

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 §2.23 and new Subchapter I, §§2.301-2.308 all relating to a Memorandum of Understanding with the Texas Commission on Environmental Quality to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed repeal 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 §2.23 and new §§2.301-2.308 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

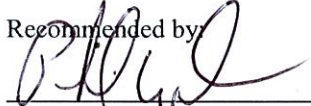
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



Director, Environmental Affairs

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 §2.23, Memorandum of Understanding with the Texas
4 Natural Resource Conservation Commission. The department
5 proposes the simultaneous replacement of the repealed section
6 with new Subchapter I, §§2.301-2.308, Memorandum of
7 Understanding with the Texas Commission on Environmental
8 Quality.

9
10 EXPLANATION OF PROPOSED REPEAL AND NEW SECTIONS

11 Transportation Code, §201.607 requires the department to adopt a
12 memorandum of understanding (MOU) with each state agency that
13 has responsibilities for the protection of the natural
14 environment or for the preservation of historic or archeological
15 resources. Transportation Code, §201.607 also requires the
16 department to adopt the MOU and all revisions to it by rule, and
17 to periodically evaluate and revise the MOU. In order to meet
18 the legislative intent and to ensure that natural resources are
19 given full consideration in accomplishing the department's
20 activities, the department has evaluated its MOU with the Texas
21 Commission on Environmental Quality (TCEQ) adopted in 2002, and
22 finds it necessary to repeal existing §2.23 and simultaneously
23 adopt new Subchapter I, §§2.301-2.308.

24
25 The proposed new MOU between TCEQ and the department satisfies

1 the statutory requirements for reviewing and revising MOUs with
2 resource agencies. It is intended to replace the existing MOU,
3 which has been in effect since March 21, 2002, with an MOU that
4 more effectively streamlines TCEQ's review of the department's
5 projects, and simultaneously better allows TCEQ to focus on
6 those projects most likely to affect natural resources. The
7 proposed MOU is better organized than the existing MOU, with
8 different subject areas broken into separate sections. The
9 proposed MOU recognizes that the legislature changed the name of
10 the Texas Natural Resource Conservation Commission to the Texas
11 Commission on Environmental Quality. Additionally, the proposed
12 MOU reflects changes made by the department's recent revision of
13 its environmental review rules, published in the March 9, 2012
14 issue of the *Texas Register* (37 TexReg 1727).

15

16 SECTION BY SECTION EXPLANATION OF PROPOSED MOU

17 Section 2.301 sets out the purpose of the MOU, to provide a
18 formal mechanism by which TCEQ reviews transportation projects
19 that have the potential to affect resources within TCEQ's
20 jurisdiction.

21

22 Section 2.302 sets forth the statutory authority for TxDOT and
23 TCEQ to enter into the MOU.

24

25 Section 2.303 contains definitions of various terms used in the

1 MOU.

2

3 Section 2.304 sets forth the statutory responsibilities of TxDOT
4 and TCEQ that are relevant to the purpose of the MOU.

5

6 Section 2.305 sets forth procedures for determining whether the
7 department is required to coordinate a given transportation
8 project with TCEQ. TxDOT will not coordinate a project that
9 TxDOT classifies as a categorical exclusion, blanket categorical
10 exclusion, or programmatic categorical exclusion, under §§2.81
11 or 2.82 of Chapter 2. TxDOT will coordinate a project for which
12 TxDOT prepares an environmental assessment unless TxDOT has
13 already coordinated an environmental report (discussed below)
14 concerning the project and certain other conditions are met.
15 TxDOT will coordinate a project for which TxDOT prepares an
16 environmental impact statement. TxDOT will coordinate a
17 reevaluation concerning a project if the earlier coordination
18 concerning the project is no longer valid as a result of changes
19 in the project.

20

21 Section 2.305(a) recognizes TxDOT's new procedures that allow
22 TxDOT to prepare an environmental report, which is a report,
23 form, checklist, or other documentation analyzing an
24 environmental issue in the context of a specific transportation
25 project or presenting a thorough summary of an environmental

1 study conducted in support of an environmental review document,
2 or demonstrating compliance with a specific environmental
3 requirement. TxDOT's recently-adopted rules authorize a project
4 sponsor to prepare an environmental report and submit it for
5 technical review before the environmental review document is
6 completed (see, 43 TAC §2.45). Similarly, the proposed MOU
7 would allow, but not require, TxDOT to coordinate separately an
8 environmental report with TCEQ. For projects for which TxDOT
9 prepares an environmental assessment, the MOU would allow TxDOT
10 to satisfy coordination requirements by coordinating an
11 environmental report provided all of the conditions in proposed
12 §2.305(a)(2)(B) are met.

13
14 Section 2.305(b) contains triggers for determining when
15 coordination is required for projects for which TxDOT prepares
16 an environmental assessment. For example, coordination is
17 required if a project will add capacity in a nonattainment or
18 maintenance area of the state. Use of these triggers will allow
19 TCEQ to focus its resources on reviewing those projects most
20 likely to adversely affect natural resources.

21
22 Section 2.305(c) includes general provisions concerning
23 compliance with law and the computation of time. The proposed
24 MOU would authorize TxDOT (but not a local government) to
25 conduct the coordination with TCEQ.

1

2 Section 2.305(d) specifies the protocols for TxDOT transmitting
3 an environmental report or environmental review document to
4 TCEQ, and then TCEQ transmitting back its comments on the
5 document. TCEQ must submit its comments within 30 days, unless
6 TCEQ gives notice that it is extending the deadline for no more
7 than an additional 15 days. TxDOT will respond in writing to
8 TCEQ's comments, and will ensure that the final version of the
9 environmental review document describes the results of any
10 coordination with and comments made by TCEQ.

