

Module 5

Environmental Compliance

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Section 1

Policy and Practices

Environmental Compliance

- a. 43 TAC 2.23, Subchapter B – Requires documentation of compliance with air quality provisions under the Memorandum of Understanding (MOU) with the Texas Natural Resource Conservation Commission (now Texas Commission on Environmental Quality).

Required Practices

- a. Compliance responsibilities vary depending on the attainment status of the project area, traffic volumes, and the scope of the project. Although federal jurisdictions do not automatically trigger compliance with state laws and regulations, projects subject to state air quality laws and regulations will also be covered by federal air quality laws and regulations.
- b. The state statutes listed above apply only to TxDOT. The LG may have local coordination or other requirements that do not apply to TxDOT.
- c. Changes in project design, implementation date or right of way and easement requirements may require the project to be re-evaluated for environmental impacts, and may require the LG to document that it has coordinated the changes with resource agencies, TxDOT, and FHWA.
- d. As this guidance is being written, TxDOT is making fundamental changes in its procedures for handling environmental compliance. It is likely that these changes will be ongoing for a number of years, and that TxDOT's processes and procedures for environmental compliance will change even over the duration of a single project. In addition, the authorities frequently change, and regulatory agencies change their procedures, requirements, and guidance on an ongoing basis. TxDOT also is developing a series of performance standards for environmental documents, reports, and other submittals. These standards also will change on an ongoing basis to reflect changes in authorities and lessons learned in ongoing application.

LG Responsibilities

- a. The LG should consult with the District to determine the requirements for air quality compliance. The LG should be especially mindful of conformance between its project descriptions and cost estimates and those in the STIP/TIP/MTP.
- b. The LG's compliance activities for air quality shall incorporate current TxDOT Air Quality Guidelines 2006 (or most recent version).
- c. Air quality standards and guidelines may change rapidly. The LG should consult with TxDOT-ENV to confirm that recent developments are covered by current guidance.
- d. The LG must document whether the project meets the conformity requirements specified by Section 176(c) of the Clean Air Act and the related requirements of 23 U.S.C. 109(j).

- e. An LG using congestion management and air quality (CMAQ) program funds must document that the project contributes to the attainment of a national ambient air quality standard in a nonattainment area, or to maintenance of a national ambient air quality standard in a maintenance area.
- f. The LG must determine and document that the project is in and consistent with the project description in the STIP/TIP/MTP, or determine and document that inclusion in the STIP/TIP/MTP is not needed.
- g. The LG must determine and document that the project complies with air quality provisions under the MOU with the Texas Natural Resource Conservation Commission. LG projects not covered by the MOU may need to be coordinated with TCEQ by the LG.
- h. The LG will perform environmental studies and submit technical reports and other deliverables to TxDOT. Different Advance Funding Agreements (AFA) and other agreements between TxDOT and LGs may assign different environmental responsibilities to LGs. Therefore, the LG must be aware that its responsibilities may vary from project to project, and should verify its responsibilities with the District. The LG must determine from its agreement with TxDOT the environmental compliance requirements, if any, that TxDOT will perform.
- i. The LG will ensure that all environmental studies, reports, documents, and public involvement performed or obtained by the LG meet TxDOT performance standards. The LG should consult with TxDOT to identify current standards. The LG must perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement.

TxDOT District Responsibilities

- a. Serve as the LG's point of contact for environmental submissions and facilitate the LG's interactions with TxDOT and FHWA.
- b. Assist LG in determining appropriate NEPA classification for project. For projects requiring an EIS or EA, the District should facilitate formation of an FHWA EIS or EA team to minimize delays resulting from implementing an inappropriate compliance program.
- c. Provide the LG with information regarding FHWA and TxDOT expectations for successful environmental compliance. The District should assist the LG in defining reliable scopes of work for environmental services.
- d. Perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement.
- e. Arrange for performance of environmental tasks and coordination assigned to TxDOT under the Master Advance Funding Agreement (MAFA), AFA, or other agreements and relevant authorities.
- f. Maintain project file that functions as NEPA administrative record and documents completion of all state and federal environmental requirements.
- g. Other District responsibilities determined by Continuous Improvement Agreement between the District and TxDOT ENV.

Section 2

Environmental Compliance: Archeological Resources

General

An archeological resource is a site characterized by the remains of past human occupation. Although it may be associated with a building, structure, object, or district, an archeological resource is treated differently than historic resources. For the purposes of this discussion, “archeological resource” does not include historic resources, which are covered in another section. Protected archeological resources are called “historic properties.” An archeological historic property is an archeological resource listed in or eligible for inclusion in the National Register of Historic Places or eligible for designation as a State Archeological Landmark. Except under unusual circumstances, the archeological resource must be at least 50 years old at the time construction begins. A cemetery with graves more than 50 years old must be treated as an archeological resource.

Federal Statutes

- a. Section 106, National Historic Preservation Act of 1966, 16 U.S.C. 470 (Section 106) – Requires federal agencies to consider the effects of their projects on archeological sites listed in or eligible for inclusion in the National Register of Historic Places. The First Amended Programmatic Agreement Among the Federal Highway Administration, the Texas Department of Transportation, the Texas State Historic Preservation Officer, the Advisory Council on Historic Preservation Regarding the Implementation of Transportation Undertakings (PA-TU) prescribes standard procedures for complying with Section 106 on FHWA projects.
- b. Section 110(k), National Historic Preservation Act of 1966, 16 U.S.C. 470 (Section 110) -- Section 110 prohibits demolition of an archeological historic property prior to conclusion of Section 106 consultation (“anticipatory demolition”). Anticipatory demolition may result in loss of FHWA funding or approval. Destruction of a site that has not been evaluated also may result in loss of funding or approval.
- c. 36 CFR 800 – Prescribes procedures for complying with Section 106 for FHWA projects removed from the PA-TU and for undertakings where an agency other than FHWA has jurisdiction.
- d. Native American Graves Protection and Repatriation Act, 25 USC §3001 (NAGPRA) – Governs planning for Native American graves for projects on federal or tribal land, and disposition of human remains and funerary objects controlled by an entity that receives federal funds.

Guidance for these subjects and others can be found at the Federal Highway Administration website: <http://www.environment.fhwa.dot.gov/guidebook/index.asp>.

State Statutes

- a. Texas Natural Resource Code, Title 9, Chapter 191, Antiquities Code of Texas (Antiquities Code) – Requires that the Texas Historical Commission (THC) be notified of proposed construction projects, and prohibits unpermitted destruction of archeological sites eligible for designation as State Archeological Landmarks.
- b. 13 TAC 26, Practice and Procedure – Rules implementing the Antiquities Code for projects on land.
- c. 13 TAC 28, Shipwrecks – Rules implementing the Antiquities Code for projects crossing water bodies. Typically restricted to projects under US Coast Guard or US Army Corps of Engineers permits.
- d. 43 TAC 2.24, Memorandum of Understanding with Texas Historical Commission (also adopted as 13 TAC 26.14) – Prescribes standard procedures for complying with the Antiquities Code on TxDOT projects, including projects that require TxDOT approval.
- e. Health and Safety Code, Title 8, Chapter 711 (THSC 711) – Specifies legal processes for removal of human graves and for converting cemetery land to a noncemetery purpose. Cemeteries with graves more than 50 years old also are subject to the Antiquities Code and Section 106.

