

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

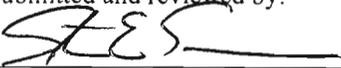
The Texas Transportation Commission (commission) finds it necessary to propose new §§9.130-9.139, new Subchapter H, relating to grant sanctions and amendments to §31.3 and §31.48 relating to public transportation grant sanctions, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed amendments and new sections, attached to this minute order as Exhibits A - E, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the General Counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

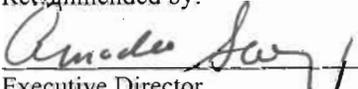
IT IS THEREFORE ORDERED by the commission that new §§9.130-9.139 and amendments to §31.3 and §31.48 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

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

Submitted and reviewed by:

  
Deputy Executive Director

Recommended by:

  
Executive Director

**112152 FEB 25 10**

Minute Number      Date Passed

Proposed Preamble

1  
2 The Texas Department of Transportation (department) proposes new  
3 §9.130, Purpose, §9.131, Definitions, §9.132, Applicability,  
4 §9.133, Procedure for Imposing Sanctions, §9.134, Improvement  
5 Action Plan, §9.135, Withholding Funds or Disallowing Costs,  
6 §9.136, Suspension or Termination for Cause, §9.137,  
7 Determination of Ineligibility, §9.138, Appeal of Sanction, and  
8 §9.139, Lessening Terms or Removal of Sanction, all concerning  
9 new Subchapter H, Grant Sanctions. These new sections are  
10 proposed in association with amendments to 43 TAC §§31.3 and  
11 31.48.

12

13 EXPLANATION OF PROPOSED NEW SUBCHAPTER

14 The proposed new sections will increase subgrantee compliance by  
15 allowing the department to sanction subgrantees for  
16 noncompliance with federal or state law, standard or special  
17 grant or subgrant conditions, or contractual agreements on which  
18 the grant or subgrant award is predicated. Additionally, the  
19 proposed new sections are in line with the department's emphasis  
20 on internal compliance and will ensure accountability for the  
21 expenditure of public funds.

22

23 The department is required by federal law to monitor subgrantee  
24 compliance with federal and state laws. For example, Title 23,  
25 United States Code, §106 states that the States are responsible

1 for determining that subrecipients of Federal funds under Title  
2 23 have adequate project delivery systems for approved projects  
3 and sufficient accounting controls to properly manage such  
4 Federal funds.

5  
6 The proposed sections establish standardized sanction procedures  
7 to be applied uniformly to ensure an efficient and fair  
8 sanctioning process. The proposed sections are largely based on  
9 and are consistent with the Uniform Grant Management Standards  
10 for state agencies as adopted in June 2004 by the Governor's  
11 Office of Budget and Planning. These Standards incorporate  
12 three principal circulars promulgated by the federal Office of  
13 Management and Budget: Circular No. A-87: Cost Principles for  
14 State, Local, and Indian Tribal Governments; Circular No. A-102:  
15 Grants and Cooperative Agreements With State and Local  
16 Governments; and Circular No. A-133: Audits of State, Local  
17 Governments, and Nonprofit Organizations. State agencies are  
18 required to adhere to and incorporate these standards into the  
19 grant agreements or the administrative rules and procedures when  
20 administering grants and other financial assistance with cities,  
21 counties, and other political subdivisions of the state. To  
22 further consistency and accountability, the department is  
23 choosing to apply these standards by rule to all its  
24 subgrantees.

25

1 The proposed rule sections will specifically apply to grants and  
2 subgrants awarded under 1) 43 TAC Chapter 11, Subchapter E,  
3 Statewide Transportation Enhancement Program; 2) 43 TAC Chapter  
4 25, Subchapter I, Safe Routes to School Program; 3) 43 TAC  
5 Chapter 25, Subchapter M, Traffic Safety Program; 4) 43 TAC  
6 Chapter 30, Subchapter C, Aviation Facilities Development and  
7 Financial Assistance Rules; 5) 43 TAC Chapter 31, Subchapter B,  
8 State Programs; or 6) 43 TAC Chapter 31, Subchapter C, Federal  
9 Programs.

