

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Proposed Rulemaking

AGENDA REQUESTED: May 22, 2013

DATE OF REQUEST: May 3, 2013

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Bruce McAnally, (512) 239-2141

CAPTION: Docket No. 2013-0348-RUL. Consideration for publication of amended Section 7.119 of 30 TAC Chapter 7, Memoranda of Understanding.

The proposed rulemaking would adopt, by reference, the rules of the Texas Department of Transportation (TxDOT) in 43 TAC Chapter 2, Subchapter I, Memorandum of Understanding with the Texas Commission on Environmental Quality (TCEQ, agency). 43 TAC Chapter 2, Subchapter I contains an updated Memorandum of Understanding (MOU) between the TCEQ and TxDOT addressing TCEQ environmental reviews of TxDOT highway (transportation) projects. The updates to the MOU implement requirements in Sections 1 and 5 of Senate Bill (SB) 548, Section 18 of SB 1420, and Sections 1 and 5 of House Bill 630, 82nd Legislature, 2011, and make additional changes to the MOU. The primary change to the updated MOU addresses the requirement in Texas Transportation Code, §201.607, that the MOU include language specifying that comments submitted to TxDOT later than the available 45-day review period will be considered by TxDOT to the extent possible. The updated MOU also makes changes to the triggers for review of a project and allows TxDOT to coordinate review of environmental reports with the TCEQ. The updated MOU also updates TCEQ's agency name from the "Texas Natural Resource Conservation Commission" to the "Texas Commission on Environmental Quality" and includes other changes. (Diane Mazuca, Angela Burnett) (Rule Project No. 2013-019-007-LS)

Caroline Sweeney

Deputy Director

David Timberger

Division Director

Bruce McAnally

Agenda Coordinator

Copy to CCC Secretary? NO

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** May 3, 2013

Thru: Bridget C. Bohac, Chief Clerk
Zak Covar, Executive Director

From: Caroline Sweeney, Deputy Director
Office of Legal Services

Docket No.: 2013-0348-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 7, Memoranda of Understanding
Memorandum of Understanding between the Texas
Department of Transportation and the Texas Commission on
Environmental Quality
Rule Project No. 2013-019-007-LS

Background and reason(s) for the rulemaking:

This rulemaking adopts, by reference, an update to the current Memorandum of Understanding (MOU) between the Texas Commission on Environmental Quality (TCEQ, agency) and the Texas Department of Transportation (TxDOT) addressing the TCEQ's environmental reviews of TxDOT highway (transportation) projects. The updates to the MOU are required to comply with provisions in Senate Bill (SB) 548, SB 1420, and House Bill (HB) 630 of the 82nd Legislature, 2011. The adopted legislation requires TxDOT to amend its rules related to environmental reviews of highway projects and update the relevant TCEQ/TxDOT MOU.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

Section 7.119 is being amended to adopt the updates to the MOU. The MOU is in 43 TAC §§2.301 - 2.308. The primary change to the updated MOU addresses newly adopted language in the Texas Transportation Code, §201.607, requiring the two agencies to include in the MOU that comments submitted to TxDOT later than the available 45-day review period will be considered by TxDOT to the extent possible. The updated MOU makes only slight changes to the triggers for review of a project, primarily for impaired water assessment units (impaired water bodies). Those changes are being made to comply with current federal requirements associated with the 303(d)- and TMDL-related requirements.

The updated MOU also includes a reference to a new document, environmental report, that TxDOT may request that the TCEQ review. An environmental report is a document that TxDOT may choose to develop early in their process, usually prior to conducting either an Environmental Assessment or Environmental Impact Statement. Also included in the MOU is the authorization to implement electronic distribution of TxDOT highway project

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information to the TCEQ and TCEQ comments to TxDOT. The updated MOU reorganizes and streamlines parts of the MOU.

The TCEQ rule references the text of the updated MOU between TxDOT and the TCEQ. That language is in 43 TAC §§2.301 - 2.308.