Required Practices

- a. Archeological compliance responsibilities of the LG and TxDOT vary depending on issues of funding, land ownership, and the involvement of one or more federal agencies.
- b. Section 106 and 36 CFR 800 apply to all projects that involve funding, licensing, permitting, or approval by a federal agency, including agencies other than FHWA. 36 CFR 800 identifies a consultation process to be followed by federal agencies. The PA-TU governs compliance with Section 106 and 36 CFR 800 when FHWA funds or approves projects. Deviation from the Section 106 process or anticipatory demolition of an archeological resource or archeological historic property prior to completion of the Section 106 process is grounds for litigation and may require the federal agency to withhold funding, licensing, permitting, or approval of the project. FHWA generally is the federal agency with jurisdiction over Section 106. On rare occasions another federal agency may have or share jurisdiction.
- c. The Antiquities Code applies to projects on land owned or controlled by the state or a political subdivision of the state. Funding source has no effect on Antiquities Code jurisdiction. The Antiquities Code requires the person primarily responsible for the project to give the Texas Historical Commission prior notice before beginning construction. Deviation from the Antiquities Code process is grounds for litigation. Unpermitted demolition of an archeological resource or historic property is grounds for prosecution as a misdemeanor offense.
- d. The project is evaluated to determine whether archeological studies are needed. If studies are needed, they are performed under an Antiquities Permit issued by the THC. Permit applications for projects on TxDOT land or land to be owned by TxDOT are submitted to the THC through TxDOT ENV.

- e. Removal of human remains from incorporated, informal, abandoned, and unknown cemeteries requires compliance with the Health and Safety Code. Depending on the circumstances, this coordination could involve the Office of the Attorney General and county courts. Removal of human remains also may require coordination with THC if the cemetery or any burials are 50 or more years old, or if the cemetery must be de-dedicated before use for noncemetery purposes. If the project is under FHWA or TxDOT jurisdiction, de-dedication and removal of burials must be implemented under oversight of TxDOT’s Supervisor of Archeology even if TxDOT does not perform the removal.
- f. NAGPRA requires that during planning for projects on federal or tribal land, Indian tribes must be consulted regarding Native American graves that may be encountered before or during construction. For any LG that receives federal money for any purpose (including purposes unrelated to the construction project), NAGPRA establishes procedures for dealing with human burials recovered as a result of the project. This applies regardless of land ownership or project funding.
- g. For projects with FHWA jurisdiction, TxDOT ENV or, in some cases, FHWA performs all coordination with THC, Indian tribes, and other consulting parties defined in federal regulations. The entity with the most funding involved in the project is required to coordinate with THC under the Antiquities Code. Any USDOT agency action that will result in a use of land from an archeological site that warrants preservation in place and that is an adverse effect must meet the requirements of the Section 4(f) of the US DOT Act of 1966 (reference Section 4(f) chapter).
- h. Changes in project design or right of way and easement requirements often require the project to be re-evaluated for archeological impacts, and require documentation that the changes were coordinated through the regulatory process.
- i. Although it is rare, an archeological resource eligible for the National Register of Historic Places or for designation as a State Archeological Landmark may be protected under 49 USC 303 (Section 4(f)) and TPWD 26. See the procedure titled “Taking or Use of Publicly Owned Park, Recreation Area, Scientific Area, Wildlife Refuge, or Historic Site.”
- j. As this guidance is being written, TxDOT is making fundamental changes in its procedures for handling environmental compliance. It is likely that these changes will be ongoing for a number of years, and that TxDOT’s processes and procedures for environmental compliance will change even over the duration of a single project. In addition, the authorities frequently change, and regulatory agencies change their procedures, requirements, and guidance on an ongoing basis. TxDOT also is developing a series of performance standards for environmental documents, reports, and other submittals. These standards also will change on an ongoing basis to reflect changes in authorities and lessons learned in ongoing application.

LG Responsibilities

- a. The LG should contact TxDOT to determine whether archeological studies should be performed and to determine whether TxDOT should be a signatory on an Antiquities Permit application.

- b. The LG will provide TxDOT with Antiquities Permit applications. The LG will not submit permit applications or technical reports directly to the THC unless the LG is responsible for conducting Antiquities Code coordination. The LG will not submit reports or other materials directly to THC or other consulting parties for the purposes of Section 106 consultation or compliance with NAGPRA.
- c. The LG will perform environmental studies and submit technical reports and other deliverables to TxDOT. Different AFA and other agreements between TxDOT and LGs may assign different environmental responsibilities to LGs. Therefore, the LG must be aware that its responsibilities may vary from project to project, and should verify its responsibilities with the District. The LG must determine from its agreement with TxDOT the environmental compliance requirements, if any, that TxDOT will perform.
- d. The LG will ensure that all environmental studies, reports, documents, and public involvement performed or obtained by the LG meet TxDOT performance standards. The LG should consult with TxDOT to identify current standards. The LG must perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement.
- e. The LG must document completion of Section 106 consultation to determine the project's effects on sites, buildings, structures, objects, and districts that may be eligible for inclusion in the National Register of Historic Places. TxDOT will provide documentation of consultation performed by TxDOT ENV or FHWA. It is possible in some instances that the LG will be required to complete coordination with the THC under the Antiquities Code, but that TxDOT will have to complete coordination separately under Section 106.
- f. The LG must document completion of coordination with THC under the Antiquities Code for projects in which the LG performed Antiquities Code coordination. TxDOT will provide documentation of coordination performed by TxDOT ENV.
- g. If the project involves a federal agency other than FHWA, the LG is responsible for meeting that agency's Section 106 requirements.
- h. If the LG recovers Native American human remains, the LG must go through the NAGPRA process to determine whether a federally recognized Indian tribe is entitled to assume control over disposition of the human remains and associated funerary objects. There are planning requirements for projects on tribal or federally owned lands. Planning requirements must be identified in consultation with the federal or tribal agencies, FHWA, and TxDOT ENV. As tribes are sovereign nations, LGs may not initiate contact with tribes.

TxDOT District Responsibilities

- a. Serve as the LG's point of contact for environmental submissions and facilitate the LG's interactions with TxDOT and FHWA.
- b. Provide the LG with information regarding FHWA and TxDOT expectations for successful environmental compliance. The District should assist the LG in defining reliable scopes of work for environmental services.

- c. Perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement.
- d. Arrange for performance of environmental tasks and coordination assigned to TxDOT under the MAFA, AFA, or relevant authorities.
- e. Coordinate with FHWA for and carry out necessary tribal consultation.
- f. Other District responsibilities determined by Continuous Improvement Agreement between the District and TxDOT ENV.

Section 3

Environmental Compliance: Biological Resources

General

A series of laws and regulations requires the LG to identify and, if necessary, mitigate impacts to biological resources, including but not limited to endangered and threatened species, critical habitat, and farmland. Violations of the Endangered Species Act and Migratory Bird Treaty Act are especially serious and can result in work stoppages and large fines. Because of the complexity of biological issues and the range of regulatory requirements, early coordination is beneficial.

Federal Statutes

- a. Endangered Species Act (ESA) as amended 16 USC §§ 1531-1544 — Regulates impacts on endangered or threatened species, or critical habitat, and in some circumstances, requires consultation with US Fish and Wildlife Service.
- b. Migratory Bird Treaty Act (MBTA) 16 USC §§ 703-712 — Prohibits taking, disturbing, or harassing a wide range of migratory birds and their nests during nesting season.
- c. Fish and Wildlife Coordination Act of 1968 (FWCA) 16 USC §§ 661-667d — Requires coordination with US Fish and Wildlife Service under circumstances where a U.S. Army Corps of Engineers Individual Permit (IP) is required
- d. Magnuson Stevens Fisheries Conservation Management Act (MSFMCA) 16 USC §§ 1801-1882 — For projects in coastal counties, requires coordination with the National Marine Fisheries Service if the project area contains essential fish habitat in tidally influenced water.
- e. Farmland Protection Policy (FPPA) 7 USC §§ 4201-4209 — Requires evaluation of impacts to new right of way that is not developed, not urbanized, and not zoned for urban use. Coordination with the National Resource Conservation Service may be necessary.
- f. Invasive Species Executive Order 13112 — Requires revegetation according to TxDOT's standard practices for urban or rural areas if the project includes landscaping plans.
- g. Presidential Executive Memorandum (EM) on Environmentally and Economically Beneficial Landscaping. Practices 4/26/1994 — Requires consideration of incorporating elements consistent with the Executive Memorandum if the project includes landscaping plans.
- h. Marine Mammal Protection Act (MMPA) 16 USC §§ 1361 — Requires coordination with the National Marine Fisheries Service if the project adversely affects tidally influenced waters.