10

11 The proposed sections were presented to the Public  
12 Transportation Advisory Committee on February 5, 2009, and  
13 recommended for adoption by the Committee on March 4, 2009.

14

15 The proposed sections will only apply to agreements signed or  
16 extended on or after the effective date of the rules.

17

18 New §9.130, Purpose, sets forth the purpose of the subchapter,  
19 which is to impose sanctions on a subgrantee if the department  
20 determines that the subgrantee has failed to comply with federal  
21 or state law, standard or special grant or subgrant conditions,  
22 or contractual agreements on which the grant award is  
23 predicated. The section provides that the sanctions under the  
24 subchapter supplement other applicable enforcement provisions.

25

1 New §9.131, Definitions, provides definitions for terms  
2 associated with the sanctioning of subgrantees.

3  
4 New §9.132, Applicability, identifies the grants and subgrants  
5 to which the subsection applies. They are grants and subgrants  
6 awarded under 1) 43 TAC Chapter 11, Subchapter E, Statewide  
7 Transportation Enhancement Program; 2) 43 TAC Chapter 25,  
8 Subchapter I, Safe Routes to School Program; 3) 43 TAC Chapter  
9 25, Subchapter M, Traffic Safety Program; 4) 43 TAC Chapter 30,  
10 Subchapter C, Aviation Facilities Development and Financial  
11 Assistance Rules; 5) 43 TAC Chapter 31, Subchapter B, State  
12 Programs; or 6) 43 TAC Chapter 31, Subchapter C, Federal  
13 Programs.

14  
15 New §9.133, Procedure for Imposing Sanctions, provides the  
16 procedure for imposing sanctions on subgrantees. The assistant  
17 executive director of the department will make the decision to  
18 impose a sanction based on the grounds for sanctions listed in  
19 §§9.135, 9.136, or 9.137. A subgrantee's adoption and  
20 enforcement of an internal compliance program that satisfies 43  
21 TAC §1.8 may be considered as a mitigating factor in the  
22 decision to impose a sanction. The consideration of the  
23 existence of a subgrantee's internal compliance program in the  
24 determination of a sanction will serve to encourage use of such  
25 a program to prevent and detect noncompliance with applicable

1 laws and procedures, and promote a culture that encourages  
2 ethical conduct and a commitment to compliance with the law.

3

4 Within five working days of the assistant executive director's  
5 decision to impose a sanction, the subgrantee will be notified  
6 by certified mail of the facts and circumstances underlying the  
7 sanction, the period of the sanction, the deadline for  
8 correction of deficient conditions, if applicable, and the  
9 opportunity to appeal the sanction in accordance with 43 TAC  
10 §9.138. The rights and remedies of the department relating to  
11 an entity are unaffected by the imposition of a sanction on that  
12 entity. The conduct of a person on behalf of an entity is  
13 attributable to the entity under the subchapter.

14

15 New §9.134, Improvement Action Plan, permits the department to  
16 require subgrantee compliance with an improvement action plan  
17 that identifies specific strategies and actions to resolve non-  
18 compliance issues. The department is not required to use an  
19 improvement action plan before imposing sanctions, but may  
20 impose sanctions for failure to comply with an improvement  
21 action plan. The purpose of this section is to give the  
22 department a means of achieving subgrantee compliance without  
23 imposing a sanction.

24

25 New §9.135, Withholding Funds or Disallowing Costs, sets forth

1 the grounds on which funds may be temporarily withheld or costs  
2 disallowed. Grounds provided by §9.135(a) for temporarily  
3 withholding funds from a specific project, part of a project, or  
4 subsequent awards to a project or disallowing all or part of the  
5 cost of a noncomplying activity or action are: failure to comply  
6 with law or the grant or subgrant agreement, failure to submit  
7 required reports, significant deficiencies in records, failure  
8 to conduct the grant or subgrant project according to the terms  
9 of the grant or subgrant, failure to comply with a condition of  
10 the grant or subgrant award document, failure to comply with an  
11 improvement action plan, or failure to begin project operations  
12 as required.