B.) Scope required by federal regulations or state statutes:

As required by state statute, the MOU between TxDOT and the TCEQ addressing the coordination process to review certain environmental documents related to highway projects is updated. The updated MOU reflects a requirement in Texas Transportation Code, §201.607, added by the 82nd Legislature, 2011, that specifies that comments submitted to TxDOT later than the available 45-day review period will be considered by TxDOT to the extent possible. It also adds a new document, environmental report, to the environmental review process.

C.) Additional staff recommendations that are not required by federal rule or state statute:

Included in the MOU is the authorization to implement an electronic distribution of TxDOT highway project information and the TCEQ comments. The updated MOU reorganizes and streamlines parts of the MOU.

Statutory authority:

Texas Water Code (TWC), §5.102, General Powers, §5.103, Rules, §5.104, Memoranda of Understanding, and §5.105, General Policy; Texas Transportation Code, §201.607, Environmental, Historical, or Archeological Memorandum of Understanding; Texas Health and Safety Code, §382.035, Memorandum of Understanding; and Texas Transportation Code, §201.607, Environmental, Historical, or Archeological Memorandum of Understanding.

Effect on the:

A.) Regulated community:

Members of the regulated community will have readily available information on the process used by the TCEQ and TxDOT to conduct the required environmental reviews of certain highway projects. TxDOT will include the TCEQ comments in public documents. With this information, the regulated community will be able to more fully participate in TxDOT's development of certain highway projects.

B.) Public:

Revising the MOU will allow the public to have readily available information on the process used by the TCEQ and TxDOT to conduct the required environmental reviews of certain highway projects. TxDOT will include TCEQ comments in public documents. The public's opportunity to review TCEQ environmental-related comments associated with these projects enables them to more fully participate in TxDOT development of certain highway projects.

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C.) Agency programs:

TCEQ program staff involved in the review process will now have an electronic-based process to manage their comments on coordinated TxDOT highway projects.

Stakeholder meetings:

Comment period during rule proposal.

Potential controversial concerns and legislative interest:

None.

Will this rulemaking affect any current policies or require development of new policies?

No change in current policies. The two agencies will jointly implement an electronic distribution system to streamline the coordinated review process. The Chief Engineer's Office is the TCEQ central point of contact for this process with TxDOT.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

If the rulemaking does not proceed, the TCEQ will not be in compliance with the statutory language in SB 548, SB 1420, and HB 630, requiring TxDOT and the TCEQ to update their MOU.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: May 22, 2013

Anticipated *Texas Register* publication date: June 7, 2013

Public hearing date (if any): None

Public comment period: June 7 thru July 8, 2013

Anticipated adoption date: September 4, 2013

Agency contacts:

Angela Burnett, Project Manager, 239-6005, General Law Division

Bruce McAnally, Texas Register Coordinator, 239-2141

Attachments

The TxDOT/TCEQ MOU language that TxDOT published in the February 15, 2013, issue of the *Texas Register* for public comment; SB 548, Sections 1 and 5; SB 1420, Section 18; and HB 630, Sections 1 and 5.

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**cc: Chief Clerk, 2 copies
Executive Director's Office
Anne Idsal
Curtis Seaton
Tucker Royall
Office of General Counsel
Angela Burnett
Diane Mazuca
Bruce McAnally
David Timberger**

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes to amend §7.119.

Background and Summary of the Factual Basis for the Proposed Rule

The commission proposes this rule to adopt by reference updates to the commission's memorandum of understanding (MOU) with the Texas Department of Transportation (TxDOT) regarding TCEQ environmental reviews of TxDOT highway (transportation) projects. The updates are required to implement the following statutes and legislation.

Texas Transportation Code, §201.607(a) requires TxDOT and each state agency that is responsible for the protection of the natural environment, which includes the TCEQ, to revise their MOU that relates to the review of the potential environmental effect of a highway project. Texas Transportation Code, §201.607(b) requires TxDOT and the TCEQ to adopt, by rule, all revisions to the MOU. In addition, Texas Transportation Code, §201.607(a)(5), as amended in Section 1 of Senate Bill (SB) 548, Section 18 of SB 1420, and Section 1 of House Bill (HB) 630, 82nd Legislature, 2011, requires that the MOU specify that comments submitted to TxDOT later than the available 45-day review period will be considered by TxDOT to the extent possible. In addition, Section 5 of SB 548, Section 18 of SB 1420, and Section 5 of HB 630 require that the MOU be updated.