Guidance for these subjects and others can be found at the Federal Highway Administration website: <http://www.environment.fhwa.dot.gov/guidebook/index.asp>.

State Statutes

- a. Texas Parks and Wildlife Code Chapter 68.015 — Prohibits capturing, trapping, taking, or killing, or attempting to capture, trap, take, or kill, endangered fish or wildlife. No exception is provided for construction or other projects.
- b. Transportation Code, Title 6, Chapter 201.607 — Requires TxDOT to establish memoranda of understanding with resource agencies
- c. 43 TAC 2.22 (Memorandum of Understanding with the Texas Parks and Wildlife Department [TPWD]). — MOU implementing Title 6, Chapter 201.607
- d. Memorandum of Agreement (MOA) with Texas Parks and Wildlife Department Concerning Habitat Descriptions and Mitigation. — Specifies procedures for coordinating with TPWD under 43 TAC 2.22. TxDOT must perform coordination with TPWD.
- e. Memorandum of Understanding (MOU) with TPWD Regarding Mitigation Banking — Establishes mitigation banks for wetland mitigation.
- f. MOA with TPWD regarding Sharing and Maintaining Natural Diversity Database Information — Gives TxDOT access to the Natural Diversity Database , and requires consideration of results in TxDOT’s environmental process.

Required Practices

- a. For projects with TPWD jurisdiction, TxDOT performs all coordination with TPWD.
- b. Changes in project design or right of way and easement requirements require the project to be re-evaluated for biological impacts, and often require documentation that the changes were coordinated through the regulatory process.
- c. As this guidance is being written, TxDOT is making fundamental changes in its procedures for handling environmental compliance. It is likely that these changes will be ongoing for a number of years, and that TxDOT’s processes and procedures for environmental compliance will change even over the duration of a single project. In addition, the authorities frequently change, and regulatory agencies change their procedures, requirements, and guidance on an ongoing basis. TxDOT also is developing a series of performance standards for environmental documents, reports, and other submittals. These standards also will change on an ongoing basis to reflect changes in authorities and lessons learned in ongoing application.

LG Responsibilities

- a. The LG contacts the District to determine the federal and state authorities that apply as a result of the project’s specific characteristics and the specific content of the LG’s agreement with TxDOT.
- b. The LG should contact TxDOT to determine whether studies should be performed.

- c. The LG will perform environmental studies and submit technical reports and other deliverables to TxDOT. Different AFA and other agreements between TxDOT and LGs may assign different environmental responsibilities to LGs. Therefore, the LG must be aware that its responsibilities may vary from project to project, and should verify its responsibilities with the District. The LG must determine from its agreement with TxDOT the environmental compliance requirements, if any, that TxDOT will perform.
- d. The LG will ensure that all environmental studies, reports, documents, and public involvement performed or obtained by the LG meet TxDOT performance standards. The LG should consult with TxDOT to identify current standards. The LG must perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement.
- e. If wetland mitigation is required, the LG should consult TxDOT to determine whether the LG can use TxDOT's mitigation banks.
- f. If the project involves a federal agency other than FHWA, the LG is responsible for meeting that agency's requirements.

TxDOT District Responsibilities

- a. Serve as the LG's point of contact for environmental submissions and facilitates the LG's interactions with TxDOT and FHWA.
- b. Provide the LG with information regarding FHWA and TxDOT expectations for successful environmental compliance. The District should assist the LG in defining reliable scopes of work for environmental services.
- c. Perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement.
- d. Arrange for performance of environmental tasks and coordination assigned to TxDOT under the MAFA, AFA, or relevant authorities.
- e. Assist LG with development of mitigation.
- f. Other District responsibilities determined by Continuous Improvement Agreement between the District and TxDOT ENV.

Section 4

Environmental Compliance: Environmental Justice (EJ) and Community Impact Analysis (CIA)

General

Federal actions are required to comply with an array of laws that pertain generally to issues of civil rights, equity and community impacts. An environmental document must disclose effects related to these issues. The general methods for analyzing and disclosing these effects fall under what is generally referred to as environmental justice (EJ) and community impact analyses (CIA). Violations of the statutes below can have serious consequences. EJ and CIA issues are a major target of environmental litigation.

EJ and CIA analyses are among the most difficult analyses to perform because they resist standardization. The variables related to and affecting the analyses are complex and their importance may vary as a result of the scale of project and the context within which the project occurs. In addition, guidance changes rapidly. The publication "Community Impact Assessment, A Quick Reference for Transportation," FHWA Publication Number FHWA-PD-96-036 (FHWA-CI) is especially useful. Many others are available from FHWA.

Federal Statutes

Statutes and Executive Orders a-g below generally provide that a project must equitably distribute project benefits among members of covered groups or classes of people.

- a. Title VI of the Civil Rights Act of 1964 (Title VI)
- b. Civil Rights Restoration Act of 1987 (CRRRA)
- c. Federal-Aid Highway Act of 1956, Section 324 (FAHA)
- d. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act)
- e. Section 504 of the Rehabilitation Act of 1973 (RA)
- f. Americans with Disabilities Act of 1990 (ADA)
- g. Age Discrimination Act of 1975 (Age Discrimination)
- h. Executive Order 12898, Environmental Justice (EJ) - specifies that a project cannot have disproportionate effects on a minority or low-income population
- i. Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency (LEP) -.specifies that public involvement must give LEP populations meaningful opportunities for participation in public involvement. Access to public services and facilities is also covered by this requirement.

Guidance for these subjects and others can be found at the Federal Highway Administration website: <http://www.environment.fhwa.dot.gov/guidebook/index.asp>.

State Statutes

- a. No specific state statute. Federal statutes other than the executive orders apply independently of funding or other considerations

Required Practices

- a. The community impact analysis must determine the extent to which the project will have direct, indirect or cumulative impacts on the adjacent properties and community, including but not limited to relocations, pedestrian access, community cohesion, air, noise, light pollution, bus stop relocations or routes, changes in access.
- b. The community impact analysis must determine the extent to which the project may have indirect impacts includes, but is not limited to changes in traffic flow patterns, diversion of traffic through neighborhoods, decreased or increased property values for residential properties and increased commercialization of adjacent properties.
- c. Community impact analysis should identify a geographic region which incorporates the communities expected to be affected by the project based on scoping, public involvement, and interagency coordination.
- d. Changes in project design or right of way and easement requirements require the project to be re-evaluated for environmental impacts, and often require the LG to document the changes in EJ and CIA impacts.
- e. As this guidance is being written, TxDOT is making fundamental changes in its procedures for handling environmental compliance. It is likely that these changes will be ongoing for a number of years, and that TxDOT's processes and procedures for environmental compliance will change even over the duration of a single project. In addition, the authorities frequently change, and regulatory agencies change their procedures, requirements, and guidance on an ongoing basis. TxDOT also is developing a series of performance standards for environmental documents, reports, and other submittals. These standards also will change on an ongoing basis to reflect changes in authorities and lessons learned in ongoing application.

LG Responsibilities

- a. The LG is strongly encouraged to consult with TxDOT in advance to develop a plan for EJ and CIA analyses.
- b. The LG contacts the District to determine the federal and state authorities that apply as a result of the project's specific characteristics and the specific content of the LG's agreement with TxDOT.

