordance with 13 TAC §26.12 and
19 ACT, §191.098.

20 (2) For a federal project, TxDOT will apply the criteria
21 of effect and in the case of a determination of adverse effect
22 will consult with THC in accordance with the provisions set
23 forth in 36 CFR Part 800.

1 (3) For a project involving a bridge-class structure that
2 TxDOT and THC concur is eligible, TxDOT shall evaluate the
3 preservation options in the following order of preference: full
4 vehicular use; reduced level of vehicular use, non-vehicular use
5 at original site; relocation for vehicular use; relocation for
6 non-vehicular use; or demolition. TxDOT will document the
7 evaluation of each preservation option including identification
8 of the preferred option with supportive reasoning, and will
9 submit the documentation to THC.

10 (A) When an eligible bridge-class structure will be
11 retained for non-vehicular use at the original site or
12 relocated, TxDOT will provide THC with an agreement signed by
13 the bridge-class structure owner that includes language that
14 ensures maintenance of the bridge-class structure, and provides
15 THC the opportunity to review and concur that current and future
16 proposed work on the bridge-class structure, beyond normal
17 maintenance, complies with the Secretary of the Interior's
18 Standards for Rehabilitation.

19 (B) Upon receipt of complete documentation, THC shall
20 have 20 days to review and comment on the project. TxDOT shall
21 take THC comments into account in making decisions on the
22 project involving the bridge-class structure.

23 (4) TxDOT will, to the maximum extent practicable,

1 provide an early opportunity for the public and interested
2 parties to receive information and to express their views on
3 projects when a historic property may be negatively affected by
4 a transportation project.

5 (5) TxDOT will also consult with THC to seek ways to
6 avoid, minimize, or mitigate any negative effects on historic
7 properties caused by federal and non-federal projects in
8 accordance with the following procedures.

9 (A) Non-federal projects. TxDOT shall take THC
10 comments into account when projects will have an adverse effect
11 on historic properties.

12 (B) Federal projects. TxDOT will follow the
13 consultation procedures set out in 36 CFR Part 800.

14 (j) Project documentation by TxDOT.

15 (1) THC may audit TxDOT project files for specific
16 undertakings submitted in the quarterly report. Projects
17 involving non-archeological properties that are submitted
18 individually to THC or included in the quarterly report, will be
19 documented by TxDOT and will include:

20 (A) a project description and scope, including project
21 drawings, photographs, reports and other information where
22 needed to clearly describe the proposed project;

23 (B) a map showing the location of the project and all

1 historic-age properties within the APE of the project;

2 (C) a statement of the efforts and methodology used to
3 identify historic-age properties in the project area;

4 (D) documentation on each identified property,
5 including at least one photograph of the property, the address,
6 if known, an architectural description, date of construction
7 (estimated or known), an integrity assessment, and any known
8 local, state, or national historical designations;

9 (E) the results of any coordination with interested
10 parties concerning the eligibility of identified historic-age
11 properties;

12 (F) the results of TxDOT's determination of eligibility
13 for each identified historic-age property; and

14 (G) TxDOT's assessment of potential project effects on
15 historic properties, including evaluations, reports and other
16 documentation relevant to the determination of effect.

17 (2) If the project is submitted to THC for review of non-
18 archeological properties, THC will respond within 20 days of
19 receipt of complete documentation and TxDOT's request for review
20 as follows.

21 (A) For a non-federal project, THC's response will
22 indicate whether the project will require a historic structures
23 permit for an SAL, whether THC intends to initiate SAL

1 nomination of a property not previously designated as an SAL, or
2 if THC has knowledge that another party intends to initiate SAL
3 nomination in accordance with 13 TAC §26.11, §26.12 and §26.22,
4 and ACT, §191.098. If THC does not respond within 20 days,
5 TxDOT will assume that THC concurs with TxDOT's determination
6 regarding historic-age property eligibility or project effects,
7 and TxDOT will proceed with the project in accordance with the
8 procedures required in this MOU.

9 (B) For a federal project, all coordination with THC
10 will follow the provisions of 36 CFR Part 800 and the PA between
11 TxDOT, FHWA, and THC.

12 (3) Projects involving archeological properties that are
13 submitted individually to THC or included in the quarterly
14 report will be documented by TxDOT in the manner described in
15 this paragraph. THC may audit TxDOT project files for specific
16 undertakings submitted in the quarterly report. For archeology,
17 project documentation will consist of a statement for "no
18 survey" or a report of an archeological impact evaluation or an
19 archeological survey report. Each project at a minimum will
20 include:

21 (A) a description of the project;

22 (B) a project location map;

23 (C) information about soils and geology in the project

1 location, as appropriate;

2 (D) information on previously recorded archeological
3 sites in the project location;

4 (E) level of effort for identification of archeological
5 sites; and

6 (F) results and recommendations.

7 (k) Environmental document and public involvement. TxDOT
8 will summarize information on its efforts to identify
9 archeological sites and historic properties, to determine the
10 effects of projects on archeological sites and historic
11 properties, and to mitigate any negative effect on these sites
12 or properties in the environmental document, if one is prepared,
13 and will include this information in public involvement
14 activities to the maximum extent practicable.

15 (l) Denial of access. In cases where access to private
16 land for conducting archeological survey is denied prior to the
17 approval of the environmental document, TxDOT will make a
18 commitment to complete testing, evaluation of site eligibility,
19 or data recovery prior to any construction related impacts.

20 (m) MOU to govern TxDOT procedures. TxDOT satisfies
21 applicable THC requirements if it utilizes the procedures of
22 this MOU in lieu of other THC procedures. In cases where TxDOT
23 is utilizing this MOU in lieu of other THC procedures, TxDOT

1 must follow the requirements of this MOU.

2 (n) THC audit. THC may audit TxDOT project files for
3 specific undertakings carried out under this MOU.

4 (o) Annual meeting. TxDOT and THC staff will meet annually
5 to discuss topics of mutual interest.

6 (p) Dispute resolution.

7 (1) If THC and TxDOT cannot reach agreement on any plans
8 or actions carried out pursuant to this MOU, THC and TxDOT will
9 consult to resolve the objection.

10 (2) If THC and TxDOT cannot reach a compromise solution
11 or otherwise resolve the objection through consultation, either
12 TxDOT or THC may choose to invoke the dispute resolution
13 provisions which are set forth in paragraph (3) of this
14 subsection.

15 (3) When these dispute resolution provisions are invoked,
16 if TxDOT and THC cannot resolve their disagreement, the two
17 agencies will resolve their dispute in accordance with the
18 procedures established under state and federal rules.

19 (A) Federal undertakings will follow the dispute
20 resolution procedures as stipulated in 36 CFR Part 800.

21 (B) Non-federal projects will follow the appeal
22 procedures provided in 13 TAC Chapter 27.

23 (q) Review of MOU. This memorandum shall be reviewed and

1 updated as provided by law or by agreement between the parties.