11

12 Section 2.306 explains that TCEQ will provide publicly available
13 information to TxDOT related to air quality so that TxDOT may
14 incorporate such information into its analyses of how a project
15 may impact air resources.

16

17 Section 2.307 states that TCEQ reserves all rights it has to
18 enforce relevant laws, and that the parties intend that TCEQ's
19 participation in this MOU does not have the effect of waiving
20 those rights or the requirements of any laws that apply to the
21 projects covered by the MOU. Also, the parties agree that the
22 MOU does not preclude either party from making any legal
23 argument.

24

25 Section 2.308 expresses the intent of TxDOT and TCEQ to update

1 the MOU in the future as required by Transportation Code,
2 §201.607, or as necessitated by a change in state and federal
3 law or a change in the state implementation plan.

4

5 FISCAL NOTE

6 James Bass, Chief Financial Officer, has determined that for
7 each of the first five years in which the new subchapter as
8 proposed is in effect, there will be no fiscal implications for
9 state or local governments as a result of enforcing or
10 administering the new subchapter.

11

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

15

16 PUBLIC BENEFIT AND COST

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

1

2 TAKINGS IMPACT ASSESSMENT

3 The department has evaluated this proposed repeal and adoption
4 of rules to determine whether Government Code, Chapter 2007
5 (Private Real Property Rights Preservation Act) requires the
6 department to complete a takings assessment. The department has
7 determined that the proposed repeal and adoption of rules does
8 not affect private real property in a manner that requires the
9 takings assessment.

10

11 COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

12 The department determined that this rulemaking relates to
13 actions subject to the Texas Coastal Management Program (CMP)
14 under the Coastal Coordination Act of 1991, as amended (Natural
15 Resources Code, §§33.201 et seq.), and must be consistent with
16 all applicable CMP policies, because it concerns the
17 department's environmental review of transportation projects.
18 The department reviewed this action for consistency with the CMP
19 goals and policies under the rules promulgated by the Coastal
20 Coordination Council, which remain in effect until superseded by
21 rules of the General Land Office. The department has determined
22 that the action is consistent with applicable CMP goals and
23 policies.

24

25 A CMP policy applicable to this rulemaking is that

1 transportation projects shall comply with certain practices
2 concerning the siting of a project to lessen the impacts on
3 coastal natural resources (see 31 TAC §501.31). The proposed
4 rules concern the method by which to evaluate the environmental
5 impacts of a transportation project, and do not dictate the
6 siting of a project. However, the purpose of the proposed rules
7 is to establish procedures for identifying the impacts of
8 transportation projects on certain resources, and for
9 coordination of projects with the relevant state resource
10 agency. This provides an additional mechanism for avoiding,
11 minimizing, or mitigating, where practicable, adverse effects of
12 department projects on coastal natural resource areas that serve
13 as habitat, on coastal preserves, and on threatened and
14 endangered species. For these reasons, the rulemaking action is
15 consistent with the CMP goal of protecting, preserving,
16 restoring, and enhancing the diversity, quality, quantity,
17 functions, and values of coastal natural areas.

18

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

24

1 PUBLIC HEARING

2 Pursuant to the Administrative Procedure Act, Government Code,
3 Chapter 2001, the Texas Department of Transportation will
4 conduct a public hearing to receive comments concerning the
5 proposed rules. The public hearing will be held at 1:30 p.m. on
6 Thursday, March 7, 2013, in the Ric Williamson Hearing Room,
7 First Floor, Dewitt C. Greer State Highway Building, 125 East
8 11th Street, Austin, Texas and will be conducted in accordance
9 with the procedures specified in 43 TAC §1.5. Those desiring to
10 make comments or presentations may register starting at 1:00
11 p.m. Any interested persons may appear and offer comments,
12 either orally or in writing; however, questioning of those
13 making presentations will be reserved exclusively to the
14 presiding officer as may be necessary to ensure a complete
15 record. While any person with pertinent comments will be
16 granted an opportunity to present them during the course of the
17 hearing, the presiding officer reserves the right to restrict
18 testimony in terms of time and repetitive content.

19 Organizations, associations, or groups are encouraged to present
20 their commonly held views and identical or similar comments
21 through a representative member when possible. Comments on the
22 proposed text should include appropriate citations to sections,
23 subsections, paragraphs, etc. for proper reference. Any
24 suggestions or requests for alternative language or other
25 revisions to the proposed text should be submitted in written

1 form. Presentations must remain pertinent to the issues being
2 discussed. A person may not assign a portion of his or her time
3 to another speaker. Persons with disabilities who plan to
4 attend this meeting and who may need auxiliary aids or services
5 such as interpreters for persons who are deaf or hearing
6 impaired, readers, large print or Braille, are requested to
7 contact Government and Public Affairs Division, 125 East 11th
8 Street, Austin, Texas 78701-2483, (512) 463-6086 at least five
9 working days prior to the hearing so that appropriate services
10 can be provided.

11

12 SUBMITTAL OF COMMENTS

13 Written comments on the proposed repeal of §2.23 and new
14 Subchapter I, §§2.301-2.308 may be submitted to Robin Carter,
15 Office of General Counsel, Texas Department of Transportation,
16 125 East 11th Street, Austin, Texas 78701-2483 or to
17 RuleComments@txdot.gov with the subject line "TCEQ MOU." The
18 deadline for receipt of comments is 5:00 p.m. on March 18, 2013.
19 In accordance with Transportation Code, §201.811(a)(5), a person
20 who submits comments must disclose, in writing with the
21 comments, whether the person does business with the department,
22 may benefit monetarily from the proposed rules, or is an
23 employee of the department.