- c. The LG will perform environmental studies and submit technical reports and other deliverables to TxDOT. Different AFA and other agreements between TxDOT and LGs may assign different environmental responsibilities to LGs. Therefore, the LG must be aware that its responsibilities may vary from project to project, and should verify its responsibilities with the District. The LG must determine from its agreement with TxDOT the environmental compliance requirements, if any, that TxDOT will perform.
- d. The LG will ensure that all environmental studies, reports, documents, and public involvement performed or obtained by the LG meet TxDOT performance standards. The LG should consult with TxDOT to identify current standards. The LG must perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement.
- e. For projects interconnecting with the interstate highway system, the LG should consult with the TxDOT, and TxDOT will coordinate with FHWA to determine the spatial extent of FHWA jurisdiction.
- f. If the project involves a federal agency other than FHWA, the LG is responsible for meeting that agency's requirements regarding water resources.

TxDOT District Responsibilities

- a. Serve as the LG's point of contact for environmental submissions and facilitates the LG's interactions with TxDOT and FHWA.
- b. Assist LG in determining appropriate NEPA classification for project .For projects requiring an EIS or EA, the District should facilitate formation of an FHWA EIS or EA team to minimize delays resulting from implementing an inappropriate compliance program.
- c. Provide the LG with information regarding FHWA and TxDOT expectations for successful environmental compliance. The District should assist the LG in defining reliable scopes of work for environmental services.
- d. Perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement.
- e. Arrange for performance of environmental tasks and coordination assigned to TxDOT under the MAFA, AFA, or relevant authorities.
- f. Maintain project file that functions as NEPA administrative record and documents completion of all state and federal environmental requirements.
- g. Other District responsibilities determined by Continuous Improvement Agreement between the District and TxDOT ENV.

Section 5

Environmental Compliance: Taking or Use of Publicly Owned Park, Recreation Area, Scientific Area, Wildlife Refuge, or Historic Site

General

The USDOT defines a “Section 4(f) property” as any publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (23 CFR 774.17). To be protected under Section 4(f), a historic site must warrant preservation in place, and must be included in or eligible for inclusion in the National Register of Historic Places. A historic site does not need to be publicly owned to be subject to Section 4(f).

Section 4(f) prohibits the USDOT from using land from a Section 4(f) property unless FHWA (or another USDOT agency with jurisdiction) determines that there is no feasible and prudent alternative to the use of land from the property, and that project planning includes all possible planning to minimize harm to the property resulting from such use. “Use” occurs when land is permanently incorporated into a transportation facility, when there is a temporary occupancy of land that is adverse in terms of the statute’s preservation purpose, or when there is a proximity impact so severe that the protected activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired (constructive use). A use of a protected property can be processed with a de minimis Section 4(f) finding if the use is minor and does not adversely affect the property. For a historic resource, the Texas Historical Commission must concur in writing that the project does not have an adverse effect. For parks, recreation areas, or wildlife and waterfowl refuges, the Official with Jurisdiction over the property must concur in writing that the project will not have an adverse effect to the protected activities, features, or attributes and that they agree with any proposed mitigation.

A similar state law applies to publicly owned properties designated and used as parks, recreation areas, scientific areas, wildlife refuges, and historic sites. State law requires that before land on a protected property can be taken or used, the Local Government (LG) must demonstrate that there is no feasible and prudent alternative to the taking, and must hold a public hearing. For protected properties subject to both Section 4(f) and TPWD 26, the LG must document compliance with both statutes.

Federal Statutes

- a. 23 USC 138 and 49 USC 303 (Section 4(f)) – Requires that there must be no feasible and prudent alternative to a project that uses publicly owned parks, recreation areas, wildlife and waterfowl refuges, or historic sites for a transportation purpose. Related regulation: 23 CFR 774.

Guidance for Section 4(f) and other subjects can be found at the Federal Highway Administration website: <http://www.environment.fhwa.dot.gov/guidebook/index.asp>.

State Statutes

- a. Parks and Wildlife Code, Title 3, Chapter 26, Protection of Public Parks and Recreational Lands (TPWD 26) – Requires that there must be no feasible and prudent alternative to a project that uses publicly owned parks, recreation areas, wildlife refuges, scientific areas, or historic sites for a transportation purpose.

Required Practices

- a. A conclusion that there is no feasible and prudent alternative under Section 4(f) requires an engineering analysis which demonstrates that there is no feasible and prudent alternative. The “no feasible and prudent alternative” standard allows impacts only when all alternatives are BOTH not feasible AND not prudent. An alternative that is feasible but not prudent (or vice versa) cannot be chosen if there is an alternative that is feasible and prudent. Court rulings have indicated that cost is not a sufficient basis for determining that there is no feasible and prudent alternative. TPWD 26 does not specify the requirements of a determination that there is no feasible and prudent alternative. 23 CFR 774.17 provides additional guidance on determining a feasible and prudent avoidance alternative. De minimis findings do not require an avoidance alternatives analysis.
- b. Section 4(f) requirements do not apply to federal actions under the jurisdiction of a federal agency other than FHWA or another component of USDOT.
- c. Changes in project design or right of way and easement requirements require the project to be re-evaluated for Section 4(f) impacts, and often require documentation that the changes were coordinated through the regulatory process.
- d. As this guidance is being written, TxDOT is making fundamental changes in its procedures for handling environmental compliance. It is likely that these changes will be ongoing for a number of years, and that TxDOT’s processes and procedures for environmental compliance will change even over the duration of a single project. In addition, the authorities frequently change and regulatory agencies change their procedures, requirements, and guidance on an ongoing basis. TxDOT also is developing a series of performance standards for environmental documents, reports, and other submittals. These standards also will change on an ongoing basis to reflect changes in authorities and lessons learned in ongoing application.

LG Responsibilities

- a. Familiarize itself in detail with the statute, policy, and procedures posted on FHWA’s web site at www.environment.fhwa.dot.gov/projdev/4fregs.asp. For protected properties subject to both Section 4(f) and TPWD 26, the LG must document compliance with both statutes.

- b. If the project will use a protected property, LG should consult with TxDOT as soon as possible to identify requirements for FHWA approval of a Section 4(f) determination, including identifying the parties whose concurrence is needed to approve the property use and associated mitigation. Because FHWA has no jurisdiction over TPWD 26, the LG must comply with TPWD 26 regardless of FHWA's determination.
- c. Because Section 4(f) and TPWD 26 require a demonstration of no feasible and prudent alternative, the LG must take and document steps to avoid affecting a protected property. The LG must demonstrate that there is no feasible and prudent alternative that would avoid using protected properties for a transportation purpose. The LG must document its efforts to avoid and minimize impacts to Section 4(f) properties. De minimis findings do not require an avoidance alternatives analysis.
- d. The LG will provide TxDOT with copies of the Section 4(f) analysis and all related technical reports generated by the LG. Different AFA and other agreements between TxDOT and LGs may assign different environmental responsibilities to LGs. Therefore, the LG must be aware that its responsibilities may vary from project to project, and should verify its responsibilities with the District. The LG must determine from its agreement with TxDOT the environmental compliance requirements, if any, that TxDOT will perform.
- e. The LG will ensure that all environmental laws, studies, reports, documents, and public involvement performed or obtained by the LG meet TxDOT performance standards. The LG should consult with TxDOT to identify current standards. The LG must perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement. Determine from its agreement with TxDOT the environmental compliance requirements, if any, that TxDOT will perform to complete a 4(f) analysis. Different AFA agreements may assign different environmental responsibilities to LGs. Although the LG is responsible for obtaining environmental services, those services must meet TxDOT performance standards. The LG should consult with TxDOT to identify current standards.
- f. Perform public involvement. While FHWA encourages project sponsors to coordinate public involvement activities to meet environmental public involvement requirements whenever possible, public involvement requirements for Section 4(f) and TPWD 26 may be in addition to requirements for public meetings and hearings under NEPA and 43 TAC 2. The requirements of Section 4(f) and TPWD 26 sometimes must be completed separately from public involvement under NEPA and 43 TAC 2. For example, if a Section 4(f) resource is identified after the LG conducts meetings with affected property owners on projects classified as programmatic categorical exclusions, additional public involvement will be needed.