13  
14 Grounds provided by §9.135(b) for temporarily withholding funds  
15 from or disallowing costs for all projects operated by a  
16 subgrantee are: failure to respond to a deficiency described in  
17 §9.135(a), failure to return to the department within the  
18 required time any unused funds remaining on an expired grant or  
19 subgrant, or failure to return to the department any funds that  
20 have been improperly accounted for or expended for ineligible  
21 purposes.

22  
23 Under new §9.135(c), the assistant executive director may  
24 release funds or allow costs if the deficiency is corrected, or  
25 alternatively, may permanently disallow all or part of the cost

1 of a noncomplying activity or action or suspend or terminate the  
2 grant or subgrant under 43 TAC §9.136 if deficiencies are not  
3 corrected.

4

5 Section 9.135(d) allows the assistant executive director to  
6 immediately impose the sanctions described in the section.

7 Immediately imposed sanctions will not be stayed during an  
8 appeal. This authority allows the withholding of additional  
9 grant or subgrant awards during the pendency of an appeal of a  
10 more severe enforcement action.

11

12 New §9.136, Suspension or Termination for Cause, provides the  
13 grounds for which a grant or subgrant may be suspended or  
14 terminated. These grounds are the failure of a subgrantee to  
15 comply with applicable law or the requirements of the grant or  
16 subgrant agreement, award document, acceptance notice,  
17 adjustment notice, standard or special conditions, or  
18 contractual agreements on which the grant or subgrant is  
19 predicated.

20

21 Section 9.136(b) requires the suspension to be based on a  
22 finding that deficient conditions make it unlikely that the  
23 objectives of the grant or subgrant will be accomplished,  
24 deficient conditions cannot be corrected within an acceptable  
25 period, or the subgrantee has repeatedly failed to correct or

1 timely correct deficient conditions.

2

3 Under §9.136(c) a suspension imposed may be withdrawn if the  
4 assistant executive director receives satisfactory evidence that  
5 the deficient conditions have been corrected.

6

7 Section 9.136(d) requires a termination to be based on a finding  
8 that deficient conditions make it unlikely that the objectives  
9 of the grant or subgrant will be accomplished, deficient  
10 conditions cannot be corrected within an acceptable period, or  
11 the subgrantee has failed to correct or timely correct deficient  
12 conditions indicated in an applicable notice of suspension.

13

14 Section 9.136(e) provides that if a subgrant is terminated, any  
15 unexpended and unobligated funds under the grant immediately  
16 revert to the department.

17

18 Section 9.136(f) defines the limited conditions under which  
19 costs of a subgrantee resulting from obligations incurred during  
20 a suspension or termination are allowable.

21

22 New §9.137, Determination of Ineligibility, provides that the  
23 assistant executive director may decide that a subgrantee is  
24 temporarily ineligible for future subgrant awards if grounds  
25 exist for the suspension or termination of a subgrant awarded to

1 the subgrantee, regardless of whether the suspension or  
2 termination has been imposed. The assistant executive director  
3 may apply the temporary ineligibility immediately and if so,  
4 that sanction will not be stayed during an appeal. Similarly,  
5 the assistant executive director may decide that a subgrantee is  
6 permanently ineligible for future subgrant awards if grounds  
7 exist for the termination of a subgrant awarded to the  
8 subgrantee. This section authorizes the assistant executive  
9 director to take immediate action in cases in which the failure  
10 to comply with applicable provisions of law, a grant or  
11 subgrant, or an application for a grant or subgrant is  
12 egregious.

