

ATTACHMENT A

Description of Changes to Key Information in TxDOT's 2014 Application



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November 8, 2018

Brandye L. Hendrickson, Acting Administrator  
Federal Highway Administration  
Office of the Administrator  
1200 New Jersey Ave., SE  
Washington, DC 20590

RE: Request for concurrence that changes to TxDOT's 2014 application for NEPA Assignment are not significant enough to warrant statewide public comment prior to submission of Renewal Package

Dear Ms. Hendrickson:

This letter summarizes changes to key information included in the TxDOT Application for the Surface Transportation Project Delivery Program, submitted to the Federal Highway Administration (FHWA) in May 2014, pursuant to 23 CFR 773. Under a Memorandum of Understanding (MOU) with the FHWA, TxDOT has since 2014 performed federal responsibilities under the National Environmental Policy Act (NEPA). Collectively, these activities are referred to as "NEPA Assignment". The current NEPA MOU expires December 16, 2019. TxDOT intends to continue performing federal NEPA responsibilities.

On September 16, 2014 a Final Rule on Surface Transportation Project Delivery Program Application Requirements was published in the Federal Register amending 23 CFR 773 to add Section 773.115 Renewals, outlining requirements for states to continue participation in NEPA Assignment. Pursuant to Section 773.115, on October 15, 2018, TxDOT submitted to the FHWA a formal letter of intent to renew participation in NEPA Assignment. TxDOT will submit a renewal request package, including a proposed draft MOU, in spring 2019, ahead of the June 16, 2019 deadline.

Prior to submitting the renewal request, TxDOT must coordinate with the FHWA to determine if significant changes have occurred or new NEPA Assignment responsibilities are being sought. During informal discussions with the FHWA, TxDOT has proposed to satisfy this requirement by describing changes to key information in the 2014 Application, without rewriting completely the original document. The FHWA has agreed to accept for consideration the description of key changes, which are outlined in this letter, but may request that TxDOT provide additional information pursuant to 23 CFR 73.115(e). The Original Application can be found at <http://ftp.dot.state.tx.us/pub/txdot-info/env/nepa-assignment/fhwa-nepa-assignment.pdf>.

TxDOT intends to renew the NEPA MOU with the FHWA and continue performing federal NEPA duties for highway projects, as defined in Title 23 of the Code of Federal Regulations, Section 773.103. No significant changes are being proposed in the draft renewal MOU. However, there have been some changes since 2014 and some information to be proposed in the draft renewal MOU will be different from the original application.

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Following is a list and summary of changes to key information with references to the original 2014 Application cited for each area.