TxDOT District Responsibilities

- a. Serve as the LG's point of contact for environmental submissions and facilitates the LG's interactions with TxDOT and FHWA.

- b. Provide the LG with information regarding FHWA and TxDOT expectations for successful Section 4(f) analysis. The District should assist the LG in defining reliable scopes of work for environmental services.
- c. Perform quality assurance/quality control oversight over the Section 4(f) analysis and public involvement.
- d. Arrange for performance of environmental tasks and coordination assigned to TxDOT under the MAFA, AFA, or relevant authorities.
- e. Other District responsibilities determined by Continuous Improvement Agreement between the District and TxDOT ENV.

Section 6

Environmental Compliance: Hazardous Materials Management and Pollution Prevention and Abatement

General

Under state and federal laws, a landowner is responsible for abating hazardous wastes. Purchasing contaminated land places the burden of abatement on the new owner. Known hazardous materials must be abated prior to construction, and construction must stop when hazardous materials are encountered during construction. Therefore, the LG must determine whether hazardous wastes occur in existing and new right of way. Contaminated right of way cannot be purchased in TxDOT's name.

Federal Statutes

A variety of federal laws and regulations govern generation and abatement of pollutants.

- a. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)
- b. Resource Conservation and Recovery Act of 1976
- c. 40 CFR 61 National Emission Standards for Hazardous Air Pollutants (Asbestos)

Guidance for these subjects and others can be found at the Federal Highway Administration website: <http://www.environment.fhwa.dot.gov/guidebook/index.asp>.

State Statutes

A variety of state regulations govern generation and abatement of pollutants.

- a. 25 TAC 295 Subchapter C Texas Asbestos Health Protection
- b. 30 TAC 327 Spill Prevention & Control
- c. 30 TAC 330 Municipal Solid Waste
- d. 30 TAC 333 Brownfields Initiatives
- e. 30 TAC 334 Underground & Above ground Storage Tanks
- f. 30 TAC 335 Industrial Solid Waste & Municipal Hazardous Waste
- g. 30 TAC 350 Texas Risk Reduction Program

Required Practices

- a. As this guidance is being written, TxDOT is making fundamental changes in its procedures for handling environmental compliance. It is likely that these changes will be ongoing for a number of years, and that TxDOT's processes and procedures for environmental compliance will change even over the duration of a single project. In addition, the authorities frequently change, and regulatory agencies change their procedures, requirements, and guidance on an ongoing basis. TxDOT also is developing a series of performance standards for environmental documents, reports, and other submittals. These standards also will change on an ongoing basis to reflect changes in authorities and lessons learned in ongoing application.
- b. TxDOT has final approval for all actions.

LG Responsibilities

- a. The LG contacts TxDOT to determine current procedures for addressing the following hazardous material issues.
 - i. Leaking petroleum storage tank assessment and remediation
 - ii. Unauthorized waste injection well assessment and remediation
 - iii. Construction through Superfund sites
 - iv. Construction through landfills
 - v. Pipeline (active & abandoned) relocation from construction areas
 - vi. Petroleum storage tank removal
 - vii. Oil & gas well plugging and abandonment
 - viii. Asbestos management
 - ix. Contaminated soil and groundwater management
- b. The LG conducts technical studies and actions as applicable to address regulatory requirements. Different AFA and other agreements between TxDOT and LGs may assign different environmental responsibilities to LGs. Therefore, the LG must be aware that its responsibilities may vary from project to project, and should verify its responsibilities with the District. The LG must determine from its agreement with TxDOT the environmental compliance requirements, if any, that TxDOT will perform.
- c. The LG will ensure that all environmental studies, reports, documents, and public involvement performed or obtained by the LG meet TxDOT performance standards. The LG should consult with TxDOT to identify current standards. The LG must perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement.
- d. Consult with TxDOT to identify the relevant regulatory agency. Agencies may include Texas Commission on Environmental Quality, Environmental Protection Agency, Texas Railroad Commission and Texas Department of State Health
- e. LG submits required technical reports to TxDOT for review and approval before submitting to the applicable regulatory agency.

- f. LG conducts all necessary coordination between TxDOT and regulatory agencies.

TxDOT District Responsibilities

- a. Serve as the LG's point of contact for environmental submissions and facilitates the LG's interactions with TxDOT and FHWA.
- b. Provide the LG with information regarding FHWA and TxDOT expectations for successful environmental compliance. The District should assist the LG in defining reliable scopes of work for environmental services.
- c. Perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement.
- d. Arrange for performance of environmental tasks and coordination assigned to TxDOT under the MAFA, AFA, or relevant authorities.
- e. Other District responsibilities determined by Continuous Improvement Agreement between the District and TxDOT ENV.

Section 7

Environmental Compliance: National Environmental Policy Act and TxDOT Environmental Requirements

General

Public works projects are subject to state and federal laws, statutes, regulations, and guidance. Environmental compliance for federalized projects occurs under the umbrella of the National Environmental Policy Act (NEPA). NEPA requires that an agency must take a “hard look” at the environmental impacts and document the extent to which a project will or will not have a significant environmental impact. Environmental compliance under state jurisdiction generally follows NEPA requirements and procedures.

Federal Statutes

- a. 42 U.S.C. 4321 et seq., National Environmental Policy Act (NEPA) – Requires federal actions to consider projects’ environmental impacts before making a decision to construct. Includes requirement to consider what level of documentation is needed to support the decision.
- b. 40 CFR §§ 1500—1508 – Council on Environmental Quality’s (CEQ) regulations implementing NEPA.
- c. 23 CFR 771 – FHWA’s regulations for implementing NEPA.
- d. Public Law 109-59, SAFETEA-LU, Section 6002 – Requires implementation of specified procedures for establishing the need and purpose, alternatives, evaluation methods, and a coordination plan for projects requiring an environmental impact statement (EIS). Other environmental requirements are scattered throughout.
- e. Programmatic Agreement for the Review and Approval of NEPA Categorically Excluded Transportation Projects (PA-FHWA) – Establishes criteria for identifying and documenting projects that do not require a NEPA environmental assessment (EA) or EIS, and procedures for obtaining NEPA approval.

Guidance for these subjects and others can be found at the Federal Highway Administration website: <http://www.environment.fhwa.dot.gov/guidebook/index.asp>.

State Statutes

- a. 43 TAC 2 – Specifies the general environmental requirements needed to obtain environmental approval from TxDOT. Related authorities:
- b. Transportation Code, Title 6, Roadways – Environmental requirements applying to specific project types are scattered throughout Title 6.
- c. Title 43, Part 1, Texas Department of Transportation – Environmental requirements applying to specific project types are scattered throughout Title 43, Part 1.