13  
14 New §9.138, Appeal of Sanction, allows a subgrantee to appeal a  
15 sanction to the executive director of the department. Within 10  
16 working days after the date that the department mailed the  
17 sanction notice, the subgrantee must submit a written notice of  
18 appeal and may submit accompanying written documentation  
19 supporting the appeal. The decision of the executive director  
20 is final and is not subject to judicial review.

21  
22 In recognition that an appeal may lead to a finding against  
23 imposition of a sanction or imposition of a reduced sanction,  
24 §9.138(d) provides that an appealed sanction is automatically  
25 stayed until the executive director's final decision on the

1 appeal. However, a temporary withholding of funds or  
2 disallowance of costs under §9.135(d) or a temporary  
3 determination of ineligibility for future grant or subgrant  
4 awards under §9.137(a), is not stayed under that provision.

5  
6 New §9.139, Lessening Terms or Removal of Sanction, provides  
7 that the executive director has the authority to lessen the  
8 terms of or remove a sanction at any time.

9  
10 FISCAL NOTE

11 James Bass, Chief Financial Officer, has determined that for  
12 each of the first five years the new sections as proposed are in  
13 effect, there will be no fiscal implications for state or local  
14 governments as a result of enforcing or administering the new  
15 sections.

16  
17 Steve Simmons, Deputy Executive Director, has certified that  
18 there will be no significant impact on local economies or  
19 overall employment as a result of enforcing or administering the  
20 new sections.

21  
22 PUBLIC BENEFIT AND COST

23 Mr. Simmons has also determined that for each year of the first  
24 five years the sections are in effect, the public benefit  
25 anticipated as a result of enforcing or administering the new

1 sections will be to further the department's mission to provide  
2 an efficient and fair process of administering grant sanctions.  
3 There are no anticipated economic costs for persons required to  
4 comply with the sections as proposed. There will be no adverse  
5 economic effect on small businesses.

6

7 SUBMITTAL OF COMMENTS

8 Written comments on the proposed new §§9.130-9.139 may be  
9 submitted to Steve Simmons, Deputy Executive Director, Texas  
10 Department of Transportation, 125 East 11th Street, Austin,  
11 Texas 78701-2483. The deadline for receipt of comments is 5:00  
12 p.m. on April 12, 2010.

13

14 STATUTORY AUTHORITY

15 The new sections are proposed under Transportation Code,  
16 §201.101, which provides the Texas Transportation Commission  
17 with the authority to establish rules for the conduct of the  
18 work of the department.

19

20 CROSS REFERENCE TO STATUTE

21 None.

1 SUBCHAPTER H. GRANT SANCTIONS

2 §9.130. Purpose. The department is required by law to monitor  
3 subgrantee compliance with federal and state laws. The  
4 department may impose sanctions on a subgrantee if the  
5 department determines that the subgrantee has failed to comply  
6 with federal or state law, standard or special grant or subgrant  
7 conditions, or contractual agreements on which the grant or  
8 subgrant award is predicated. The sanctions provided under this  
9 subchapter are in addition to any enforcement provisions of an  
10 award document, description of a specific grant or subgrant, or  
11 rules governing a specific grant program or any other remedy  
12 legally available. The proposed sections will only apply to  
13 agreements signed or extended on or after the effective date of  
14 the rules.

15  
16 §9.131. Definitions. The following words and terms, when used  
17 in this subchapter, shall have the following meanings, unless  
18 the context clearly indicates otherwise.

19 (1) Assistant executive director--The assistant executive  
20 director of the Texas Department of Transportation or the  
21 assistant executive director's designee not below the level of  
22 district engineer, division director, or office director.

23 (2) Executive director--The executive director of the

1 Texas Department of Transportation.

2 (3) Sanction--A penalty imposed under this subchapter.

3 The term includes the withholding of funds or disallowance of  
4 costs under a grant or subgrant, the suspension or termination  
5 of all or part of a subgrant or projects under a subgrant, and  
6 being determined temporarily or permanently ineligible for a  
7 subgrant award.