TxDOT and the TCEQ have negotiated updated MOU language. TxDOT has adopted the

updated MOU in 43 TAC Chapter 2, Subchapter I. The TCEQ proposed rulemaking would adopt 43 TAC §§2.301 - 2.308 by reference.

Section Discussion

§7.119, Memorandum of Understanding Between the Texas Department of Transportation and the Texas Natural Resource Conservation Commission

The commission proposes to amend §7.119 to update the TCEQ adoption, by reference, of its MOU with TxDOT. Until TxDOT recently amended its rules, the MOU was in 43 TAC §2.23. In a recent rulemaking, TxDOT moved the MOU to 43 TAC §§2.301 - 2.308, organized the MOU into sections, and adopted the updated MOU, including changing the title of the MOU to Memorandum of Understanding with The Texas Commission on Environmental Quality.

TxDOT has amended the MOU between TxDOT and the TCEQ to reflect the changes in law made under SB 548, Section 1, Section 18 of SB 1420, and Section 1 of HB 630 and additional changes agreed to by the TCEQ and TxDOT. The amended MOU was adopted by TxDOT on April 26, 2013, and was effective May 16, 2013. The proposed amendment to §7.119 would adopt, by reference, 43 TAC §§2.301 - 2.308.

The updated MOU specifies that comments submitted to TxDOT later than the available 45-day review period will be considered by TxDOT to the extent possible. The updated

MOU also makes changes to the triggers for review of a project and allows TxDOT to coordinate review of environmental reports with the TCEQ. The updated MOU also specifies that environmental documents will be sent to the TCEQ by e-mail for review. The updated MOU differentiates the process for review for different types of environmental documents. The updated MOU reorganizes and streamlines parts of the MOU, including updating the definitions section, updating provisions regarding the TxDOT and the TCEQ exchange of air quality information, and updating the TCEQ agency name from the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality. The updates to the MOU deleted some parts of the previous version of the MOU, including the dispute resolution section and the reference to an Interagency Cooperation Contract between TxDOT and the TCEQ regarding the Edwards Aquifer Protection Program. The reference to the contract was deleted because the application review addressed in the contract is not part of the environmental review process addressed in MOU.

The TCEQ is proposing to adopt the updated MOU by reference in order for TCEQ rules to reflect the changes in the MOU that were required by legislation and to improve the clarity of the MOU, including the environmental review process.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for

the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or TxDOT as a result of administration or enforcement of the proposed rule. The proposed rule will have no fiscal implications for other units of state or local government.

This rulemaking adopts, by reference, a revision to the current MOU between the agency and TxDOT concerning the review process that the TCEQ conducts on TxDOT highway projects. The revisions to the MOU are required to comply with provisions in SB 548, SB 1420, and HB 630, which require TxDOT to amend its rules related to environmental reviews of highway projects and update the relevant TCEQ/TxDOT MOU. With regards to the TCEQ, the updated MOU makes only slight changes to the triggers for review of a project, primarily for impaired water assessment units (impaired water bodies). Those changes are being made to comply with current federal requirements associated with the Federal Clean Water Act 303(d) list and TMDL-related requirements. The updated MOU also includes a reference to a new document, environmental report, that TxDOT may request that the TCEQ review. The revised MOU also streamlines the current process by shifting from a paper-based to an electronic-based process. Both TxDOT and the TCEQ may realize cost savings when utilizing the new process, but any cost savings are expected to be minimal.

The proposed rule will have no fiscal implications for other state agencies or units of

local government.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law and more readily available information on the process used by both TxDOT and the TCEQ concerning the required environmental reviews of highway projects.