24

25 STATUTORY AUTHORITY

1 The repeal and new sections are proposed under Transportation
2 Code, §201.101, which provides the Texas Transportation
3 Commission with the authority to establish rules for the conduct
4 of the work of the department, and more specifically,
5 Transportation Code, §201.607(b), which requires the department
6 to adopt memoranda of understanding with each agency that has
7 responsibility for the protection of the natural environment or
8 for the preservation of historical or archeological resources,
9 and to adopt all revisions to these memoranda by rule.

10

11 CROSS REFERENCE TO STATUTE

12 Transportation Code, §201.607.

1 SUBCHAPTER I. MEMORANDUM OF UNDERSTANDING WITH THE TEXAS
2 COMMISSION ON ENVIRONMENTAL QUALITY

3 §2.301. Purpose. This subchapter contains the Memorandum of
4 Understanding (MOU) between the Texas Department of
5 Transportation (TxDOT) and the Texas Commission on Environmental
6 Quality (TCEQ) concerning the review of the potential
7 environmental effect of transportation projects as required by
8 Transportation Code, §201.607. The MOU does not affect
9 coordination or permits required by other state or federal laws;
10 however, as set forth in this MOU, TxDOT may elect to coordinate
11 with TCEQ under this MOU concerning transportation projects that
12 this MOU does not require to be coordinated. The purpose of
13 this MOU is to provide a formal mechanism by which TCEQ reviews
14 transportation projects that have the potential to affect
15 resources within TCEQ's jurisdiction. This MOU also promotes
16 the mutually beneficial sharing of information between TxDOT and
17 TCEQ, which will assist TxDOT in making environmentally sound
18 decisions.

19
20 §2.302. Authority.

21 (a) Transportation Code, §201.607, directs the Texas
22 Department of Transportation to adopt memoranda of understanding
23 with each agency that has responsibilities for the protection of

1 the natural environment.

2 (b) Under Water Code, §5.104(b) and Health and Safety Code,
3 §382.035, the Texas Commission on Environmental Quality (TCEQ)
4 may enter into a memorandum of understanding with any other
5 state agency and shall adopt by rule any memorandum of
6 understanding between TCEQ and any other state agency.

7

8 §2.303. Definitions. The following words and terms, when used
9 in this subchapter, have the following meanings, unless the
10 context clearly indicates otherwise.

11 (1) Assessment unit--For a water body in the state, the
12 smallest geographic area of use support analyzed for such body
13 in Texas Commission on Environmental Quality's most recent
14 integrated report prepared under the Clean Water Act §305(b)
15 that includes a Clean Water Act §303(d) list that has been
16 approved by the U.S. Environmental Protection Agency. An
17 assessment unit is based on the primary segment assessment unit
18 identified in the integrated report.

19 (2) Construction--Activities that involve the building of
20 transportation projects on new location; or the expansion,
21 rehabilitation, or reconstruction, of an existing facility.

22 (3) EPA--The United States Environmental Protection
23 Agency.

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

9 (5) Environmental review document--An environmental
10 assessment, a draft environmental impact statement, a final
11 environmental impact statement, a reevaluation as described in
12 §2.85 of this chapter (relating to Reevaluations), or a
13 supplemental environmental impact statement as described in
14 §2.86 of this chapter (relating to Supplemental Environmental
15 Impact Statements), or a document prepared to demonstrate that
16 an Federal Highway Administration (FHWA) transportation project
17 qualifies as a categorical exclusion when FHWA requires a
18 narrative document as opposed to a checklist. An environmental
19 review document includes any attached environmental reports.

20 (6) Federal Clean Air Act (FCAA)--The federal statute,
21 including all amendments, that establishes National Ambient Air
22 Quality Standards (NAAQS) and mandates procedures for reaching
23 and maintaining these standards, codified at 42 United States

1 Code §§7401, et seq.

2 (7) FHWA transportation project--A transportation project
3 for which the approval of the United States Department of
4 Transportation Federal Highway Administration (FHWA) is required
5 by law to comply with the National Environmental Policy Act,
6 codified at 42 United States Code §§ 4321, et seq. and
7 implementing regulations (NEPA), FHWA is the lead federal
8 agency, and FHWA agrees Texas Department of Transportation may
9 act as the joint lead agency under 23 Code of Federal
10 Regulations §771.109.

11 (8) Impaired assessment unit--An assessment unit that
12 does not support or meet water quality standards established by
13 the Texas Commission on Environmental Quality (TCEQ) as shown in
14 TCEQ's most recent integrated report prepared under the Clean
15 Water Act §305(b) that includes a Clean Water Act §303(d) list
16 that has been approved by EPA. An assessment unit identified in
17 the integrated report as impaired due to nonsupport of a water
18 quality standard that is not caused by a pollutant (identified
19 as category 4c) will not be considered an impaired assessment
20 unit for the purposes of this MOU.

21 (9) Maintain or maintenance--Activities which involve the
22 upkeep or preservation of an existing facility to prevent that
23 facility's degradation to an unsafe or irreparable state, or

1 which involve the treatment of an existing facility or its
2 environs to meet acceptable standards of operation or aesthetic
3 quality. The activities generally do not require the
4 acquisition of additional right of way or result in increased
5 roadway capacity.

6 (10) Maintenance area--A geographic area previously
7 designated as a non-attainment area and subsequently
8 redesignated to attainment subject to the requirement to develop
9 a maintenance plan under 42 United States Code §7505a of the
10 FCAA, and other areas designated as maintenance areas by the
11 EPA.