Required Practices

- a. The process for complying with NEPA can be complex for a number of reasons:
 - i. A project that requires no documentation for the purposes of compliance NEPA could require documentation under other state and federal authorities.
 - ii. Although TxDOT and the LG will typically perform NEPA activities, FHWA is legally responsible for federally funded projects and has final authority on environmental document approval.
 - iii. Changes in project design or right of way/easement requirements generally require the project to be re-evaluated for environmental impacts.
- b. Under 42 USC 4332 AND 23 CFR 771.109(a), some projects may require FHWA approval even if they do not involve FHWA funding. These projects include:
 - i. new access to an Interstate highway,
 - ii. changes in existing access to or existing air space across an Interstate highway,
 - iii. changes to operations of federally funded HOV lanes (e.g., removing HOV, changing to HOT, changing occupancy requirements, etc.), and
 - iv. temporary or permanent changes to real highway property, including highway air space (e.g., cases where Federal funds were used to fund preliminary engineering, ROW, and/or construction, and where Federal funds are used to control ROW to preserve sufficient space for safety and expansion).
- c. Compliance responsibilities of the LG and TxDOT vary depending on issues of funding, operational project control, and the involvement of one or more federal agencies.
- d. Changes in project design or right of way and easement requirements require the project to be re-evaluated for environmental impacts, and often require the LG to document that it has coordinated the changes with resource agencies, TxDOT, and FHWA.
- e. A design-build firm cannot produce a NEPA decision document or participate in a NEPA decision. However, a design-build firm can perform environmental studies underlying a NEPA decision document.
- f. As this guidance is being written, TxDOT is making fundamental changes in its procedures for handling environmental compliance. It is likely that these changes will be ongoing for a number of years, and that TxDOT's processes and procedures for environmental compliance will change even over the duration of a single project. In addition, the authorities frequently change, and regulatory agencies change their procedures, requirements, and guidance on an ongoing basis. TxDOT also is developing a series of performance standards for environmental documents, reports, and other submittals. These standards also will change on an ongoing basis to reflect changes in authorities and lessons learned in ongoing application.

LG Responsibilities

- a. The LG contacts the District to determine the level of NEPA compliance required for the project (e.g., environmental impact statement, environmental assessment, or categorical exclusion). The LG must determine in advance the level of NEPA document needed for the project. If the project requires an environmental impact statement, the LG must work with the District and FHWA to set up a scoping and coordination plan that complies with Section 6002 of SAFETEA-LU.
- b. The LG contacts the District to determine the federal and state authorities that apply as a result of the project's specific characteristics and the specific content of the LG's agreement with TxDOT.
- c. The LG will perform environmental studies and submit all NEPA documents and technical reports and other deliverables to TxDOT. Different AFA and other agreements between TxDOT and LGs may assign different environmental responsibilities to LGs. Therefore, the LG must be aware that its responsibilities may vary from project to project, and should verify its responsibilities with the District. The LG must determine from its agreement with TxDOT the environmental compliance requirements, if any, that TxDOT will perform.
- d. The LG will ensure that all environmental studies, reports, documents, and public involvement performed or obtained by the LG meet TxDOT performance standards. The LG should consult with TxDOT to identify current standards. The LG must perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement.
- e. Regardless of the party responsible for performing environmental tasks, the LG must maintain a legally sufficient project file documenting that the project complies with all federal, state, and local laws and regulations.
- f. If the project involves a federal agency other than FHWA, the LG is responsible for meeting that agency's NEPA requirements.

TxDOT District Responsibilities

- a. Serve as the LG's point of contact for environmental submissions and facilitates the LG's interactions with TxDOT and FHWA.
- b. Assist LG in determining appropriate NEPA classification for project. For projects requiring an EIS or EA, the District should facilitate formation of an FHWA EIS or EA team to minimize delays resulting from implementing an inappropriate compliance program.
- c. If the project meets FHWA criteria for a Blanket Categorical Exclusion, the District must document that the LG has performed all coordination required under state and federal statutes and regulations.
- d. If the project meets FHWA criteria for a Programmatic Categorical Exclusion, the District must certify that the project meets the criteria for a PCE and meets TxDOT's current performance standards. The District coordinates the project with its Regional Environmental Center.

- e. Provide the LG with information regarding FHWA and TxDOT expectations for successful environmental compliance. The District should assist the LG in defining reliable scopes of work for environmental services.
- f. Perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement.
- g. Arrange for performance of environmental tasks and coordination assigned to TxDOT under the MAFA, AFA, or relevant authorities.
- h. Maintain project file that functions as NEPA administrative record and documents completion of all state and federal environmental requirements.
- i. Other District responsibilities determined by Continuous Improvement Agreement between the District and TxDOT ENV.

Section 8

Environmental Compliance: Noise Abatement

General

Highway projects must be evaluated for their potential to cause noise impacts that must be abated.

Federal Statutes

- a. 23 CFR 772 – Provides standards, procedures for noise studies, and noise abatement measures to be followed on federally-funded projects.

See

http://www.txdot.gov/txdot_library/publications/business/contractors_consultants/traffic_noise.htm.

State Statutes

- a. No specific statute.

Required Practices

- a. Analyses of noise impacts are performed as specified in TxDOT's Highway Traffic Noise Analysis and Abatement Policy and Guidance, and in the current TxDOT FHWA-approved Guidelines for Analysis and Abatement of Highway Traffic Noise. Noise analyses are reported in the NEPA document.
- b. TxDOT does not fund noise abatement activities on Type II projects (noise abatement activities retrofitting an existing highway).
- c. A noise analysis consists of a noise impact analysis and, if noise impacts will occur, an abatement assessment.
- d. Changes in project design or right of way/easement requirements often require the project to be re-evaluated, and may require the LG to document that project changes do not affect previous noise analyses.
- e. As this guidance is being written, TxDOT is making fundamental changes in its procedures for handling environmental compliance. It is likely that these changes will be ongoing for a number of years, and that TxDOT's processes and procedures for environmental compliance will change even over the duration of a single project. In addition, the authorities frequently change, and regulatory agencies change their procedures, requirements, and guidance on an ongoing basis. TxDOT also is developing a series of performance standards for environmental documents, reports, and other submittals. These standards also will change on an ongoing basis to reflect changes in authorities and lessons learned in ongoing application.

LG Responsibilities

- a. Consult with TxDOT to determine whether the project requires a noise analysis.
- b. Consult with TxDOT district to determine area of TxDOT jurisdiction if an off-system project connects with an on-system facility.
- c. The LG will perform and report noise analyses.
- d. Different AFA and other agreements between TxDOT and LGs may assign different environmental responsibilities to LGs. Therefore, the LG must be aware that its responsibilities may vary from project to project, and should verify its responsibilities with the District. The LG must determine from its agreement with TxDOT the environmental compliance requirements, if any, that TxDOT will perform.
- e. The LG will ensure that all environmental studies, reports, documents, and public involvement performed or obtained by the LG meet TxDOT performance standards. The LG should consult with TxDOT to identify current standards. The LG must perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement.
- f. If abatement is required, the LG must develop and implement the abatement plan.

TxDOT District Responsibilities

- a. Serve as the LG's point of contact for environmental submissions and facilitates the LG's interactions with TxDOT and FHWA.
- b. Provide the LG with information regarding FHWA and TxDOT expectations for successful compliance. The District should assist the LG in defining reliable scopes of work for environmental services.
- c. Perform quality assurance/quality control oversight over noise studies, reports, and documents.
- d. Other District responsibilities determined by Continuous Improvement Agreement between the District and TxDOT ENV.

Section 9

Environmental Compliance: Water Resources

General

Roadway construction projects typically transect or abut a number of waterbodies (streams, rivers, lakes, bays, wetlands) and therefore typically involve a number of related water quality issues. Water quality related permits and authorizations for construction activities are always required. Some authorizations may be general permits or nationwide permits that can be obtained in a very short period of time. An example is the TPDES stormwater permit for construction activities, an authorization that can be obtained in as little as twenty-four hours. Other authorizations, such as an individual US Army Corp of Engineers permit, or an individual TPDES wastewater discharge permit, may require a year or more to obtain. Therefore it is important to identify water resource issues very early in the planning phase of a project and to allow ample time to obtain water resource authorizations. Violations of permit and other requirements are serious, and can result in work stoppages and large fines.