## SUMMARY OF CHANGES

### Global Terminology Changes

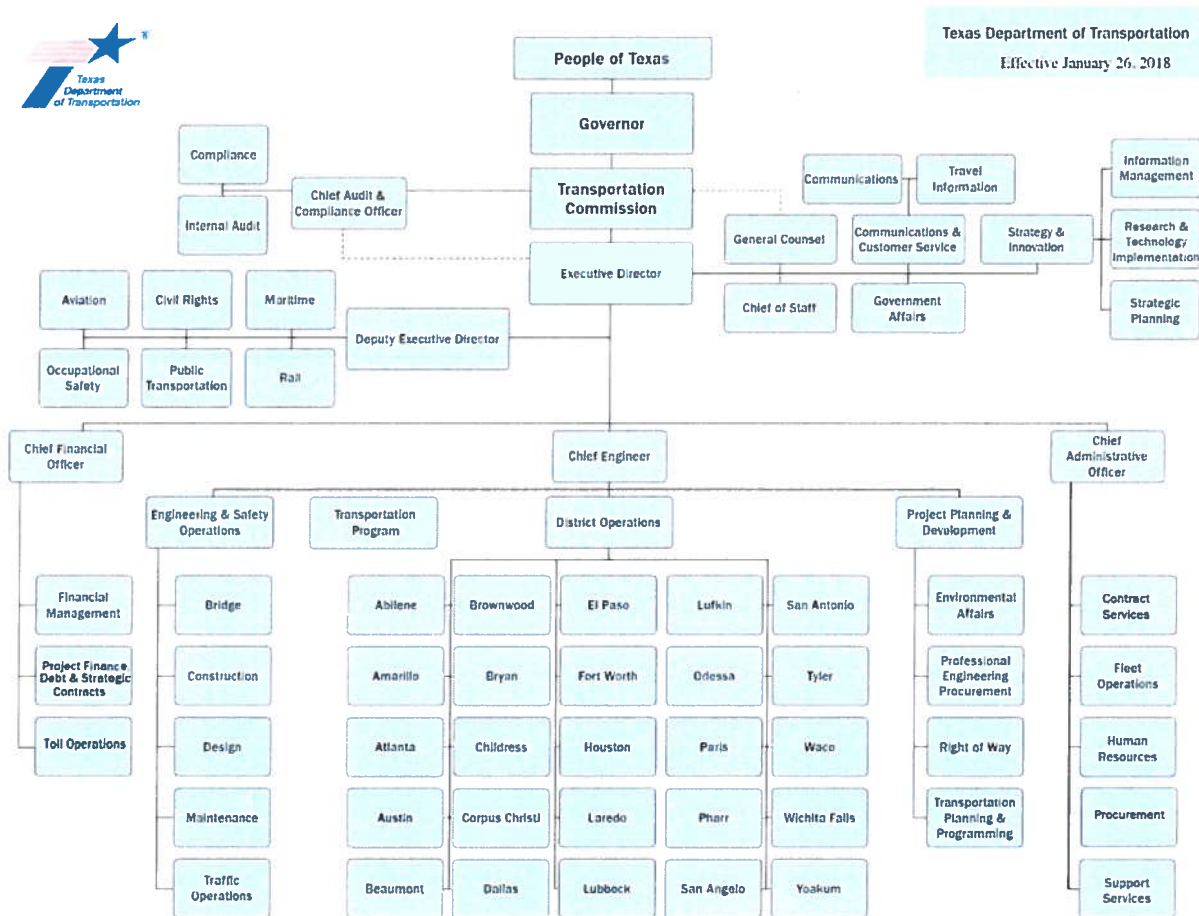
These terminological changes apply throughout the text of the Original Application.

- “Office of General Counsel (OGC)” is now “General Counsel Division (GCD).”
- “Self-assessment” in the Original Application would be replaced by “self-monitoring” under a renewed MOU.
- “Self-Assessment” branch in the Original Application is now “Program Review” section.
- “Pollution Prevention and Abatement” section under the original MOU is now “Environmental Resources Management” section.
- “Cultural Resource Management” section in the Original Application is now “Cultural Resources Management” section.
- “Natural Resource Management” section in the Original Application is now “Natural Resources Management” section.
- “Program Operations” under the Original Application refers to a disbanded section whose functions have been redistributed.
- “Rail Projects” section in the Original Application refers to a disbanded section whose functions have been redistributed.
- “State Legislative Affairs Office” and “Federal Affairs Office” in the Original Application are now “Government Affairs Division.”
- “Office of Public Involvement” in the Original Application is now “Public Involvement section.”
- “Local Government Project Office” in the Original Application is now “Local Government Project Program.”
- “Review for readiness” in the Original Application is now “technical review.”

## SECTION-BY-SECTION CHANGES

Legal citations and page numbers refer to sections and pages in the Original Application.

- **§773.106 (b)(1): Classes of Highway Projects for Which TxDOT Is Requesting NEPA Responsibility, page 6**
  - Except for the South Padre Island, Second Crossing, Pharr EIS project noted in the Original Application, no projects are retained by FHWA. This change applies to Appendix A.
  
