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TITLE 43. TRANSPORTATION

Part I. Texas Department of Transportation

Chapter 2. Environmental Policy

Subchapter B. Memoranda of Understanding with Natural Resource Agencies

43 TAC §2.22

The Texas Department of Transportation proposes the repeal of §2.22 and simultaneously proposes new §2.22, concerning Memorandum of Understanding with the Texas Parks and Wildlife Department.

EXPLANATION OF PROPOSED REPEAL AND NEW SECTION

Transportation Code §201.607, requires the Texas Department of Transportation (TxDOT) to adopt a Memorandum of Understanding (MOU) with each state agency that has responsibilities for the protection of the natural environment, the preservation of the natural environment, or for the preservation of historic or archeological resources. Section 201.607 also requires TxDOT to adopt the memoranda and all revisions by rule and to periodically evaluate and revise the memoranda. In order to meet the legislative intent and to ensure that natural environmental resources are given full consideration in accomplishing TxDOT's activities, TxDOT has evaluated the memorandum adopted in 1992 and finds it necessary to propose the repeal of §2.22 and to simultaneously propose the adoption of new §2.22 in a revised form. New §2.22 describes procedures providing for Texas Parks and Wildlife Department (TPWD) review of TxDOT projects that have the potential to affect natural resources within the jurisdiction of TPWD.

New §2.22 describes the purpose of the section, including implementing provisions of Texas Transportation Code, §201.607, and the rules for coordination of state-assisted transportation projects, Title 43, Texas Administrative Code, §§2.40-2.51, which underline the need for and importance of comprehensive environmental coordination for all transportation projects. Section 2.22 also provides definitions for words and terms used in the MOU.

Subsection (a) explains the purpose of the MOU, including a statement of TxDOT policy regarding the identification of environmental impacts of TxDOT projects; the basis for project decisions; public input; and the use of a systematic interdisciplinary approach in project development. The MOU provides a formal mechanism by which TPWD may review TxDOT projects. This review will promote the mutually beneficial sharing of information between TxDOT and TPWD, which will assist TxDOT in making environmentally sound decisions.

Subsection (b) provides definitions for this section.

Subsection (c) outlines the responsibilities of the department and TPWD. The department's responsibilities include plan-

ning and designing safe, efficient, effective and environmentally sound transportation facilities, while avoiding, minimizing, or compensating, where practicable, for anticipated environmental impacts; the timely and efficient construction of transportation facilities; and the ongoing maintenance of transportation facilities. As a state natural resource protection agency, TPWD's responsibilities include protecting the state's fish and wildlife resources; providing recommendations for protection of fish and wildlife resources to agencies that construct developmental projects; providing information on fish and wildlife resources to agencies or organizations that make decisions affecting those resources; and maintaining a listing of endangered and threatened species and providing these listings to agencies that make decisions affecting those species.

Subsection (d) contains a new provision for early project development that provides a process for early contact with TPWD to identify potential impacts to natural resources caused by proposed transportation projects; contains a revised set of criteria under which transportation projects will be coordinated with TPWD; provides for the review of biological and natural resource information contained in the environmental documentation by a qualified biologist prior to coordination with TPWD; contains a new provision for an interagency team (TPWD and TxDOT) that will develop procedures and methodologies for providing habitat characterizations and impact descriptions to be included in environmental documentation, and which will also develop criteria for the appropriateness, planning and implementation of mutually agreed upon mitigation needs; provides for an amended TPWD review time of environmental documentation by decreasing the time from 50 days to 45 days; provides TxDOT the authority to determine final disposition of transportation projects; provides for continuing coordination between TxDOT and TPWD through the construction period of a transportation project if needed; reiterates that additional coordination with TPWD will occur if unforeseen impacts to endangered or threatened species or their habitat occur; provides an opportunity for TPWD to review TxDOT statewide maintenance programs; and specifies that information provided by TPWD will include species of concern in a project area, suggested mitigation measures, and recommendations for the protection of natural resources under the jurisdiction of TPWD.

Subsection (e) contains a revised section concerning special provisions relating to information exchange between TPWD and TxDOT as it relates to the maintenance and enhancement of a computer-based information system detailing threatened and endangered species. This subsection also provides for the development of a protocol for the transfer, use, distribution and security of information relating to the location of endangered and threatened species and habitats of concern.