8 (4) Subgrant--An award of funds or property in lieu of  
9 funds made by the department to an eligible subgrantee or by the  
10 eligible subgrantee to another individual or entity. The term  
11 does not include:

12 (A) procurement purchases;

13 (B) technical assistance;

14 (C) assistance in the form of revenue sharing, loans,  
15 loan guarantees, interest subsidies, or insurance; or

16 (D) assistance for which no accounting by the  
17 subgrantee is required.

18 (5) Subgrantee--An individual or entity to which a  
19 subgrant is awarded, including an individual or entity that  
20 receives a subgrant from a subgrantee. Subgrantee is synonymous  
21 with subrecipient.

22

23 §9.132. Applicability. This subchapter applies only to a

1 subgrant awarded under:

2 (1) 43 TAC Chapter 11, Subchapter E, Statewide

3 Transportation Enhancement Program;

4 (2) 43 TAC Chapter 25, Subchapter I, Safe Routes to

5 School Program;

6 (3) 43 TAC Chapter 25, Subchapter M, Traffic Safety

7 Program;

8 (4) 43 TAC Chapter 30, Subchapter C, Aviation Facilities

9 Development and Financial Assistance Rules;

10 (5) 43 TAC Chapter 31, Subchapter B, State Programs; or

11 (6) 43 TAC Chapter 31, Subchapter C, Federal Programs.

12

13 §9.133. Procedure for Imposing Sanctions.

14 (a) The assistant executive director may impose sanctions

15 on a subgrantee under §9.135 of this subchapter (relating to

16 Withholding Funds or Disallowing Costs), §9.136 of this

17 subchapter (relating to Suspension or Termination for Cause), or

18 §9.137 of this subchapter (relating to Determination of

19 Ineligibility).

20 (b) In making the decision whether to impose a sanction,

21 the assistant executive director may consider, as a mitigating

22 factor, whether the subgrantee has adopted and enforces an

23 internal ethics and compliance program that satisfies the

1 requirements of 43 TAC §1.8 (relating to Internal Ethics and  
2 Compliance Program).

3 (c) If the assistant executive director decides to impose a  
4 sanction on a subgrantee, the department will notify the  
5 subgrantee of the sanction by certified mail within five working  
6 days after the date of the assistant executive director's  
7 decision. The notice will summarize the facts and circumstances  
8 underlying the sanction, identify the period of the sanction and  
9 the deadline for correction of deficient conditions, if  
10 applicable, and state that the subgrantee may appeal the  
11 sanction in accordance with §9.138 of this subchapter (relating  
12 to Appeal of Sanction).

13 (d) Except as provided by §9.138(d) of this subchapter, a  
14 sanction is effective on the date specified in the notice given  
15 under subsection (c) of this section.

16 (e) The imposition of a sanction does not affect a  
17 subgrantee's obligations under a grant or subgrant agreement  
18 with the department or limit the department's remedies under  
19 such an agreement. The department may take any remedy that is  
20 legally available.

21 (f) For purposes of this subchapter, an act or omission by  
22 an individual or other person on behalf of a subgrantee is  
23 considered to be an act or omission of the subgrantee.

1

2 §9.134. Improvement Action Plan. The department may require a  
3 subgrantee to comply with an improvement action plan that  
4 identifies specific strategies and actions to resolve a  
5 subgrantee's non-compliance with law or with grant or subgrant  
6 conditions. The plan will indicate the actions to be taken by  
7 the subgrantee within a specified period. Failure to comply  
8 with the plan may lead to the imposition of sanctions, but the  
9 implementation of an improvement action plan is not a  
10 prerequisite for the imposition of sanctions.

11

12 §9.135. Withholding Funds or Disallowing Costs.