- **§773.106 (b)(3)(i), page 7: Existing Organization and Procedures.** The Original Application describes procedures in place at the time of the Original Application. Changes are as follow below, and reflect changes that would apply under the renewed MOU.
  - **TxDOT Organization, page 7-8:** The TxDOT organization has changed.
    - Districts no longer report directly to the deputy executive director.
    - The Environmental Affairs Division (ENV) and the Transportation Planning and Programming Division (TPP) now report to Project Planning and Development.
    - The State Legislative Affairs Office and Federal Affairs Office are now combined into the Government Affairs Division.
    - The chart below replaces Figure 1, TxDOT Organization Chart, page 8.



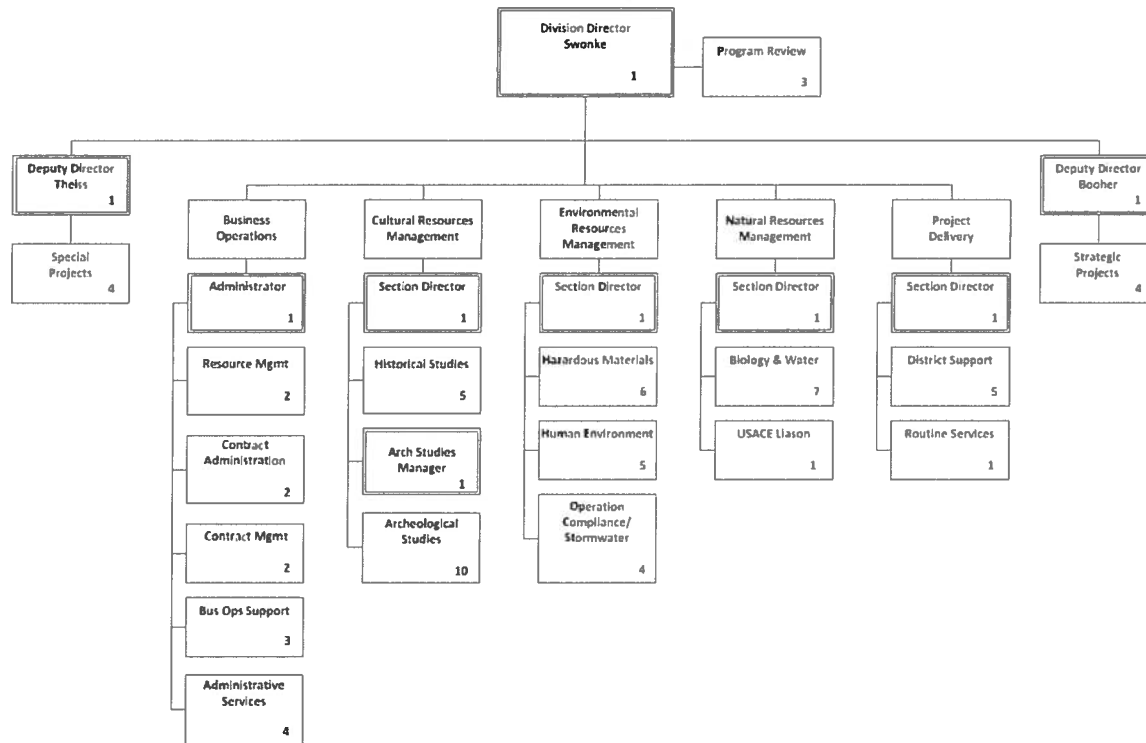
- **ENV Organization, page 9:** The ENV organization has changed as noted below.
  - **Page 9:** Currently, ENV has a staff of 77 full time employees (FTEs), including environmental managers, specialists, planners and a variety of SMEs, including biologists, geologists, water quality experts, archeologists, historians, architectural historians, and a historical architect. All cultural resource management staff meet the Secretary of Interior's standards as qualified professionals.
- The following figure replaces Figure 2, Environmental Affairs Division Organization Chart, page 10.