The proposed rule adopts by reference the MOU between TxDOT and the TCEQ to conduct environmental reviews on highway projects. Individuals and large businesses are not expected to experience significant fiscal impacts as a result of the proposed rule. Individuals and large businesses may find information more readily available concerning the process used by the two agencies for these environmental reviews.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. The proposed rule is expected to have the same fiscal impacts on a small business as it does for a large business.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative Procedures Act. A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public

health and safety of the state or a sector of the state.

This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not the specific intent of the rule to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the proposed rulemaking is to implement legislative changes enacted by portions of SB 548, SB 1420, and HB 630. Those changes require that the MOU between TxDOT and the TCEQ specify that TCEQ review and comments be completed within 45 days of receiving the MOU. All three bills also specify that comments submitted to the TxDOT later than the period agreed to by the agencies will be considered by the TxDOT to the extent possible. The rulemaking also updates language in the MOU, including, but not limited to, definitions triggers for TCEQ review, and the review process.

The rulemaking does not meet the statutory definition of a "major environmental rule" because the proposed rule will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The cost of complying with the proposed rule is not expected to be significant with respect to the economy.

Furthermore, the proposed rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicability requirements listed in

Texas Government Code, §2001.0225(a). This rule does not exceed a standard set by federal law, rather it addresses the process for environmental review performed by the TCEQ for TxDOT, as mandated under state law. Second, the proposed rulemaking does not exceed an express requirement of state law. Third, the proposed rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Finally, the proposed rulemaking is not proposed solely under the general powers of the agency, but specifically under Texas Transportation Code, §201.607, which requires TxDOT and the TCEQ to update their MOU.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the rule and performed an assessment of whether the rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the rule is to update the reference to the updated MOU between the TxDOT and the TCEQ regarding TCEQ environmental reviews of TxDOT highway projects. The MOU required updating due to statutory changes and to improve the clarity of the MOU, including the environmental review process.

Promulgation and enforcement of the rule would be neither a statutory nor a constitutional taking of public or private real property because the rule does not affect real property. Because the rule does not affect real property, it does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. The rule merely updates the reference to the MOU, which is used to explain the process for TCEQ's environmental reviews of TxDOT highway projects and additional cooperation between TxDOT and the TCEQ. Therefore, the rule does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rule and found it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-019-007-LS. The comment period closes July 8, 2013. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Angela Burnett, (512) 239-6005.

§7.119

Statutory Authority

This amendment is proposed under Texas Water Code, (TWC), §5.102, which establishes the general authority of the Texas Commission on Environmental Quality (TCEQ, commission) necessary to carry out its jurisdiction; §5.103, which establishes that the commission, by rule, shall establish and approve all general policy of the commission; §5.104, which establishes the authority of the commission to enter memoranda of understanding with any other state agency and adopt by rule the memoranda of understanding; §5.105, which establishes the general authority of the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of this state; Texas Health and Safety Code, §382.035, Memorandum of Understanding, which requires the commission to adopt, by rule, any memorandum of understanding between the commission and another state agency in relation to the Texas Clean Air Act; and Texas Transportation Code, §201.607, Environmental, Historical, or Archeological Memorandum of Understanding, which requires TxDOT and the TCEQ to examine and revise their memorandum of understanding relating to the TCEQ review of highway projects for potential environmental effects.

The proposed amendment implements requirements in Sections 1 and 5 of Senate Bill (SB) 548, Section 18 of SB 1420, and Sections 1 and 5 of House Bill 630, 82nd Legislature, 2011. In addition, the proposed amendment implements requirements in

Texas Transportation Code, §201.607.

§7.119. Memorandum of Understanding Between the Texas Department of Transportation and the Texas Commission on Environmental Quality [Texas Natural Resource Conservation Commission].

The commission adopts by reference the rules of the Texas Department of Transportation in 43 TAC §§2.301 - 2.308 [§2.23] (relating to Memorandum of Understanding with the Texas Commission on Environmental Quality [Texas Natural Resource Conservation Commission]).