Subsection (f) provides for the review and revision of the MOU, at a minimum, every fifth year beginning January 1, 2002, and that TxDOT and TPWD will adopt by rule the MOU and all revisions to the MOU.

FISCAL NOTE

Frank J. Smith, Director, Finance Division, has determined that, for the first five-year period the new section is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new section. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Dianna F. Noble, P.E., Director, Environmental Affairs Division, has certified that there will not be significant impacts on local economies or overall employment as a result of enforcing or administering the repealed and new section.

PUBLIC BENEFIT

Ms. Noble has also determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of enforcing the section, consistent with TxDOT's mission, will be an increased effectiveness in how TxDOT's transportation projects provide for the safe, effective, efficient movement of people and goods in an environmentally sensitive manner, as a result of increased coordination and communication between the department and TPWD. Implementation of this MOU will also ensure that the state's natural resources are preserved to the fullest extent possible, enhanced where practicable, and will ensure comprehensive environmental coordination for all transportation projects in a manner consistent with federal and state laws, regulations and guidelines. There will be no effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, TxDOT and TPWD will conduct a joint public hearing to receive comments concerning the proposed new chapter. The public hearing will be held at 10:00 a.m. on Friday, January 22, 1999, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 9:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc., for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. A person who disrupts a public hearing must leave the hearing room if ordered to do so by the presiding officer. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Eloise Lundgren, Director, Public Information Office, 125 East 11th Street, Austin, Texas, 78701-2483, 512/463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal and new section may be submitted to Dianna F. Noble, P.E., Director of Environmental Affairs, 125 East 11th Street, Austin, Texas, 78701-2483. The deadline for receipt of comments will be 5:00 p.m. on February 1, 1999.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

This rulemaking action has been determined to be subject to the Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §33.201 et. seq.) and the rules of the Coastal Coordination Council (31 TAC Chapters 501-506). As required by 31 TAC §505.22(a), this rulemaking action must be consistent with all applicable CMP policies.

This action has been reviewed for consistency, and it has been determined that this rulemaking is consistent with the applicable CMP goals and policies. The primary CMP policy applicable to this rulemaking action is the policy that transportation projects be located at sites that, to the greatest extent practicable, avoid and otherwise minimize the potential for adverse effects to coastal natural resource areas from construction and maintenance of roads, bridges, causeways, and other development associated with the project. This rulemaking action provides a means for identifying the environmental impacts of department transportation projects on natural resources, including threatened and endangered species and habitat, for coordination of these projects with the relevant state resource agency, and for inclusion of these investigations and coordination in the environmental documentation for each project. All of these purposes will provide a mechanism for avoiding, minimizing, or compensating, where practicable, for the adverse effects of department projects on coastal natural resource areas that serve as habitat, on coastal preserves, and on threatened and endangered species. For these same reasons, the rulemaking action is consistent with the CMP goal of protecting, preserving, restoring, and enhancing the diversity, quality, quantity, functions, and values of coastal natural resource areas. Interested persons are requested to submit comments on the consistency of the proposed rules with the CMP.

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeal is 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 Texas Department of Transportation, and more specifically, Transportation Code, §201.607, which requires that the department adopt memoranda of understanding with each agency that has responsibility for the protection of the natural environment, the preservation of the natural environment, or for the preservation of historic or archeological resources, and that these memoranda and all revisions be adopted as rules.

No statutes, articles, or codes are affected by this proposed repeal.

§2.22. *Memorandum of Understanding with the Texas Department of Parks and Wildlife.*

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 December 21, 1998.

TRD-9818480
Richard Monroe



STATUTORY AUTHORITY

The new section is 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 Texas Department of Transportation, and more specifically, Transportation Code, §201.607, which requires that the department adopt memoranda of understanding with each agency that has responsibility for the protection of the natural environment, the preservation of the natural environment, or for the preservation of historic or archeological resources, and that these memoranda and all revisions be adopted as rules.

No statutes, articles, or codes are affected by this proposed new section.

§2.22. Memorandum of Understanding with the Texas Parks and Wildlife Department.

(a) Purpose.

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

(A) investigate fully the environmental impacts of TxDOT transportation projects, coordinate these projects with applicable state and federal agencies, and reflect these investigations and coordinations in the environmental documentation for each project;

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

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

(D) utilize a systematic interdisciplinary approach as an essential part of the development process for transportation projects.