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## ENVIRONMENTAL AFFAIRS DIVISION



- Page 10: ENV includes eight sections: Cultural Resources Management, Pollution Prevention and Abatement, Natural Resources Management, Strategic Projects, Project Delivery, Special Projects, Program Review, and Business Operations.
- Page 10: The function of the Strategic Projects section has evolved and now closely overlaps that of the Project Delivery section.
- Page 11: The Program Operations section was disbanded when the section manager retired. The Self-Assessment branch was replaced by the Program Review section. Program Review performs quality assurance reviews for completed CE, EA, and EIS projects. Program Review staff also coordinate with section managers regarding identified subject-matter improvements and observations. Other Program Operations functions were redistributed among other sections.
- New addition: The Pollution Prevention/Abatement Section was reorganized and is now the “Environmental Resources Management Section.” The section houses three branches and a position for Operation Compliance/Stormwater.
- New addition: The Natural Resources Management section houses biology and water subject matter experts and a liaison for the U.S. Army Corps of Engineers.
- New addition: The Special Projects section houses senior level staff that manage varied subject matters including the management and coordination of rail projects; managing

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the ENV training program; developing and monitoring performance metrics; managing the NEPA assignment program including identifying trends, corrective actions, audit compliance, training, monitoring, and coordination with FHWA; performing specific studies; reviewing and commenting on proposed state and federal legislation and regulations; monitoring of trends and changes in federal and state policy and guidance; reviewing and developing policy, procedures, training, and guidance; and coordinating with TxDOT's Government Affairs Division regarding pending legislation.

- Page 11: The Rail Projects manager has been moved to the Special Projects section.
- Page 11-12: Efforts with the Project Management Office to integrate scheduling and resource commitments in ECOS into a project management system, and to perform workforce analyses have been redistributed into a broader department-wide program.
- Page 12: EAs for projects with toll elements are no longer automatically referred to General Counsel Division for legal review.
- **Existing Environmental Staff, page 14**
  - Page 14: ENV has a staff of 77 FTEs. Districts have environmental staff of 91 FTEs. Total TxDOT staff concentrating on environmental aspects of project delivery is about 168 FTEs. ENV no longer has on-site contractor staff working at ENV.
  - Page 14: TxDOT made 2,925 environmental decisions in FY 2018, including twenty-one de minimis, seven programmatic, one individual Section 4(f) evaluation, and twenty-one 4(f) exceptions.
  - Page 14: There are no substantive changes to Figure 4: District Staff, by Location, Responsible for Environmental Compliance and Documentation.
  - Page 15: There are no substantive changes to Table 1: TxDOT Range of Technical Expertise.
- **Process for TxDOT-Sponsored Projects, page 16**
  - Page 18: The box indicating, "Public Hearing," changes to "Public Hearing/Opportunity for Public Hearing" in Figure 6: Existing Environmental Compliance Process.
  - Page 18: The box indicating, "Prepare Public Hearing Summary & Final Document" changes to "Prepare Public Hearing Documentation/Opportunity for Public Hearing Documentation & Final Document" in Figure 6: Existing Environmental Compliance Process.
  - Page 18: Texas statutorily-required scoping is done in ECOS using the information entered into the Project Definition and Work Plan Development screens. The project scope or "work plan" is documented on the Project Work Plan screen. Subjects for which no work is needed are documented with findings to that effect.