13 (a) The assistant executive director may decide to  
14 temporarily withhold funds from a specific project, part of a  
15 project, or subsequent awards to a project or temporarily  
16 disallow all or part of the cost of a noncomplying activity or  
17 action for:

18 (1) failure to comply with any applicable federal or  
19 state law or the grant or subgrant agreement;

20 (2) failure to submit required reports, including  
21 expenditure, status, or progress reports, at the times and in  
22 the manner established for the reports;

23 (3) significant deficiencies or irregularities in records

1 maintained by the subgrantee for operation or administration of  
2 the grant or subgrant project;

3 (4) failure to conduct the grant or subgrant project  
4 according to the terms of the application for grant or subgrant,  
5 the grant or subgrant award document, the subgrantee acceptance  
6 notice, or a grant or subgrant adjustment notice;

7 (5) failure to comply with a standard or special  
8 condition of the grant or subgrant award document;

9 (6) failure to comply with an improvement action plan; or

10 (7) failure to begin project operations within the period  
11 specified in the grant or subgrant award document or if no  
12 period is specified in that document, within 45 days after the  
13 project start date.

14 (b) The assistant executive director may decide to  
15 temporarily withhold funds or disallow costs from all projects  
16 operated by a subgrantee for:

17 (1) failure to respond to a deficiency listed in  
18 subsection (a) of this section;

19 (2) failure to return to the department within the  
20 required time any unused grant or subgrant funds remaining on an  
21 expired grant or subgrant; or

22 (3) failure to return to the department any grant or  
23 subgrant funds that have been improperly accounted for or

1 expended for ineligible purposes under a grant or subgrant.

2 (c) Funds withheld under this section may be released or  
3 costs disallowed under this section may be allowed if the  
4 assistant executive director receives satisfactory evidence that  
5 the deficient conditions have been corrected. If the deficient  
6 conditions are not corrected within the period set by the  
7 department, the assistant executive director may decide to  
8 permanently disallow all or part of the cost of a noncomplying  
9 activity or action or may suspend or terminate the grant or  
10 subgrant under §9.136 of this subchapter (relating to Suspension  
11 or Termination for Cause).

12 (d) At the assistant executive director's discretion, the  
13 withholding of funds or disallowance of costs under this section  
14 may be imposed immediately and will not be stayed during the  
15 pendency of an appeal. Funds may be withheld or costs  
16 disallowed under this subsection while more severe enforcement  
17 action is pending.

18

19 §9.136. Suspension or Termination for Cause.

20 (a) The assistant executive director may suspend or  
21 terminate all or part of a subgrant or all projects operated by  
22 a subgrantee for failure to comply with:

23 (1) applicable federal or state law;

1           (2) terms of the application for a grant or subgrant, the  
2 grant or subgrant award document, the grantee or subgrantee  
3 acceptance notice, or a grant or subgrant adjustment notice; or

4           (3) standard or special grant or subgrant conditions or  
5 contractual agreements on which the subgrant awarded to the  
6 subgrantee is predicated.

7           (b) A suspension under this section must be based on a  
8 finding that:

9           (1) deficient conditions make it unlikely that the  
10 objectives of the grant or subgrant will be accomplished;

11           (2) the subgrantee has repeatedly failed to correct  
12 deficient conditions;

13           (3) deficient conditions cannot be corrected within a  
14 period determined to be acceptable by the department; or

15           (4) the subgrantee has failed to correct a deficiency  
16 listed in §9.135(a) or (b) of this subchapter (relating to  
17 Withholding Funds or Disallowing Costs) in the period indicated  
18 in the initial sanction notice sent under §9.133(c) of this  
19 subchapter (relating to Procedure for Imposing Sanctions).

20           (c) A suspension imposed under this section may be  
21 withdrawn if the assistant executive director receives  
22 satisfactory evidence that all deficient conditions have been  
23 corrected.

1 (d) A termination under this section must be based on a  
2 finding described by subsection (b)(1), (2), or (3) of this  
3 section or, if all or part of the subgrant or projects under the  
4 subgrant have been suspended, a finding that the subgrantee has  
5 failed to correct a deficiency in the period indicated in the  
6 notice of suspension sent under §9.133(c) of this subchapter.