(2) In order to pursue this policy, TxDOT and the Texas Parks and Wildlife Department (TPWD) have agreed to develop this Memorandum of Understanding (MOU) that will supersede the MOU which became effective on October 15, 1992.

(3) Transportation Code, §201.607, directs TxDOT to adopt memoranda of understanding with appropriate environmental resource agencies, including TPWD.

(4) The rules for coordination of state-assisted transportation projects found in §§2.40-2.51, of this title (relating to Environmental Review and Public Involvement for Transportation Projects), underline the need for and importance of comprehensive environmental coordination for all transportation projects.

(5) It is the purpose of this MOU to provide a formal mechanism by which the TPWD may review TxDOT transportation projects, including those that have the potential to affect natural resources within facilities owned or managed by TPWD. This review will promote the mutually beneficial sharing of information between TxDOT and TPWD, which will assist TxDOT in making environmentally sound decisions.

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

(1) Construction—Activities which involve the building of transportation facilities on a new location, or the expansion, rehabilitation, or reconstruction of an existing facility.

(2) Early project development—The phase of project development that includes, but is not limited to, project planning, field surveys, database searches, in-house coordination, initial resource agency coordination, and scoping, if necessary prior to selection of alternatives.

(3) Environmental document—A decision-making document which incorporates the results of environmental studies, coordination and consultation efforts, and engineering elements. Types of documents include categorical exclusions, environmental assessments, and environmental impact statements.

(4) Habitat—Areas of intrinsic biological resource value, the disturbance of which would not require: a U.S. Army Corps of Engineers permit; a U.S. Coast Guard permit; coordination under the Endangered Species Act, Fish and Wildlife Coordination Act, or the Migratory Bird Treaty Act.

(5) Maintenance—Activities which involve the repair 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 operations or aesthetic quality. Such activities generally do not require the acquisition of additional right of way.

(6) Maintenance programs—A collection of maintenance activities performed singularly or collectively on the state highway system. The following categories have been established as maintenance programs: bridge maintenance; customer service; debris and spills; drainage; ferry maintenance; maintenance enhancement; pavement maintenance; roadside appurtenances; traffic pavement markings; and vegetation management.

(7) Memorandum of Understanding (MOU)—A formal document which outlines the relationship between agencies or parties, including the responsibilities and jurisdiction of each party.

(8) Mitigation—A means of addressing adverse impacts to the natural environment including, in general order of preference, avoidance, minimization, and compensation, the commitment for which will be included in the environmental document wherever the need is mutually agreed upon by TxDOT and TPWD, including detailed plans where practicable.

(9) National Environmental Policy Act of 1969 (NEPA)—The basic national charter for protection of the environment which establishes policy, sets goals, and provides means for carrying out the policies. NEPA is binding upon federal agencies, including the Federal Highway Administration, and is usually followed as an environmental guideline by state and local agencies. In this document, NEPA includes the Act itself, its subsequent amendments, and implementing regulations.

(10) Project development—The planning process of a transportation project which includes early project development, environmental studies including the development of the appropriate environmental documentation, public involvement, engineering design, and right of way acquisition.

(11) Public involvement—An important, ongoing phase of the project planning process which encourages and solicits public

input and seeks to provide the public the opportunity to become fully informed regarding project development.

(12) Right of way—The land provided for a transportation facility, for example, the roadway itself (including shoulders), and areas between the roadway and adjacent properties (including drainage facilities).

(13) Transportation projects—All surface transportation projects designed, constructed, and maintained by TxDOT, excluding toll projects.

(c) Responsibilities.

(1) Texas Department of Transportation. The responsibilities of TxDOT pertain primarily to:

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

(B) timely and efficient construction of transportation facilities in a manner consistent with approved plans or agreements that TxDOT has executed regarding the protection of the natural environment to provide safe, efficient, and environmentally sound transportation facilities for the traveling public;

(C) the ongoing maintenance of these facilities to provide safe, efficient, and environmentally sound transportation facilities for the traveling public, and dedication to the protection of natural resources within the jurisdiction of TxDOT; and

(D) as directed by House Bill 1359, 74th Legislature, 1995 which amended House Bill 9, 72nd Legislature, 1991, the construction, repair, and maintenance of roads in and adjacent to state parks, state fish hatcheries, state wildlife management areas, and support facilities for parks, fish hatcheries, and wildlife management areas. (These items have been implemented under a separate memorandum of agreement between TxDOT and TPWD dated September 1, 1998.)