12 (11) Non-attainment area--A geographic area designated
13 nonattainment by the EPA as failing to meet the NAAQS for a
14 pollutant for which a standard exists. The EPA designates
15 counties (or portions thereof) as nonattainment under the
16 provisions of 42 United States Code §7407(d). For the official
17 list and boundaries of nonattainment areas, see 40 Code of
18 Federal Regulations Part 81 and relevant notices in the *Federal*
19 *Register*.

20 (12) State Implementation Plan (SIP)--The plan prepared
21 by the Texas Commission on Environmental Quality under 42 United
22 States Code §7410 of the FCAA to attain, maintain, implement, or
23 enforce NAAQS. An approved SIP is the implementation plan, or

1 most recent revision of this plan, that has been approved by EPA
2 under 42 United States Code §7410 of the FCAA.

3 (13) TCEQ--Texas Commission on Environmental Quality.

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

5 (15) Total Maximum Daily Load (TMDL)--The total amount of
6 a substance that a water body can assimilate and still meet the
7 Texas Surface Water Quality Standards as adopted by the TCEQ for
8 a particular water body.

9 (16) TMDL Implementation Plan (I-Plan)--A plan describing
10 the strategy and activities TCEQ and watershed partners will
11 carry out to improve water quality in the affected watershed.

12 (17) Transportation enhancement--An activity that is
13 listed under 23 United States Code §101(a)(29), that relates to
14 a transportation project, and is eligible for federal funding
15 under 23 United States Code §133.

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

21

22 §2.304. Responsibilities.

23 (a) TxDOT is responsible for the development, construction,

1 maintenance, and operation of the state highway system and other
2 transportation systems as designated by the legislature.

3 (b) TCEQ is the state air and water pollution control
4 agency and is the principal authority in Texas on matters
5 relating to the quality of the state's air and water resources,
6 including the following:

7 (1) Air quality. TCEQ's primary responsibility relating
8 to air, as designated by Health and Safety Code, §382.002,
9 includes, but is not limited to, setting standards, criteria,
10 levels, and emission limits for air quality and air pollution
11 control; and

12 (2) Water quality. TCEQ is charged with the protection
13 of water quality, water rights, and the adoption and enforcement
14 of rules and performance of other acts relating to the safe
15 construction, maintenance, and removal of dams. TCEQ's
16 jurisdiction over water quality, water rights, and enforcement
17 of both water quality and water rights includes, but is not
18 limited to, those items outlined in Water Code, §5.013.

19
20 §2.305. Coordination during Environmental Review Process.

21 (a) Applicability. This section specifies when TxDOT shall
22 designate TCEQ as a participating agency in relation to the
23 environmental review of a transportation project, and therefore

1 coordinate with TCEQ. TxDOT may elect to coordinate with TCEQ
2 concerning other transportation projects that this MOU does not
3 require to be coordinated.

4 (1) Not applicable. This MOU does not apply to a project
5 that TxDOT classifies as a categorical exclusion, blanket
6 categorical exclusion, or programmatic categorical exclusion,
7 under §2.81 of this chapter (relating to Categorical Exclusions)
8 or §2.82 of this chapter (relating to Blanket and Programmatic
9 Categorical Exclusions), and TxDOT will not coordinate such
10 projects with TCEQ.

11 (2) Applicable.

12 (A) Environmental reports. TxDOT may, but is not
13 required to, separately coordinate an environmental report with
14 TCEQ.

15 (B) Environmental assessments. TxDOT shall coordinate
16 the environmental assessment with TCEQ if one or more of the
17 triggers in subsection (b) of this section apply, except TxDOT
18 will not coordinate an environmental assessment if:

19 (i) TxDOT already coordinated one or more
20 environmental reports for a project that evaluate the subject
21 matter of all applicable triggers in subsection (b) of this
22 section;

23 (ii) the project as it affects the subject matter of

1 the applicable triggers in subsection (b) of this section does
2 not subsequently change;

3 (iii) the conclusions in the environmental reports do
4 not subsequently change; and

5 (iv) TCEQ did not request TxDOT to also coordinate
6 the environmental assessment under subsection (d)(2) of this
7 section.

8 (C) Environmental impact statements and supplemental
9 environmental impact statements. TxDOT shall coordinate the
10 draft environmental impact statement and the final environmental
11 impact statement with TCEQ following the requirements of this
12 MOU and at the times described in §2.103(d)(2)(A) & (B) and
13 §2.103(g)(2) of this chapter (relating to Public Participation
14 for an Environmental Impact Statement or Supplemental
15 Environmental Impact Statement). TxDOT will coordinate a
16 supplemental environmental impact statement with TCEQ following
17 the requirements of this MOU.

18 (D) Reevaluations. If TxDOT prepares a written
19 reevaluation for a transportation project under §2.85 of this
20 chapter (relating to Reevaluations), TxDOT shall coordinate the
21 reevaluation with TCEQ if the earlier coordination concerning
22 the project is no longer valid as a result of changes in the
23 project.

1 (b) Triggers for coordination.

2 (1) Air quality. Projects that add capacity in a
3 nonattainment or maintenance area of the State.

4 (2) Water quality.

5 (A) Projects that will require Tier II individual Clean
6 Water Act Section 401 certification under procedures defined in
7 the most recent version of the memorandum of agreement between
8 the U.S. Army Corps of Engineers and TCEQ.

9 (B) Projects located in the recharge, transition, or
10 contributing zones of the Edwards Aquifer, pursuant to 30 TAC
11 Chapter 213, Subchapters A and B (Edwards Aquifer rules). For
12 these projects, the environmental review document or
13 environmental report provided to TCEQ by TxDOT shall provide the
14 location of the project within the Edwards Aquifer. TxDOT shall
15 include a statement that the proposed projects and associated
16 activities are to be implemented, operated, and maintained in a
17 manner that complies with the Edwards Aquifer rules and any
18 applicable TCEQ guidance documents in effect to implement the
19 rules.