Jeff Graham
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 17, 2013
For further information, please call: (512) 463-8683

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

43 TAC §§2.301 - 2.308

STATUTORY AUTHORITY

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

CROSS REFERENCE TO STATUTE

Transportation Code, §201.607.

§2.301. *Purpose.*

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

§2.302. *Authority.*

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

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

§2.303. *Definitions.*

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Assessment unit--For a water body in the state, the smallest geographic area of use support analyzed for such body in Texas Commission on Environmental Quality's most recent integrated report prepared under the Clean Water Act §305(b) that includes a

Clean Water Act §303(d) list that has been approved by the U.S. Environmental Protection Agency. An assessment unit is based on the primary segment assessment unit identified in the integrated report.

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

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

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

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

(6) Federal Clean Air Act (FCAA)--The federal statute, including all amendments, that establishes National Ambient Air Quality Standards (NAAQS) and mandates procedures for reaching and maintaining these standards, codified at 42 United States Code §§7401, et seq.

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

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

(9) Maintain or maintenance--Activities which involve the upkeep or preservation of an existing facility to prevent that facility's degradation to an unsafe or irreparable state, or which involve the treatment of an existing facility or its environs to meet acceptable standards of operation or aesthetic quality. The activities generally do not require the acquisition of additional right of way or result in increased roadway capacity.

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

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

(12) State Implementation Plan (SIP)--The plan prepared by the TCEQ under 42 United States Code §7410 of the FCAA to attain, maintain, implement, or enforce NAAQS. An approved SIP is the implementation plan, or most recent revision of this plan, that has been approved by EPA under 42 United States Code §7410 of the FCAA.

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

(14) TxDOT--Texas Department of Transportation.

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

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

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

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

§2.304. Responsibilities.

(a) TxDOT is responsible for the development, construction, maintenance, and operation of the state highway system and other transportation systems as designated by the legislature.

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

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

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

§2.305. Coordination during Environmental Review Process.

(a) Applicability. This section specifies when TxDOT shall designate TCEQ as a participating agency in relation to the environmental review of a transportation project, and therefore coordinate with TCEQ. TxDOT may elect to coordinate with TCEQ concerning other transportation projects that this MOU does not require to be coordinated.

(1) Not applicable. This MOU does not apply to a project that TxDOT classifies as a categorical exclusion, blanket categorical

exclusion, or programmatic categorical exclusion, under §2.81 of this chapter (relating to Categorical Exclusions) or §2.82 of this chapter (relating to Blanket and Programmatic Categorical Exclusions), and TxDOT will not coordinate such projects with TCEQ.

(2) Applicable.

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

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

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

(ii) the project as it affects the subject matter of the applicable triggers in subsection (b) of this section does not subsequently change;

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

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

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

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

(b) Triggers for coordination.

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

(2) Water quality.

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

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

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

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

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

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

(ii) Required information. If the trigger in this subparagraph applies to a project, TxDOT in the environmental review document or environmental report shall provide the location of the project in the watershed of the impaired assessment unit, the assessment unit number, segment name, segment number, impairments, and the year of the Clean Water Act §303(d) list used, and shall provide:

(I) For impaired assessment units with EPA-approved TMDLs, the name and date of the EPA-approved TMDL and if applicable, the TCEQ-approved I-Plan, and a statement that the project and associated activities will be implemented, operated, and maintained in a manner that is consistent with the approved TMDL or approved I-Plan; or

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

(c) General.

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

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

(3) Computation of time. In computing time for the purposes of this MOU, the period begins on the day after the act or event in question and concludes at the end of the last day of that designated period, unless that day is a Saturday, Sunday, or state holiday, in which event the period concludes at the end of the next day that is not a Saturday, Sunday, or state holiday.

(d) Review and response.

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

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

(3) If TCEQ provides comments, TxDOT will respond in writing to TCEQ's comments. TxDOT will ensure that the final version of the environmental review document describes the results of any coordination with and comments made by TCEQ, and includes a summary of those contacts and comments. TxDOT will consider TCEQ comments submitted to TxDOT after the comment deadline to the extent possible, given the stage of the environmental review process at the time of the submission.