(2) Texas Parks and Wildlife Department.

(A) The responsibilities of TPWD relate primarily to its functions as a natural resource agency, including its resource protection functions, designated by Parks and Wildlife Code, Chapters 67, 68, 88, and §12.001 and §12.0011, and include:

(i) acting as the state agency with primary responsibility to protect the state's fish and wildlife resources;

(ii) providing recommendations that will promote fish and wildlife resources to local, state, and federal agencies that approve, permit, license, or construct developmental projects;

(iii) providing information on fish and wildlife resources to any local, state, or federal agencies or private organizations that make decisions affecting those resources; and

(iv) maintaining a listing of endangered and threatened species and providing these listings to local, state, and federal agencies that make decisions affecting those species.

(B) TPWD will identify and appoint appropriate staff to coordinate with TxDOT staff on transportation projects and to review project-specific information and documentation.

(d) Provisions. For the purpose of this MOU, the activities of TxDOT are divided into the following categories.

(1) Early project development. TxDOT may coordinate the potential impacts with TPWD Wildlife Habitat Assessment Program staff or the appropriate selected regional staff. TPWD will provide a list of regional director contacts for district use. TPWD staff may provide information concerning the occurrence of unique or important wildlife travel or activity areas, sensitive habitats, important vegetative communities or ecosystems, suitability of habitat for threatened or endangered species, or other natural resource information that could identify potential undesirable impacts and associated planning constraints before completion of a project design, and selection of a preferred project alternative. The level of information provided by TPWD will be consistent with protocol established to protect confidentiality of site-specific data collected on private lands pursuant to Parks and Wildlife Code, §12.0251 and §12.103. TxDOT will provide project specific information, as available, to TPWD regional contacts. Following appropriate early coordination that may involve TPWD regional staff, TxDOT may solicit written concurrence from TPWD of a proposed project's potential impacts and mitigation during early project development. However, initially, written concurrence must be coordinated through the Wildlife Habitat Assessment Program of TPWD. Eventually, projects successfully coordinated with TPWD regional staff during early project development may not require additional coordination with TPWD as required under paragraph (2) of this subsection, as determined by mutual agreement between TPWD and TxDOT.

(2) Project development. Upon completion of TxDOT's preliminary project review, a copy of the environmental documentation shall be furnished to TPWD for all projects meeting the criteria for coordination unless previously documented as shown in paragraph (1) of this subsection. Coordination will be conducted for projects that:

(A) involve more than 1.0 acre (0.4 hectares) of new right of way within floodplains or creek drainages in rural or undeveloped urban areas;

(B) require channel modifications to streams, rivers, or water bodies;

(C) involve a channel realignment involving the creation of new drainage ways or other excavation impacting more than 1.0 acre (0.4 hectares) of mature woody vegetation;

(D) require any excavation (scraping, clearing, or other surface disturbance) of the existing channel outside of TxDOT's existing right of way or of the channel inside TxDOT's existing right of way which is not routinely maintained and exhibits native vegetation;

(E) might affect mature woody vegetation, dense mature brush, including any significant remnant native vegetation (e.g., undisturbed native prairie or bottomland hardwood, etc.);

(F) are within the range and in suitable habitat of any state or federally listed threatened or endangered species;

(G) involve mitigation plans, or otherwise involve proposals to redress project impacts on fish, wildlife, or plant resources;

(H) have previous environmental documentation but where three years have passed without major action(s) (i.e., final design, acquisition of right of way, approval of plans, specifications, or estimates) and the project has not been reviewed by TPWD, but meets the above listed criteria; or

(I) have previous environmental documentation but where three years have passed with major action(s) and the project

may or may not have been reviewed by TPWD, but meets the above listed criteria.

(3) Elements of documentation. The level of environmental documentation prepared and provided to TPWD will be of sufficient detail to allow determination of the kinds of vegetation communities that will be affected and areal extent of vegetation impacted. The biological and natural resource information contained in the environmental documentation will be interpreted and verified by a qualified biologist prior to coordination with TPWD. When available, environmental documentation may be supported by aerial photography or on-ground photography taken by a hand-held camera.