20 (C) Projects located within five miles of an impaired
21 assessment unit and within the watershed of the impaired
22 assessment unit.

23 (i) Determination of trigger. For the purposes of

1 this subparagraph, the determination of whether an assessment
2 unit is impaired must be made when TxDOT assesses whether a
3 trigger in this subparagraph applies to the transportation
4 project, and must be based on the most recent TCEQ integrated
5 report at that time prepared under Clean Water Act §305(b) that
6 includes a Clean Water Act §303(d) list that has been approved
7 by the EPA.

8 (I) TxDOT will identify impaired assessment units
9 using information publicly available from TCEQ.

10 (II) TxDOT shall identify whether the project
11 drains to any impaired assessment unit using publicly available
12 map resources, survey data, topographic data, or other
13 scientifically valid data. TxDOT may identify the watershed of
14 an impaired assessment unit using the 12-digit hydrologic unit
15 codes produced by the United States Geologic Service.

16 (ii) Required information. If the trigger in this
17 subparagraph applies to a project, TxDOT in the environmental
18 review document or environmental report shall provide the
19 location of the project in the watershed of the impaired
20 assessment unit, the assessment unit number, segment name,
21 segment number, impairments, and the year of the 303(d) list
22 used, and shall provide:

23 (I) For impaired assessment units with EPA-approved

1 TMDLs, the name and date of the EPA-approved TMDL and if
2 applicable, the TCEQ-approved I-Plan, and a statement that the
3 project and associated activities will be implemented, operated,
4 and maintained in a manner that is consistent with the approved
5 TMDL or approved I-Plan; or

6 (II) For impaired assessment units without EPA-
7 approved TMDLs, an acknowledgement that the assessment unit does
8 not have an EPA-approved TMDL and a statement that the project
9 and associated activities will be implemented, operated, and
10 maintained using best management practices to control the
11 discharge of pollutants from the project site.

12 (c) General.

13 (1) No coordination by local government. When a local
14 government acts as the project sponsor concerning the
15 preparation of an environmental review document or environmental
16 report, TxDOT shall perform the coordination of the document
17 with TCEQ as described in this MOU.

18 (2) Compliance with law. Environmental review documents
19 and environmental reports prepared and provided to TCEQ by TxDOT
20 will be in compliance with applicable law.

21 (3) Computation of time. In computing time for the
22 purposes of this MOU, the period begins on the day after the act
23 or event in question and concludes at the end of the last day of

1 that designated period, unless that day is a Saturday, Sunday,
2 or state holiday, in which event the period concludes at the end
3 of the next day that is not a Saturday, Sunday, or state
4 holiday.

5 (d) Review and response.

6 (1) TxDOT shall forward the environmental review document
7 or environmental report to the e-mail address specified by TCEQ.
8 The e-mail will indicate all triggers under subsection (b) of
9 this section that apply to the project. TCEQ shall have a
10 period of 30 days, from the date of receipt, to review the
11 environmental review document or environmental report and
12 provide written comments. Before the deadline for review, TCEQ
13 may, if necessary, notify TxDOT that it is extending the review
14 period for no more than 15 additional days. TCEQ will submit
15 any comments to the e-mail address specified by TxDOT.

16 (2) For a project for which TxDOT prepares an
17 environmental assessment, if TxDOT coordinates an environmental
18 report concerning the project, TCEQ may request during the
19 comment period that TxDOT also coordinate the environmental
20 assessment for the project. If TCEQ makes a request TxDOT shall
21 coordinate the related environmental assessment.

22 (3) If TCEQ provides comments, TxDOT will respond in
23 writing to TCEQ's comments. TxDOT will ensure that the final

1 version of the environmental review document describes the
2 results of any coordination with and comments made by TCEQ, and
3 includes a summary of those contacts and comments. TxDOT will
4 consider TCEQ comments submitted to TxDOT after the comment
5 deadline to the extent possible, given the stage of the
6 environmental review process at the time of the submission.

7

8 §2.306. Exchange of Air Quality Information.

9 (a) Upon request by TxDOT, TCEQ will provide publicly
10 available information to TxDOT related to air quality, such as:

11 (1) information useful for establishing existing air
12 quality conditions to be described in an environmental review
13 document;

14 (2) the location and severity of conditions in non-
15 attainment areas;

16 (3) information affecting transportation-related activity
17 and mobile sources in the state implementation plan; and

18 (4) proposed and existing locations of roadside air
19 monitors.

20 (b) TxDOT and TCEQ will exchange data useful for developing
21 mobile source budgets, and data on transportation conformity
22 determinations, including for any area newly designated by EPA
23 as a non-attainment area.

1

2 §2.307. No waiver of rights. As the state environmental
3 regulatory agency, TCEQ reserves all rights it has to enforce
4 relevant laws, and the parties intend that TCEQ's participation
5 in this MOU does not have the effect of waiving those rights or
6 the requirements of any laws that apply to the projects covered
7 by this MOU. The parties agree that this MOU does not preclude
8 either party from making any legal argument.

9

10 §2.308. Review of MOU. This MOU shall be reviewed and updated
11 no later than January 1, 2017. TxDOT and TCEQ by rule shall
12 adopt the MOU and all revisions to the MOU. If a change in
13 state or federal law or a change in the SIP necessitates a
14 change in this MOU, then representatives from both TxDOT and
15 TCEQ will meet to work out a mutually agreeable amendment to the
16 MOU.

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

3 §2.23. Memorandum of Understanding with the Texas Natural
4 Resource Conservation Commission.