§2.306. Exchange of Air Quality Information.

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

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

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

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

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

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

§2.307. No Waiver of Rights.

As the state environmental regulatory agency, TCEQ reserves all rights it has to enforce relevant laws, and the parties intend that TCEQ's participation in this MOU does not have the effect of waiving those rights or the requirements of any laws that apply to the projects covered by this MOU. The parties agree that this MOU does not preclude either party from making any legal argument.

§2.308. Review of MOU.

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

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2013.

TRD-201300412

Jeff Graham

General Counsel

Texas Department of Transportation

Earliest possible date of adoption: March 17, 2013

For further information, please call: (512) 463-8683



AN ACT

1
2 relating to the environmental review process for transportation
3 projects.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Section 201.607, Transportation Code, is amended
6 by amending Subsection (a) and adding Subsection (c) to read as
7 follows:

8 (a) Not later than January 1, 1997, and every fifth year
9 after that date, the department and each state agency that is
10 responsible for the protection of the natural environment or for
11 the preservation of historical or archeological resources shall
12 examine and revise their memorandum of understanding that:

13 (1) describes the responsibilities of each agency
14 entering into the memorandum relating to the review of the
15 potential environmental, historical, or archeological effect of a
16 highway project;

17 (2) specifies the responsibilities of each agency
18 entering into the memorandum relating to the review of a highway
19 project;

20 (3) specifies the types of information the department
21 must provide to the reviewing agency and the period during which the
22 department must provide the information;

23 (4) specifies the period during which the reviewing
24 agency must review the highway project and provide comments to the

1 department, as negotiated by the department and the agency but
2 which may not exceed 45 days after the date the agency receives a
3 request for comments from the department; ~~and~~

4 (5) specifies that comments submitted to the
5 department later than the period specified under Subdivision (4)
6 will be considered by the department to the extent possible; and

7 (6) includes any other agreement necessary for the
8 effective coordination of the review of the environmental,
9 historical, or archeological effect of a highway project.

10 (c) The department by rule shall establish procedures
11 concerning coordination with agencies in carrying out
12 responsibilities under agreements under this section.

13 SECTION 2. (a) Chapter 201, Transportation Code, is
14 amended by adding Subchapter I-1 to read as follows:

15 SUBCHAPTER I-1. ENVIRONMENTAL REVIEW PROCESS

16 Sec. 201.751. DEFINITIONS. In this subchapter:

17 (1) "Day" means a calendar day.

18 (2) "Federal Highway Administration" means the United
19 States Department of Transportation Federal Highway
20 Administration.

21 (3) "Highway project" means a highway or related
22 improvement that is:

23 (A) part of the state highway system; or

24 (B) not part of the state highway system but
25 funded wholly or partly by federal money.

26 (4) "Local government sponsor" means a political
27 subdivision of the state that:

1 SECTION 5. Subsection (a), Section 201.607, Transportation
2 Code, as amended by this Act, and Subsection (b-1), Section
3 12.0011, Parks and Wildlife Code, as added by this Act, apply only
4 to a request for comments from the Texas Department of
5 Transportation received by a state agency on or after the effective
6 date of this Act. As necessary, the Texas Department of
7 Transportation and each affected state agency shall promptly revise
8 the memorandum of understanding required by Section 201.607,
9 Transportation Code, to implement the change made by this Act to
10 Subsection (a), Section 201.607, Transportation Code.