7 (e) On termination of a subgrant, the unexpended and  
8 unobligated funds awarded to the subgrantee immediately revert  
9 to the department.

10 (f) The costs of a subgrantee resulting from obligations  
11 incurred by the subgrantee during a suspension or after  
12 termination of an award are not allowable unless the department  
13 expressly authorizes those costs in the notice of suspension or  
14 termination given under §9.133(c) of this subchapter or in  
15 writing after the date of that notice. Other subgrantee costs  
16 incurred during suspension or after termination that are  
17 necessary and not reasonably avoidable are allowable if:

18 (1) the costs result from obligations that were properly  
19 incurred by the subgrantee before the effective date of the  
20 suspension or termination, are not in anticipation of the  
21 suspension or termination, and, in the case of a termination,  
22 are noncancelable; and

23 (2) the costs normally would be allowable if the subgrant

1 award were not suspended or were to have expired at the end of  
2 the funding period in which the termination takes effect.

3

4 §9.137. Determination of Ineligibility.

5 (a) The assistant executive director may determine that a  
6 subgrantee is temporarily ineligible for future subgrant awards  
7 if a subgrant awarded to the subgrantee is suspended or  
8 terminated or could be suspended or terminated under §9.136 of  
9 this subchapter (relating to Suspension or Termination for  
10 Cause). At the assistant executive director's discretion, a  
11 determination of temporary ineligibility under this subsection  
12 may be imposed immediately and will not be stayed during the  
13 pendency of an appeal.

14 (b) The assistant executive director may determine that a  
15 subgrantee is permanently ineligible for future subgrant awards  
16 if a subgrant awarded to the subgrantee is terminated or could  
17 be terminated under §9.136 of this subchapter.

18

19 §9.138. Appeal of Sanction.

20 (a) A subgrantee may appeal a sanction by delivering to the  
21 executive director a written notice within 10 working days after  
22 the date that the department mailed the notice of the sanction  
23 under §9.133 of this subchapter (relating to Procedure for

1 Imposing Sanctions).

2 (b) The subgrantee may submit with the notice of appeal  
3 written documentation in support of the appeal.

4 (c) The executive director will consider any written  
5 documentation submitted by a subgrantee in support of an appeal  
6 and will make a decision on the subgrantee's appeal and issue a  
7 final order.

8 (d) A sanction, other than a withholding of funds or  
9 disallowance of costs under §9.135(d) of this subchapter  
10 (relating to Withholding Funds or Disallowing Costs) or a  
11 temporary determination of ineligibility for future subgrant  
12 awards under §9.137(a) of this subchapter (relating to  
13 Determination of Ineligibility), is automatically stayed from  
14 the date that the department receives the subgrantee's notice of  
15 appeal until the executive director's decision under subsection  
16 (c) of this section. On entry of a final order by the executive  
17 director imposing the sanction, the full term of the sanction  
18 will be imposed on the date of the final order unless the  
19 executive director expressly orders that a lesser sanction be  
20 imposed.

21 (e) The decision of the executive director under subsection  
22 (c) of this section is final and not subject to judicial review.

23

1 §9.139. Lessening Terms or Removal of Sanction. The executive  
2 director at any time may lessen the terms of or remove a  
3 sanction imposed under this subchapter.

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes  
3 amendments to §31.3 and §31.48, concerning program  
4 administration. These amendments are proposed in association  
5 with the proposal of new 43 TAC §§9.130 - 9.139.

6  
7 EXPLANATION OF PROPOSED AMENDMENTS

8 For reasons of consistency and uniform application of grant  
9 sanctions, the amendments to 43 TAC Chapter 31 remove sanction  
10 provisions and refer to new grant sanction provisions proposed  
11 in 43 TAC Chapter 9, new Subchapter H. New Subchapter H applies  
12 to all department grants and subgrants and will increase  
13 subgrantee compliance by allowing the department to sanction  
14 subgrantees for noncompliance with federal or state law,  
15 standard or special grant or subgrant conditions, or contractual  
16 agreements on which the grant or subgrant award is predicated.  
17 Additionally, new Subchapter H is in line with the department's  
18 emphasis on internal compliance and will ensure accountability  
19 for the expenditure of public funds.