5 (a) Purpose. This section contains the Memorandum of
6 Understanding (MOU) between the Texas Department of
7 Transportation (TxDOT) and the Texas Natural Resource
8 Conservation Commission (TNRCC) concerning the coordination of
9 environmental reviews associated with transportation projects.
10 The MOU addresses only those reviews required by Transportation
11 Code, §201.607, and does not affect coordination or permits
12 required by other state or federal regulations.

13 (1) It is the policy of TxDOT to:

14 (A) investigate fully the environmental impacts of
15 departmental transportation projects, coordinate these projects
16 with applicable state and federal agencies, and reflect these
17 investigations and coordination in the environmental
18 documentation for each project;

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

22 (C) receive input from the public through the public
23 involvement process;

1 (D) utilize a systematic interdisciplinary approach as
2 essential parts of the development process for transportation
3 projects; and

4 (E) strive for environmental soundness of
5 transportation activities through appropriate mitigation, where
6 feasible and prudent, in coordination with appropriate resource
7 agencies.

8 (2) It is the policy of TNRCC to:

9 (A) promote and foster voluntary compliance with
10 environmental laws;

11 (B) ensure that the regulations promote flexibility in
12 achieving environmental goals and are applied clearly and
13 consistently;

14 (C) base decisions on the law, common sense, good
15 science, and fiscal responsibility;

16 (D) ensure that regulations are necessary, effective,
17 and current;

18 (E) ensure meaningful public participation in the
19 decision making process; and

20 (F) ensure consistent, just, and timely enforcement
21 when environmental laws are violated.

22 (3) The rules for coordination of state-assisted
23 transportation projects developed by TxDOT, codified as 43 TAC

1 §§2.40-2.51, underline the need for and importance of
2 comprehensive environmental coordination for all transportation
3 projects.

4 (4) The intent of this MOU is to provide a formal
5 mechanism by which TNRCC may review TxDOT projects that have the
6 potential to affect resources within TNRCC's jurisdiction. This
7 review will promote the mutually beneficial sharing of
8 information between TxDOT and TNRCC, which will assist TxDOT in
9 making environmentally sound decisions.

10 (b) Authority.

11 (1) Transportation Code, Section 201.607, directs TxDOT
12 to adopt memoranda of understanding with each agency that has
13 responsibilities for protection of the natural environment.

14 (2) By statute, TNRCC may enter into a memorandum of
15 understanding with any other state agency and shall adopt by
16 rule any memorandum of understanding between TNRCC and any other
17 state agency (Water Code, Section 5.104, and Health and Safety
18 Code, Section 382.035).

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

22 (1) Construction--Activities that involve the building of
23 transportation projects on new location, the expansion,

1 rehabilitation, or reconstruction, of an existing facility.

2 (2) Districts--One of the 25 geographical districts into
3 which TxDOT is divided.

4 (3) Environmental documents--Decision-making documents
5 prepared pursuant to 23 CFR §771 (or any subsequent amendments
6 or regulations) for federal-aid projects or §§2.40 et seq. of
7 this chapter for non federal-aid projects that incorporate the
8 results of environmental studies, coordination and consultation
9 efforts, and engineering elements. These documents include
10 categorical exclusions, environmental assessments, and
11 environmental impact statements.

12 (4) The United States Environmental Protection Agency
13 (EPA)--The federal agency which is generally charged with
14 administering federal authority over the quality of air and
15 water resources.

16 (5) Federal Clean Air Act (FCAA)--(42 USC §7401) The
17 federal act, including all amendments, that establishes national
18 ambient air quality standards and mandates procedures for
19 reaching and maintaining these standards.

20 (6) Inspection and Maintenance Program--A vehicle
21 emissions inspection program as defined by the EPA that
22 includes, but is not limited to, the use of computerized
23 analyzers, on-road testing, and/or inspection of vehicle

1 emission devices.

2 (7) Maintenance--Activities which involve the repair or
3 preservation of an existing facility to prevent that facility's
4 degradation to an unsafe or irreparable state, or which involve
5 the treatment of an existing facility or its environs to meet
6 acceptable standards of operation or aesthetic quality. The
7 activities generally do not require the acquisition of
8 additional right of way or result in increased roadway capacity.

9 (8) Memorandum of Understanding--A formal document that
10 outlines the relationship between agencies or parties, including
11 the responsibilities and jurisdiction of each party, and which
12 sets forth within its provisions agreements between the parties
13 and a means of dispute resolution.

14 (9) Metropolitan Planning Organization (MPO)--An
15 organization designated in certain urbanized areas to carry out
16 the transportation planning process as required by 23 USC §134.

17 (10) Mitigation--A means of addressing impacts to the
18 natural environment including in general order of preference,
19 avoidance, minimization, and compensation.

20 (11) National Environmental Policy Act of 1969 (NEPA)--
21 (42 USC §4332) The basic national charter for protection of the
22 environment. It establishes policy, sets goals, and provides
23 means for carrying out the policy. NEPA is binding on federal

1 agencies, including the Federal Highway Administration (FHWA),
2 and is usually followed as an environmental guideline by state
3 and local agencies. For the purpose of this MOU, NEPA includes
4 the Act itself, its subsequent amendments, and implementing
5 regulations.

6 (12) Non-attainment counties--Counties in an air quality
7 control region for which any pollutant exceeds the National
8 Ambient Air Quality Standards (NAAQS) for the pollutant as
9 designated pursuant to 42 USC §7407 (Section 107 of the FCAA).

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

15 (14) Right of way--The land provided for a transportation
16 facility. Right of way includes the roadway itself (including
17 shoulders) and the areas between the roadway and adjacent
18 properties.

19 (15) Single occupancy vehicle--A motor vehicle operated
20 by a driver and carrying no passengers.