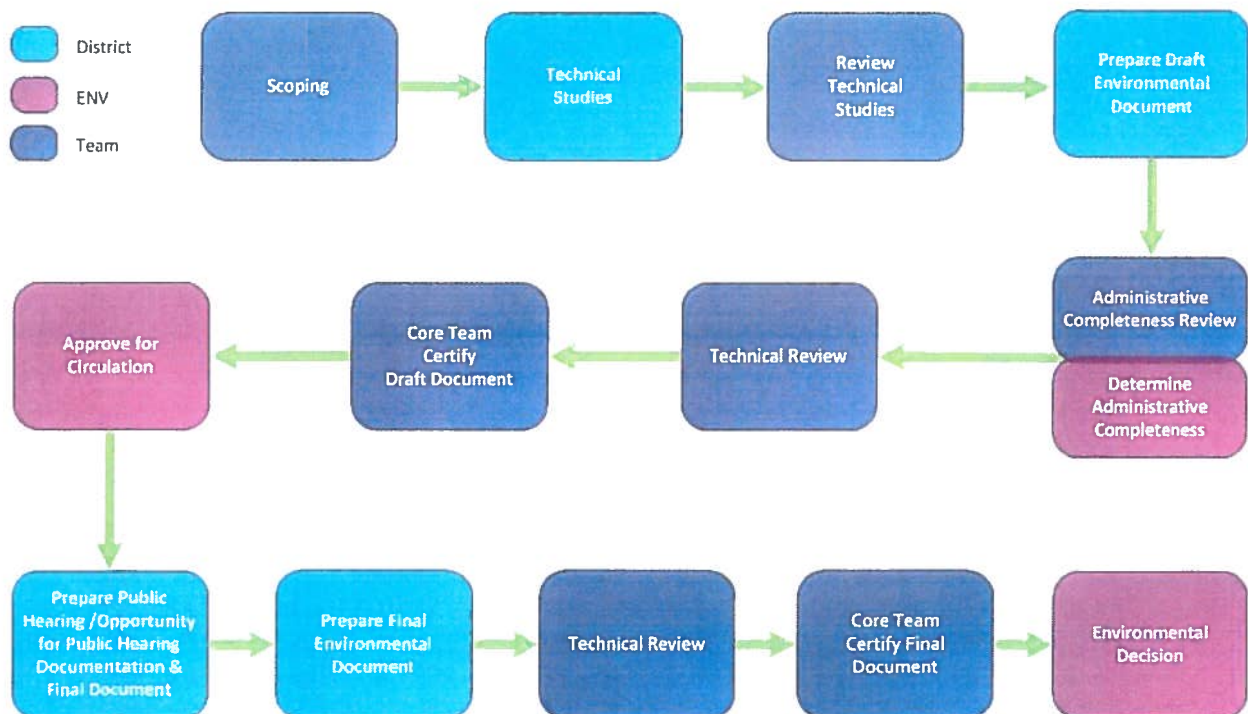
- Page 19: For TxDOT-sponsored projects, administrative completeness review is seamlessly integrated into technical review of the document. Technical review does not proceed if the document is found to be incomplete.
- Page 19: It is common for ENV to provide a DEIS to General Counsel Division for review prior to approval, but legal sufficiency review is required only for the FEIS.
- **Process for Local Government-Sponsored Project, page 19, Table 2**
  - For local government-sponsored projects, administrative completeness review is documented as a distinct activity with a checklist form that is uploaded to ECOS.
- **Approach to Categorical Exclusion Documentation Preparation, page 21**
  - CE approval authority is determined by each district's delegation approval; a District Engineer is no longer required to sign (d) CEs as long as the DE has provided such signature authority within their district.
  - There is no required peer review for (d)-list CEs.
- **Public Involvement Procedures, page 21**
  - Page 22: TxDOT's state rules no longer require meetings with affected property owners (MAPOs) as part of the environmental review process. Instead, they require a new form of public involvement called a "notice and opportunity to comment."
  - Page 22: A "public involvement summary and analysis report" is no longer prepared. Instead, either "Public Meeting Documentation" or "Public Hearing Documentation" is prepared.
- **Quality Control Procedures, page 22**
  - Page 23: Again, it is common for ENV to provide a DEIS to General Counsel Division for review prior to approval, but legal sufficiency review is required only for the FEIS.
- **Environmental Commitments, page 23**
  - For EAs and EISs, EPIC-related information is conveyed to the public in the EA or EIS. For CEs, there is usually no conveyance of EPIC-related information to the public unless requested.
- **Tools and Guidance, page 23**
  - New addition: Guidance aimed primarily at internal staff, as opposed to outside contractors and consultants, is stored on an internal SharePoint site.