(4) Interagency team. An interagency team consisting of staff from both TxDOT and TPWD will be established within 60 days from the signature date of this MOU.

(A) This team will:

(i) develop procedures and methodologies for providing habitat characterizations and impact descriptions, and develop supporting information for the environmental documentation; and

(ii) establish criteria for the appropriateness, planning, and implementation of compensatory mitigation when TxDOT has identified a need, or when TxDOT and TPWD mutually have identified the need, for compensation (Because mitigation planning or implementation may be completed after the contract for the project is awarded, no project shall be delayed pending mitigation.).

(B) In addition, TxDOT has the final decision on the implementation of a given mitigation plan. However, if TxDOT determines that mitigation is not feasible, an explanation of why it will not be undertaken shall be provided to TPWD.

(5) Review period. TPWD shall have a period of 45 days from the date of the transmittal letter to review project environmental documentation. Any comments submitted by TPWD shall be considered by TxDOT in making project decisions. If additional information is requested by TPWD it shall be provided by TxDOT, if such information is available or reasonably can be obtained. In such case, TPWD shall have an additional 30 days from the date of TxDOT's second transmittal letter that will accompany the additional information forwarded to TPWD to review documentation.

(6) Final disposition of projects. TxDOT reserves the right to determine the final disposition of proposed transportation projects, based on a considered analysis of TPWD comments and practical alternatives as they relate to TxDOT's responsibilities as described in this document.

(7) Ongoing coordination. When necessary, construction activities coordination between TxDOT and TPWD shall continue through the construction phase to provide for the protection of natural resources. Mitigation proposals agreed upon by TxDOT and TPWD relating to construction activities will be included in the project construction plans.

(8) Unforeseen protected species impacts. In the event that unforeseen impacts to endangered or threatened species or their habitat under TPWD jurisdiction are identified after construction has commenced, TxDOT will coordinate with TPWD regarding such resources.

(9) Maintenance program review. TPWD will be provided the opportunity to review TxDOT maintenance programs prior to implementation of each program or plan. TPWD will be provided an opportunity to comment and make suggested revisions to the programs, and TxDOT will give consideration to these suggested

revisions. If TxDOT does not fully implement the revisions suggested by TPWD, TxDOT will provide a written explanation to TPWD.

(10) TPWD document commentary. Comments received by TxDOT from TPWD in the coordination process shall, when applicable, include:

(A) guidance as to what species may be present within the project area that may require special considerations in terms of those species and their habitat;

(B) suggested mitigation measures; and

(C) recommendations for protection of natural resources under TPWD jurisdiction, as defined in Parks and Wildlife Code, §12.001 and §12.0011.

(e) Special provisions relating to information exchange.

(1) TxDOT and TPWD shall cooperate in the maintenance and enhancement of a computer-based information system detailing the distribution of species listed as threatened or endangered (including state and federal listings), or those which are of concern and are being considered for listing.

(2) TxDOT and TPWD shall cooperate to develop a protocol addressing the transfer of the computer-based information on locations of protected species and/or habitats of concern, the use and distribution of this information, and the security of the information. The level of information provided by TPWD will be consistent with protocol established to protect confidentiality of site specific data collected on private lands pursuant to Parks and Wildlife Code, §12.0251 and §12.103.

(f) Review of MOU. This MOU shall be reviewed and updated, at a minimum, every fifth year beginning January 1, 2002, and TxDOT and TPWD by rule shall adopt the MOU and all revisions 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 December 21, 1998.

TRD-9818479

Richard Monroe

General Counsel

Texas Department of Transportation

Earliest possible date of adoption: January 31, 1999

For further information, please call: (512) 463-8630



Chapter 9. Contract Management

Subchapter C. Contracting for Architectural, Engineering, and Surveying Services

43 TAC §§9.30, 9.31, 9.33-9.39, 9.41, 9.43

The Texas Department of Transportation proposes amendments to §§9.30, 9.31, 9.33-9.39, 9.41, and 9.43, concerning contracting for architectural, engineering, and surveying services.

EXPLANATION OF PROPOSED AMENDMENTS

The proposed amendments to these sections are necessary to shorten the selection process and clarify several work category requirements.