21 (16) State Implementation Plan (SIP)--The plan prepared
22 by TNRCC as required by 42 USC §7410 (Section 110 of the FCAA)
23 to attain and maintain air quality standards. An approved SIP

1 is the implementation plan, or most recent revision of this
2 plan, that has been approved by EPA under Section 110.

3 (17) Statewide Transportation Improvement Plan (STIP)--
4 The statewide multi-year transportation improvement program made
5 up of Transportation Improvement Plans (TIPs) from all
6 metropolitan planning areas, as well as the rural TIPs for areas
7 outside the metropolitan planning areas, and some statewide
8 programs.

9 (18) TNRCC--For the purposes of this MOU, TNRCC refers to
10 the commissioners, executive director, and their respective
11 staffs, of the Texas Natural Resource Conservation Commission.

12 (19) Transportation Improvement Program (TIP)--A staged,
13 multi-year (normally three years), intermodal program of
14 transportation projects which are consistent with the
15 metropolitan transportation plan (MTP) as defined in 23 CFR
16 450.322 and which covers a metropolitan planning area.

17 (20) Transportation projects--All surface transportation
18 projects designed, constructed, and maintained by TxDOT.

19 (21) TxDOT--For the purposes of this MOU, TxDOT refers to
20 the commissioners, executive director, and staff of the Texas
21 Department of Transportation.

22 (22) TxDOT environmental rules--The rules relating to the
23 environmental review and public involvement process for

1 transportation projects (§§2.40-2.51 of this chapter).

2 (d) Responsibilities.

3 (1) The responsibilities of TxDOT pertain primarily to
4 its functions as a transportation agency and include:

5 (A) planning and designing safe, efficient, cost
6 effective and environmentally sound transportation projects,
7 while avoiding, minimizing, or compensating for anticipated
8 environmental impacts to the fullest extent practicable;

9 (B) timely and efficient construction of transportation
10 projects consistent with transportation control measures in the
11 SIP and with approved plans and agreements which have been
12 executed by TxDOT regarding the protection of the environment;

13 (C) ongoing maintenance to protect transportation
14 investments and to provide safe and efficient transportation
15 facilities for the traveling public;

16 (D) preservation of the environment when possible and
17 enhancement of the environment when practicable;

18 (E) maintaining vehicle registration data which will
19 facilitate mobile source air quality planning and implementation
20 as directed by the SIP and as agreed to by TxDOT;

21 (F) developing a STIP, which includes each MPO's TIP
22 and specific projects in the TIP; and

23 (G) implementing an enforceable and verifiable

1 registration denial mechanism which requires emissions testing
2 as a prerequisite to vehicle registration in appropriate areas.

3 (2) The responsibilities of TNRCC pertain to air and
4 water quality as described in this paragraph.

5 (A) Air quality.

6 (i) TNRCC is the state air pollution control agency
7 and is the principal authority in Texas on matters relating to
8 the quality of the state's air resources.

9 (ii) TNRCC's primary responsibility, as designated by
10 Health and Safety Code, Section 382.002, includes, but is not
11 limited to, setting standards, criteria, levels, and emission
12 limits for air quality and air pollution control.

13 (iii) General powers and duties of TNRCC regarding
14 air quality are:

15 (I) regulation of air quality through the
16 development, implementation, and enforcement of strategies, and
17 control programs as necessary to satisfy all federal and state
18 requirements, including SIP requirements mandated by the FCAA;

19 (II) participation in the preparation and review of
20 SIP conformity evaluations and other SIP documents for
21 determination purposes of transportation programs, plans, and
22 projects as required by the FCAA;

23 (III) participation, through coordination with

1 TxDOT, in the development and implementation of transportation
2 control measures, which may require action by TxDOT; and

3 (IV) implementation of an effective vehicle
4 inspection and maintenance program incorporating an enforceable
5 and verifiable registration denial mechanism.

6 (iv) TNRCC has the authority to develop the following
7 items.

8 (I) State Air Control Plan. TNRCC shall prepare
9 and develop a general, comprehensive plan for the proper control
10 of the state's air quality.

11 (II) Air quality control regions. TNRCC may
12 designate air quality control regions based on jurisdictional
13 boundaries, urban/industrial concentrations, and other factors,
14 including atmospheric conditions, necessary to provide adequate
15 implementation of air quality standards.

16 (III) Emission inventory. TNRCC may require any
17 entity whose activities cause emissions of air contaminants to
18 submit information to enable TNRCC to develop an inventory of
19 air contaminants.

20 (B) Water quality

21 (i) TNRCC is charged with the protection of the
22 quality of water and water rights in the state.

23 (ii) TNRCC's jurisdiction, as outlined in Water Code,

1 §5.013, includes:

2 (I) water and water rights, including the issuance
3 of water rights permits, water rights adjudication, cancellation
4 of water rights, and enforcement of water rights;

5 (II) the state's water quality program, including
6 issuance of permits, enforcement of water quality rules,
7 standards, orders, and permits, certification of federal permits
8 and water quality planning;

9 (III) the determination of the feasibility of
10 certain federal projects;

11 (IV) the administration of the state's programs
12 relating to inactive hazardous substance, pollutant, and
13 contaminant disposal facilities;

14 (V) the administration of the state's programs
15 involving underground water; and

16 (VI) any other areas assigned to TNRCC by the Water
17 Code and other state law.

18 (e) Provisions regarding coordination and document review.

19 (1) Coordination.