- **Environmental Compliance Oversight System (ECOS) , page 25**
  - ECOS retains the functions identified in the Original Application. Since assignment, there have been two major updates. Other updates are planned.
- **Programmatic Agreements and Agency Consultation, page 25**
  - Page 25: The Section 106 programmatic agreement was amended in 2105 to acknowledge NEPA assignment.
  - Page 26: The programmatic agreement with UFWS became obsolete upon assignment and was terminated.
  - New addition: TxDOT executed a cooperative agreement with USFWS for a designated Transportation Liaison in 2015 to replace the agreement between TxDOT, FHWA, and USFWS.
  - New addition: Endangered Species Act Programmatic Consultation Agreement: Red-cockaded Woodpecker, letter agreement with USFWS, November 3, 2016. The agreement provides a programmatic approach to address project effects to the red-cockaded woodpecker for projects that “may affect, but are not likely to adversely affect” the species.
  - New addition: Endangered Species Act Programmatic Consultation Agreement for the Black-Capped Vireo and Golden-Cheeked Warbler, letter agreement with USFWS, July 31, 2017. The agreement provides a programmatic approach to address project effects to the black-capped vireo and golden-cheeked warbler for projects that “may affect, but are not likely to adversely affect” the species.
  - New addition: In 2015, TxDOT executed an agreement with the US Army Corps of Engineers, Galveston District to provide funding for expedited reviews of transportation project permit applications under the jurisdiction of the Department of the Army.
  - New addition: Memorandum of Understanding: Sole Source Aquifers – Safe Drinking Water Act, June 18, 2018. Pursuant to Section 1424(e) of the Safe Drinking Water act (PL 93-523), the MOU between TxDOT and the Environmental Protection Agency (EPA) describes the consultation and review process for Federal-aid highway projects which may affect water quality in designated sole source aquifers.
- **Internal Monitoring and Process Reviews, page 26**
  - Replace second paragraph: “TxDOT conducts performance reviews for projects approved under assignment. The Program Review section evaluates projects to determine if findings were appropriate, decisions were made by authorized staff, project scopes were complete and accurate, project descriptions were complete, and tasks required in the project scope were undertaken and appropriately documented in the ECOS file.”

- §773.106 (b)(3)(ii): Changes to Be Made for Assumption of Responsibilities, page 27
  - Changes from the Original Application noted throughout this document will apply under the renewed MOU.
- Organization and Procedures under the Assignment Program, page 28
  - Page 28: The figure below replaces Figure 8, NEPA Assignment Program Environmental Compliance Process for EAs and EISs.
    - “District Certify Draft Document” in the original figure changes to “Core Team Certify Draft Document.”
    - The box indicating “Prepare Public Hearing Summary & Final Document” in the original figure changes to “Prepare Public Hearing /Opportunity for Public Hearing Documentation & Final Document.”
    - The box indicating “District Certify Final Document” in the original figure changes to “Core Team Certify Final Document.”

Figure 8  
NEPA Assignment Program Environmental Compliance Process for Eas and EISs