11 SECTION 6. This Act takes effect September 1, 2011.

President of the Senate

Speaker of the House

I certify that H.B. No. 630 was passed by the House on April 11, 2011, by the following vote: Yeas 147, Nays 0, 1 present, not voting; and that the House concurred in Senate amendments to H.B. No. 630 on May 25, 2011, by the following vote: Yeas 139, Nays 0, 3 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 630 was passed by the Senate, with amendments, on May 24, 2011, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

Governor

1 AN ACT
2 relating to the environmental review process for transportation
3 projects.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Section 201.607, Transportation Code, is amended
6 by amending Subsection (a) and adding Subsection (c) to read as
7 follows:

8 (a) Not later than January 1, 1997, and every fifth year
9 after that date, the department and each state agency that is
10 responsible for the protection of the natural environment or for
11 the preservation of historical or archeological resources shall
12 examine and revise their memorandum of understanding that:

13 (1) describes the responsibilities of each agency
14 entering into the memorandum relating to the review of the
15 potential environmental, historical, or archeological effect of a
16 highway project;

17 (2) specifies the responsibilities of each agency
18 entering into the memorandum relating to the review of a highway
19 project;

20 (3) specifies the types of information the department
21 must provide to the reviewing agency and the period during which the
22 department must provide the information;

23 (4) specifies the period during which the reviewing
24 agency must review the highway project and provide comments to the

1 department, as negotiated by the department and the agency but
2 which may not exceed 45 days after the date the agency receives a
3 request for comments from the department; ~~and~~

4 (5) specifies that comments submitted to the
5 department later than the period specified under Subdivision (4)
6 will be considered by the department to the extent possible; and

7 (6) includes any other agreement necessary for the
8 effective coordination of the review of the environmental,
9 historical, or archeological effect of a highway project.

10 (c) The department by rule shall establish procedures
11 concerning coordination with agencies in carrying out
12 responsibilities under agreements under this section.

13 SECTION 2. (a) Chapter 201, Transportation Code, is
14 amended by adding Subchapter I-1 to read as follows:

15 SUBCHAPTER I-1. ENVIRONMENTAL REVIEW PROCESS

16 Sec. 201.751. DEFINITIONS. In this subchapter:

17 (1) "Day" means a calendar day.

18 (2) "Federal Highway Administration" means the United
19 States Department of Transportation Federal Highway
20 Administration.

21 (3) "Highway project" means a highway or related
22 improvement that is:

23 (A) part of the state highway system; or

24 (B) not part of the state highway system but
25 funded wholly or partly by federal money.

26 (4) "Local government sponsor" means a political
27 subdivision of the state that:

1 (2) must require the agency receiving money to
2 complete the environmental review in less time than is customary
3 for the completion of environmental review by that agency.

4 (c) The department may enter into a separate agreement for a
5 transportation project that the department determines has regional
6 importance.

7 (d) An agreement entered into under this section does not
8 diminish or modify the rights of the public regarding review and
9 comment on transportation projects.

10 (e) An entity entering into an agreement under this section
11 shall make the agreement available on the entity's Internet
12 website.

13 Sec. 222.006. ENVIRONMENTAL REVIEW CERTIFICATION PROCESS.

14 The department by rule shall establish a process to certify
15 department district environmental specialists to work on all
16 documents related to state and federal environmental review
17 processes. The certification process must:

18 (1) be available to department employees; and

19 (2) require continuing education for recertification.

20 SECTION 4. Section 12.0011, Parks and Wildlife Code, is
21 amended by adding Subsection (b-1) to read as follows:

22 (b-1) Recommendations and information submitted by the
23 department under Subsection (b) in response to a request for
24 comments from the Texas Department of Transportation must be
25 submitted not later than the 45th day after the date the department
26 receives the request.

27 SECTION 5. Subsection (a), Section 201.607, Transportation

1 Code, as amended by this Act, and Subsection (b-1), Section
2 12.0011, Parks and Wildlife Code, as added by this Act, apply only
3 to a request for comments from the Texas Department of
4 Transportation received by a state agency on or after September 1,
5 2011. As necessary, the Texas Department of Transportation and
6 each affected state agency shall promptly revise the memorandum of
7 understanding required by Section 201.607, Transportation Code, to
8 implement the change made by this Act to Subsection (a), Section
9 201.607, Transportation Code.

10 SECTION 6. (a) Section 222.005, Transportation Code, as
11 added by this Act, takes effect immediately if this Act receives a
12 vote of two-thirds of all the members elected to each house, as
13 provided by Section 39, Article III, Texas Constitution. If this
14 Act does not receive the vote necessary for immediate effect,
15 Section 222.005 takes effect September 1, 2011.