20 (A) TxDOT is committed to performing early
21 identification efforts to assess potential environmental
22 concerns related to proposed transportation projects, and
23 initiating coordination with TNRCC during the early planning

1 stages of these projects. Early identification of environmental
2 concerns and coordination with TNRCC is essential to TxDOT's
3 efforts to:

4 (i) consider environmental issues early in the
5 project development process;

6 (ii) design and develop transportation projects in a
7 timely manner; and

8 (iii) avoid and minimize impacts to environmental
9 resources to the maximum extent practicable.

10 (B) TxDOT's districts are encouraged to coordinate
11 projects early in development by working with TNRCC's Austin
12 Headquarters and regional offices. Any information received,
13 and the results of coordination will be summarized in the
14 environmental document prepared for the project.

15 (C) Through notices, public meetings, and public
16 hearings, TxDOT and TNRCC are committed to encouraging public
17 input as specified by statute and TNRCC and TxDOT rules
18 concerning plans and actions that may affect environmental
19 quality.

20 (2) Environmental document review.

21 (A) TxDOT will furnish environmental documentation to
22 TNRCC for types of projects listed in this paragraph, pertaining
23 to air quality and water quality.

1 (i) Air quality. TxDOT shall furnish to TNRCC
2 environmental documentation for all projects that:

3 (I) involve the construction of highway projects on
4 new location in non-attainment areas;

5 (II) involve additional single occupancy vehicle
6 capacity in non-attainment areas;

7 (III) are in non-attainment areas and which may
8 affect air quality; and

9 (IV) involve construction of single occupancy
10 vehicle projects on new location and increased single occupancy
11 vehicle highway capacity in metropolitan areas with a total
12 metropolitan area threshold of at least 100,000.

13 (ii) Water quality. TxDOT project types to be
14 coordinated with TNRCC include:

15 (I) projects which may encroach upon threatened or
16 impaired stream segments designated under §303(d) of the Clean
17 Water Act and/or are 5 miles upstream from the designated stream
18 segment;

19 (II) projects in the recharge or contributing zone
20 of the Edwards Aquifer, pursuant to 30 TAC §213.3, §213.10 and
21 §§213.20-213.28; and

22 (III) projects that will require individual Clean
23 Water Act Section 401 certification under procedures defined in

1 a Memorandum of Agreement between the U.S. Army Corps of
2 Engineers and the TNRCC.

3 (B) Environmental documentation prepared and provided
4 to TNRCC by TxDOT will be in compliance with NEPA, USDOT
5 regulations (23 CFR 771), TxDOT environmental rules, and other
6 applicable laws, rules, and regulations.

7 (C) The environmental document shall be forwarded to
8 the designated points of contact at TNRCC following TxDOT
9 review. TNRCC shall have a period of 30 days, from date of
10 receipt, to review the environmental document and provide
11 written comments. TNRCC may, if necessary, submit a written
12 request to extend the review period for a maximum of 30 days.
13 The reason for requesting a review extension must be included in
14 any such request.

15 (D) For projects requiring the preparation of an
16 environmental impact statement, TxDOT shall furnish the
17 preliminary environmental/scoping document to TNRCC upon
18 approval of the document by the FHWA for federal projects or
19 TxDOT for state projects. TxDOT will also provide the draft and
20 final environmental impact statements to TNRCC for review and
21 comment.

22 (f) Additional provisions regarding air quality.

23 (1) TNRCC shall furnish TxDOT information detailing the

1 location and severity of non-attainment counties and information
2 affecting transportation-related activity and mobile sources to
3 be included in the SIP. The information is helpful in the
4 planning and location of future TxDOT projects, and in the
5 coordination of the projects with TNRCC.

6 (2) TxDOT and TNRCC shall exchange, on a statewide basis,
7 accurate and timely information to facilitate the coordination
8 of environmental reviews. In addition, data for developing
9 mobile source budgets and data on transportation conformity
10 determinations will also be provided, particularly for any new
11 areas designated by EPA as non-attainment.

12 (g) Additional provisions regarding water quality. TxDOT
13 will coordinate with TNRCC in complying with 30 TAC Chapter 213
14 (Edwards Aquifer Protection Program) in accordance with the
15 Interagency Cooperation Contract relating to such coordination.

16 (h) Dispute resolution. When TxDOT and TNRCC are unable to
17 reach a mutually agreeable plan of action regarding impacts of
18 transportation projects to natural resources within the
19 jurisdiction of TNRCC, each agency shall make a good faith
20 effort to address the major concerns of the other party. TxDOT
21 will evaluate comments received from TNRCC in conjunction with
22 all other applicable factors (i.e., other agency comments,
23 project alternatives, cost, mitigation requirements, and safety

1 considerations) in an attempt to arrive at a plan of action
2 acceptable to the affected parties. A period of 45 days shall
3 be provided for the resolution of such disputes, after which the
4 department is charged with determining the disposition of
5 transportation projects within its jurisdiction. If TxDOT
6 proceeds with a proposed transportation project in conflict with
7 TNRCC comments, TxDOT will submit to TNRCC a complete and
8 detailed justification demonstrating full compliance with all
9 federal and state rules, regulations, and laws. TNRCC reserves
10 the right to bring enforcement action against TxDOT for
11 violation of laws or rules that TNRCC is charged with enforcing
12 and that may be applicable to TxDOT operations. Both parties
13 agree that this MOU does not preclude either party from making
14 any legal argument.

15 (i) Review of MOU. This MOU shall be reviewed and updated
16 no later than January 1, 2007. TxDOT and TNRCC by rule shall
17 adopt the MOU and all revisions to the MOU. If a change in
18 state or federal law or a change in the Texas SIP necessitates a
19 change in this MOU, then representatives from both TxDOT and
20 TNRCC will meet to work out a mutually agreeable amendment to
21 the MOU. If such an amendment is not possible, either party may
22 require dispute resolution under subsection (h) of this section.