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- **Expanded Quality Control Procedures, page 29**
  - Page 30: Signature authority for FONSI, DEIS, FEIS, and RODs has been delegated to the ENV Deputy Directors. Signature authority for FONSI has been delegated to the Project Delivery Management Section Director. But, all of these are usually signed by the ENV Director.
  - Page 30: TxDOT normally combines the FEIS and ROD into a single document.
  - Page 30: Again, CE approval authority is determined by each district's delegation approval, a District Engineer is no longer required to sign (d) CEs as long as the DE has provided such signature authority within their district.
  - Page 30: Again, there is no require peer review for (d)-list CEs.
- **Independent Environmental Decision-Making, page 31**
  - Again, signature authority for FONSI, DEIS, FEIS, and RODs has been delegated to the ENV Deputy Directors. Signature authority for FONSI has been delegated to the Project Delivery Management Section Director. But, all of these are usually signed by the ENV Director.
- **Consultation and Coordination with Resource Agencies, page 32**
  - The standard operating procedure *Accessing USFWS Ecological Services for Technical Assistance and Section 7 Consultations* has been updated and the name changed to *Process: District and Environmental Division Interactions for ESA Section 7 Obligations*.
- **Issue Identification and Conflict Resolution Procedures, page 33**
  - Page 33: Only the paper scope used for local government-sponsored projects includes a dispute escalation ladder.
  - Page 34: Stipulation XI.F in the amended Section 106 programmatic agreement addresses dispute resolution.
- **Expanded Internal Compliance and Self-Assessment Reviews, page 35**
  - As noted above, the Program Review internally monitors compliance. The Special Projects section will coordinate annual self-monitoring reports.
- **Performance Measures to Assess the NEPA Assignment Program, page 36**
  - Page 36: TxDOT proposes to fold the measure for Quality Control and Assurance for NEPA Decisions into the measure for Compliance with NEPA and other Federal environmental statutes and regulations. Documenting compliance with NEPA, FHWA NEPA regulations, and other federal environmental statutes and regulations under the first performance measure directly measures the efficacy of QC/QA processes, making Quality Control and Assurance measure redundant as a stand-alone measure.

- Page 37: TxDOT proposes to alter the measure for increased efficiency in completion of the NEPA process to eliminate comparison to FHWA preassignment performance. Comparisons to FHWA performance are no longer relevant.
- **Training to be Provided to Implement the Assignment Program, page 37**
  - TxDOT will continue its ongoing training program and annual update of its training plan.
- **§773.106 (b)(4)(i): Staff Dedicated to Additional Functions, page 39**
  - Page 39: Functions of the Performance Branch manager in the Original Application are performed by a training manager under the Special Projects section.
  - Page 40: TxDOT has four staff attorneys assigned by GCD to provide legal counsel to ENV.
- **§773.106 (b)(4)(ii): Changes to the Organizational Structure, page 40**
  - See changes noted under §773.106 (b)(3)(i) above.
  - Again, signature authority for FONSI, DEIS, FEIS, and RODs has been delegated to the ENV Deputy Directors. Signature authority for FONSI has been delegated to the Project Delivery Management Section Director. But all of these are usually signed by the ENV Director.
- **§773.106 (b)(5): Financial Resources Under the Assignment Program, page 42**
  - TxDOT continues to maintain sufficient financial resources to meet the NEPA Assignment Program responsibilities.
  - ENV's budget for FY 2019 is \$16,356,679.00.
  - The ENV Self-Assessment Branch manager in the Original Application is the ENV Program Review section director.
  - The ENV Staff Development Coordinator in the Original Application is the Training Coordinator in the Special Projects section.
- **§773.106 (b)(6): Certification for Consent to Exclusive Federal Court Jurisdiction and Waiver of Immunity, page 42**
  - The certification by the First Assistant Attorney General of Texas in the Original Application remains correct.
- **§773.106 (b)(7): Certification that the State of Texas's Public Records Act Is Comparable to the Federal Freedom of Information Act, page 43**
  - The certification by the First Assistant Attorney General of Texas in the Original Application remains correct.

**CONCLUSION**

TxDOT proposes that the informational changes described here do not individually or collectively constitute significant change nor do they warrant statewide notice for public comment prior to the formal submittal of the renewal request package by TxDOT to the FHWA. TxDOT requests that the FHWA consider this proposal and information and to then notify TxDOT of the FHWA determination by email to Carlos Swonke, Division Director, ENV, at [carlos.swonke@TxDOT.gov](mailto:carlos.swonke@TxDOT.gov) or 512/416-2734.

Sincerely,



James M. Bass  
Executive Director