Federal Statutes

- a. 33 USC 403 (relating to Protection of Navigable Waters and of Harbor and River Improvements Generally) — Requires a US Coast Guard permit for a project that will obstruct navigable waters by fill, construction of a bridge, bulkhead, or other structure.
- b. 33 USC 1342 (relating to National Pollutant Discharge Elimination System) — Prohibits discharge of any pollutant (including stormwater associated with construction and industrial activities) into Waters of the U.S. without first obtaining an NPDES permit. Related regulation: 40 CFR 122
- c. 33 USC 13344 (relating to Permits for Dredged or Fill Material) – Prohibits dredge and discharge of fill material in navigable waters without first obtaining a permit from the U.S. Army Corps of Engineers.
- d. Executive Order 11990- Protection of Wetlands — Prohibits construction located in wetlands unless (1) there is no practicable alternative, and (2) the proposed action includes all practicable measures to minimize harm to wetlands.
- e. Executive Order 11988- Floodplain Management — Requires coordination with the local floodplain administrator for projects within a floodplain to prevent adverse impacts associated with the modification of floodplains.
- f. 22 USC 7 (esp. §277) 1944 Water Treaty of the United States International Boundary and Water Commission — A license or permit is required from the USIBWC for any proposed activities crossing or encroaching upon the floodplains of USIBWC flood control projects and right of way. Related regulation: United States Section Directive, Vol. IV, Chapter 315.

- g. 16 USC 28.1271-1287 (relating to Wild and Scenic Rivers) — Requires that selected rivers shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected. Applies only to projects along the Rio Grande at Big Bend National Park.

Guidance for these subjects and others can be found at the Federal Highway Administration website: <http://www.environment.fhwa.dot.gov/guidebook/index.asp>.

State Statutes

- a. Texas Natural Resources Code, Chapter 33, Subchapter F §33.205 (relating to Coastal Coordination Act) — Requires that a project meet the policies and goals of the Coastal Management Program
- b. Texas Natural Resources Code, Chapter 61 (relating to Use and Maintenance of Public Beaches) — Requires that projects in the vicinity of public beaches must not affect public access and use, and must comply with local beach access and use plans.
- c. Texas Natural Resources Code, Chapter 63 (relating to Dunes) — Requires that projects in the vicinity of dunes with public access must conform to local dune permit programs, ordinances and other protections established within the dune protection line.
- d. 31 TAC 16 (relating to Coastal Coordination Council) — Requires that projects within the Coastal Management Plan boundaries must comply with the CMP.
- e. 30 TAC 213 (relating to Edwards Aquifer) — Requires that projects within the Edwards Aquifer Contributing Zone must develop and implement an approved Edwards Aquifer Protection Plan. The Contributing Zone occurs only within the Austin and San Antonio Districts
- f. 43 TAC 2.23 (Relating to Memorandum of Understanding with the Texas Natural Resource Conservation Commission) — Requires coordination to address water quality certification by TCEQ for TxDOT transportation projects with a USACE authorization, Edwards Aquifer protection, and impaired waterbodies (Clean Water Act Section 303(d)).
- g. Texas Water Code Chapter 26.121 (relating to Unauthorized Discharges Prohibited) — Prohibits discharge of waste, wastewater, and regulated stormwater runoff without a Texas Pollutant Discharge Elimination System (TPDES) permit. Storm Water Pollution Prevention Plan (SW3P). Related regulations: 30 TAC 205, 216, 281.25.
- h. Texas Water Code Chapter 11, Subchapter D (relating to Permits to Use State Water) — Requires a permit to appropriate state water for use.

Required Practices

- a. Compliance responsibilities of the LG and TxDOT vary depending on issues of funding, land ownership, geographic location, operational project control, and the involvement of one or more federal agencies.

- b. Changes in project design or right of way and easement requirements require the project to be re-evaluated for water impacts, and often require documentation that the changes were coordinated through the regulatory process.
- c. As this guidance is being written, TxDOT is making fundamental changes in its procedures for handling environmental compliance. It is likely that these changes will be ongoing for a number of years, and that TxDOT's processes and procedures for environmental compliance will change even over the duration of a single project. In addition, the authorities frequently change, and regulatory agencies change their procedures, requirements, and guidance on an ongoing basis. TxDOT also is developing a series of performance standards for environmental documents, reports, and other submittals. These standards also will change on an ongoing basis to reflect changes in authorities and lessons learned in ongoing application.

LG Responsibilities

- a. The LG contacts the District to determine the federal and state authorities that apply as a result of the project's specific characteristics and the specific content of the LG's agreement with TxDOT.
- b. The LG should contact TxDOT to determine the studies that should be performed.
- c. The LG will perform environmental studies and submit technical reports and other deliverables to TxDOT. Different AFA and other agreements between TxDOT and LGs may assign different environmental responsibilities to LGs. Therefore, the LG must be aware that its responsibilities may vary from project to project, and should verify its responsibilities with the District. The LG must determine from its agreement with TxDOT the environmental compliance requirements, if any, that TxDOT will perform.
- d. The LG will ensure that all environmental studies, reports, documents, and public involvement performed or obtained by the LG meet TxDOT performance standards. The LG should consult with TxDOT to identify current standards. The LG must perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement.
- e. For projects that may impact a stream, the LG should contact TxDOT to determine whether the stream is classified as a navigable water and whether the project will need a US Coast Guard Section 10 permit. When required, the LG shall obtain a US Coast Guard permit.
- f. If the project will result in discharge any pollutant (including stormwater associated with construction and industrial activities) into waters of the U.S., the LG shall coordinate with TECQ to obtain a Texas Pollutant Discharge Elimination System (TPDES) permit. The LG shall prepare and implement a Storm Water Pollution Prevention Plan (SW3P). If the project is within the boundaries of a Municipal Separate Storm Sewer System (MS4), the LG shall coordinate MS4 requirements with TCEQ.

- g. If the project will involve dredging or and discharging fill material into navigable waters, the LG shall obtain a permit from the U.S. Army Corps of Engineers. The permit application must indicate that the project is a TxDOT project. After obtaining the permit, the LG must pass all permit inquiries through TxDOT.
- h. The LG must determine whether the project will impact wetlands. If wetland impacts will occur, the LG must coordinate with the USACE to establish jurisdictional waters and the need for a nationwide or individual permit.
- i. If the project will encroach onto a floodplain, the LG shall identify and coordinate with the local floodplain administrator to determine and prevent any long and short term adverse impacts associated with the modification of floodplains. If the project is in the Trinity in Dallas County or Tarrant County, the LG shall obtain a Trinity River Corridor Development Certificate.
- j. If the project will cross or encroach upon the floodplains of USIBWC flood control projects and right of way on the Rio Grande, the LG shall coordinate with USIBWC to obtain a license or permit.
- k. If the project will involve dredging or and discharging fill material into navigable waters, the LG shall obtain a permit from the U.S. Army Corps of Engineers. The LG may submit permit applications directly to the USACE. The permit application must clearly state that the project is a TxDOT project. All subsequent communication with USACE regarding the status of the application must be coordinated by TxDOT.
- l. If the project is in Orange, Jefferson, Chambers, Harris, Galveston, Brazoria, Matagorda, Jackson, Calhoun, Victoria, Refugio, Aransas, San Patricio, Nueces, Kleberg, Kennedy, Wilacy, or Cameron County, the LG must consult with the Coastal Coordination Council to determine the project's consistency with the Coastal Management Plan.
- m. The LG must consult with the National Park Service for projects along the Rio Grande at Big Bend National Park.
- n. If the project involves a federal agency other than FHWA, the LG is responsible for meeting that agency's requirements regarding water resources.
- o. The LG will provide TxDOT with copies of all technical reports generated by the LG.

TxDOT District Responsibilities

- a. Serve as the LG's point of contact for environmental submissions and facilitate the LG's interactions with TxDOT and FHWA.
- b. Provide the LG with information regarding FHWA and TxDOT expectations for successful environmental compliance. The District should assist the LG in defining reliable scopes of work for environmental services.
- c. Perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement.
- d. Arrange for performance of environmental tasks and coordination assigned to TxDOT under the MAFA, AFA, or relevant authorities.