16 (b) Except as provided by Subsection (a) of this section,
17 this Act takes effect September 1, 2011.

S.B. No. 548

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 548 passed the Senate on March 31, 2011, by the following vote: Yeas 31, Nays 0; and that the Senate concurred in House amendment on May 25, 2011, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 548 passed the House, with amendment, on May 23, 2011, by the following vote: Yeas 142, Nays 0, one present not voting.

Chief Clerk of the House

Approved:

Date

Governor

1 more frequently as necessary.

2 SECTION 17. Subchapter H, Chapter 201, Transportation Code,
3 is amended by adding Section 201.6015 to read as follows:

4 Sec. 201.6015. INTEGRATION OF PLANS AND POLICY EFFORTS. In
5 developing each of its transportation plans and policy efforts, the
6 department must clearly reference the statewide transportation
7 plan under Section 201.601 and specify how the plan or policy effort
8 supports or otherwise relates to the specific goals under that
9 section.

10 SECTION 18. (a) Section 201.607, Transportation Code, is
11 amended by amending Subsection (a) and adding Subsection (c) to
12 read as follows:

13 (a) Not later than January 1, 1997, and every fifth year
14 after that date, the department and each state agency that is
15 responsible for the protection of the natural environment or for
16 the preservation of historical or archeological resources shall
17 examine and revise their memorandum of understanding that:

18 (1) describes the responsibilities of each agency
19 entering into the memorandum relating to the review of the
20 potential environmental, historical, or archeological effect of a
21 highway project;

22 (2) specifies the responsibilities of each agency
23 entering into the memorandum relating to the review of a highway
24 project;

25 (3) specifies the types of information the department
26 must provide to the reviewing agency and the period during which the
27 department must provide the information;

1 (4) specifies the period during which the reviewing
2 agency must review the highway project and provide comments to the
3 department, as negotiated by the department and the agency but
4 which may not exceed 45 days after the date the agency receives a
5 request for comments from the department; ~~and~~

6 (5) specifies that comments submitted to the
7 department later than the period specified under Subdivision (4)
8 will be considered by the department to the extent possible; and

9 (6) includes any other agreement necessary for the
10 effective coordination of the review of the environmental,
11 historical, or archeological effect of a highway project.

12 (c) The department by rule shall establish procedures
13 concerning coordination with agencies in carrying out
14 responsibilities under agreements under this section.

15 (b) Subsection (a), Section 201.607, Transportation Code,
16 as amended by this section, applies only to a request for comments
17 from the Texas Department of Transportation received by a state
18 agency on or after the effective date of this Act. As necessary,
19 the Texas Department of Transportation and each affected state
20 agency shall promptly revise the memorandum of understanding
21 required by Section 201.607, Transportation Code, to implement the
22 change made by this section to Subsection (a), Section 201.607,
23 Transportation Code.

24 SECTION 19. Subchapter H, Chapter 201, Transportation Code,
25 is amended by adding Section 201.620 to read as follows:

26 Sec. 201.620. COORDINATION WITH METROPOLITAN PLANNING
27 ORGANIZATIONS TO DEVELOP LONG-TERM PLANNING ASSUMPTIONS. The

S.B. No. 1420

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 1420 passed the Senate on April 18, 2011, by the following vote: Yeas 31, Nays 0; May 6, 2011, Senate refused to concur in House amendments and requested appointment of Conference Committee; May 17, 2011, House granted request of the Senate; May 28, 2011, Senate adopted Conference Committee Report by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 1420 passed the House, with amendments, on May 2, 2011, by the following vote: Yeas 121, Nays 24, one present not voting; May 17, 2011, House granted request of the Senate for appointment of Conference Committee; May 29, 2011, House adopted Conference Committee Report by the following vote: Yeas 118, Nays 26, one present not voting.

Chief Clerk of the House

Approved:

Date

Governor