- e. Other District responsibilities determined by Continuous Improvement Agreement between the District and TxDOT ENV.

Section 10

Environmental Compliance: Historic Resources

General

A historic resource is a building, structure, object, or district that, except under unusual circumstances, must be at least 50 years old at the time construction begins. Historic resources are treated differently than archeological resources. For the purposes of this discussion, “historic resource” does not include archeological resources, which are covered in another section. Protected historic resources are called “nonarcheological historic properties.” A nonarcheological historic property is listed or eligible for inclusion in the National Register of Historic Places or eligible for designation as a State Archeological Landmark. A cemetery with graves more than 50 years old must be treated as a historic resource.

Federal Statutes

- a. Section 106, National Historic Preservation Act of 1966, 16 U.S.C. 470 (Section 106) – Requires federal agencies to consider the effects of their projects on historic resources listed or eligible for inclusion in the National Register of Historic Places. The First Amended Programmatic Agreement Among the Federal Highway Administration, the Texas Department of Transportation, the Texas State Historic Preservation Officer, the Advisory Council on Historic Preservation Regarding the Implementation of Transportation Undertakings (PA-TU) prescribes standard procedures for complying with Section 106 on FHWA projects.
- b. Section 110(k), National Historic Preservation Act of 1966, 16 U.S.C. 470 (Section 110) – Section 110 prohibits demolition of an archeological historic property prior to conclusion of Section 106 consultation (“anticipatory demolition”). Anticipatory demolition may result in loss of FHWA funding or approval. Destruction of a site that has not been evaluated also may result in loss of funding or approval.
- c. 36 CFR 800 – Prescribes procedures for complying with Section 106 for FHWA projects removed from the PA-TU and for undertakings where an agency other than FHWA has jurisdiction.

Guidance for these subjects and others can be found at the Federal Highway Administration website: <http://www.environment.fhwa.dot.gov/guidebook/index.asp>.

State Statutes

- a. Texas Natural Resource Code, Title 9, Chapter 191, Antiquities Code of Texas (Antiquities Code) – Requires that the Texas Historical Commission (THC) be notified of proposed construction projects, and prohibits unpermitted destruction of archeological sites eligible for designation as State Archeological Landmarks.
- b. 13 TAC 26, Practice and Procedure – Rules implementing the Antiquities Code.

- c. 43 TAC 2.24, Memorandum of Understanding with Texas Historical Commission (also adopted as 13 TAC 26.14) – Prescribes standard procedures for complying with the Antiquities Code on TxDOT projects, including projects that require TxDOT approval.

Required Practices

- a. Historical compliance responsibilities of the LG and TxDOT vary depending on issues of funding, land ownership, and the involvement of one or more federal agencies.
- b. The project is evaluated to determine whether historical studies are needed. If studies are needed, they are performed under a research design that must be approved by TxDOT and THC.
- c. Section 106 and 36 CFR 800 apply to all projects that involve funding, licensing, permitting, or approval by a federal agency, including agencies other than FHWA. 36 CFR 800 identifies a consultation process to be followed by federal agencies. The PA-TU governs compliance with Section 106 and 36 CFR 800 when FHWA funds or approves projects. Under the PA-TU, TxDOT performs all actual consultation tasks on behalf of FHWA. If FHWA is not involved, the federal agency follows 36 CFR 800. Deviation from the Section 106 process or anticipatory demolition of an historic resource or nonarcheological historic property prior to completion of the Section 106 process is grounds for litigation and may require the federal agency to withhold funding, licensing, permitting, or approval of the project. FHWA generally is the federal agency with jurisdiction over Section 106. On rare occasions another federal agency may have or share jurisdiction.
- d. The Antiquities Code applies to projects on land owned or controlled by the state or a political subdivision of the state. Funding source has no effect on Antiquities Code jurisdiction. The Antiquities Code requires the person primarily responsible for the project to give the THC prior notice before beginning construction. Historic resources are protected by the Antiquities Code only if they are listed on the National Register of Historic Places. Deviation from the Antiquities Code process is grounds for litigation. Unpermitted demolition of a historic resource or historic property is grounds for prosecution as a misdemeanor offense.
- e. For projects with FHWA jurisdiction, TxDOT ENV or, in some cases, FHWA performs all coordination with THC and other consulting parties defined in federal regulations. The entity with the most funding involved in the project is required to coordinate with THC under the Antiquities Code.
- f. Changes in project design or right of way and easement requirements require the project to be re-evaluated for historic impacts, and require documentation that the changes were coordinated through the regulatory process.

- g. A historic resource eligible for the National Register of Historic Places or for designation as a State Archeological Landmark may be protected under 49 USC 303 (Section 4(f)) and TPWD 26. See the procedure titled “Taking or Use of Publicly Owned Park, Recreation Area, Scientific Area, Wildlife Refuge, or Historic Site.” Any USDOT agency action that will result in a use of land from a historic resource that warrants preservation in place and that is an adverse effect must meet the requirements of the Section 4(f) of the US DOT Act of 1966 (reference Section 4(f) chapter).
- h. As this guidance is being written, TxDOT is making fundamental changes in its procedures for handling environmental compliance. It is likely that these changes will be ongoing for a number of years, and that TxDOT’s processes and procedures for environmental compliance will change even over the duration of a single project. In addition, the authorities frequently change, and regulatory agencies change their procedures, requirements, and guidance on an ongoing basis. TxDOT also is developing a series of performance standards for environmental documents, reports, and other submittals. These standards also will change on an ongoing basis to reflect changes in authorities and lessons learned in ongoing application.

LG Responsibilities

- a. The LG should contact TxDOT to determine whether historical studies should be performed.
- b. The LG will provide TxDOT with copies of all technical reports for historical studies generated by the LG. The LG will not submit reports directly to the THC unless the LG is responsible for conducting Antiquities Code coordination. The LG will not submit reports or other materials directly to THC or other consulting parties for the purposes of Section 106 consultation.
- c. The LG must document completion of Section 106 consultation to determine the project’s effects on sites, buildings, structures, objects, and districts that are listed or may be eligible for inclusion in the National Register of Historic Places. TxDOT will provide documentation of consultation performed by TxDOT ENV or FHWA. It is possible in some instances that the LG will be required to complete coordination with the THC under the Antiquities Code, but that TxDOT will have to complete coordination separately under Section 106.
- d. The LG must document completion of coordination with THC under the Antiquities Code for projects in which the LG performed Antiquities Code coordination. TxDOT will provide documentation of coordination performed by TxDOT ENV.
- e. The LG will perform environmental studies and submit technical reports and other deliverables to TxDOT. Different AFA and other agreements between TxDOT and LGs may assign different environmental responsibilities to LGs. Therefore, the LG must be aware that its responsibilities may vary from project to project, and should verify its responsibilities with the District. The LG must determine from its agreement with TxDOT the environmental compliance requirements, if any, that TxDOT will perform.

- f. The LG will ensure that all environmental studies, reports, documents, and public involvement performed or obtained by the LG meet TxDOT performance standards. The LG should consult with TxDOT to identify current standards. The LG must perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement.
- g. If the project involves a federal agency other than FHWA, the LG is responsible for meeting that agency's Section 106 requirements.

TxDOT District Responsibilities

- a. Serve as the LG's point of contact for environmental submissions and facilitate the LG's interactions with TxDOT and FHWA.
- b. Provide the LG with information regarding FHWA and TxDOT expectations for successful environmental compliance. The District should assist the LG in defining reliable scopes of work for environmental services.
- c. Perform quality assurance/quality control oversight over environmental studies, reports, documents, and public involvement.
- d. Arrange for performance of environmental tasks and coordination assigned to TxDOT under the MAFA, AFA, or relevant authorities.
- e. Other District responsibilities determined by Continuous Improvement Agreement between the District and TxDOT ENV.