20  
21 The proposed sections were presented to the Public  
22 Transportation Advisory Committee on February 5, 2009, and  
23 recommended for adoption by the Committee on March 4, 2009.

24  
25 The proposed sections will only apply to agreements signed or

1 extended on or after the effective date of the rules.

2

3 Amendments to §31.3, Definitions, make a nonsubstantive change  
4 to the definition of the term "executive director." The change  
5 makes the definition consistent with the definition of that term  
6 in other chapters of the title.

7

8 Amendments to §31.48, Project Oversight, delete language in  
9 subsection (d) describing actions to be imposed in cases of  
10 noncompliance with federal and state program requirements and  
11 instead, provide that failure to comply with federal or state  
12 law, standard or special grant or subgrant conditions, or  
13 contractual agreements on which the grant or subgrant award is  
14 predicated, is subject to actions under new 43 TAC Chapter 9,  
15 Subchapter H. Section 31.48(a)-(c) is unchanged.

16

17 FISCAL NOTE

18 James Bass, Chief Financial Officer, has determined that for  
19 each of the first five years the amendments as proposed are in  
20 effect, there will be no fiscal implications for state or local  
21 governments as a result of enforcing or administering the  
22 amendments.

23

24 Steve Simmons, Deputy Executive Director, has certified that  
25 there will be no significant impact on local economies or

1 overall employment as a result of enforcing or administering the  
2 amendments.

3

4 PUBLIC BENEFIT AND COST

5 Mr. Simmons has also determined that for each year of the first  
6 five years the sections are in effect, the public benefit  
7 anticipated as a result of enforcing or administering the  
8 amendments will be to further the department's mission to  
9 provide an efficient and fair process of administering grant  
10 sanctions. There are no anticipated economic costs for persons  
11 required to comply with the sections as proposed. There will be  
12 no adverse economic effect on small businesses.

13

14 SUBMITTAL OF COMMENTS

15 Written comments on the proposed amendments to §31.3 and §31.48  
16 may be submitted to Steve Simmons, Deputy Executive Director,  
17 Texas Department of Transportation, 125 East 11th Street,  
18 Austin, Texas 78701-2483. The deadline for receipt of comments  
19 is 5:00 p.m. on April 12, 2010.

20

21 STATUTORY AUTHORITY

22 The amendments are proposed under Transportation Code, §201.101,  
23 which provides the Texas Transportation Commission with the  
24 authority to establish rules for the conduct of the work of the  
25 department.

- 1
- 2 CROSS REFERENCE TO STATUTE
- 3 None.

1 SUBCHAPTER A. GENERAL

2 §31.3. Definitions. The following words and terms, when used  
3 in this chapter, shall have the following meanings, unless the  
4 context clearly indicates otherwise:

5 (1) - (17) (No change.)

6 (18) Executive director--The executive director of the  
7 department [~~The chief executive officer of the department~~].

8 (19) - (82) (No change.)

1 SUBCHAPTER D. PROGRAM ADMINISTRATION

2 §31.48. Project Oversight.

3 (a) - (c) (No change.)

4 (d) Noncompliance. A subrecipient's failure to comply with  
5 federal or state law, standard or special grant or subgrant  
6 conditions, or contractual agreements on which the grant or  
7 subgrant award is predicated, is subject to actions under 43 TAC  
8 Chapter 9, Subchapter H (relating to Grant Sanctions) [observe  
9 and comply with federal and state program requirements will  
10 cause the department to find that subrecipient in noncompliance  
11 and take actions as specified in this subsection].

12 [~~(1) Minor deficiencies. A minor deficiency is cited~~  
13 ~~when an error occurs that can generally be attributed to a~~  
14 ~~subrecipient's lack of knowledge about a particular requirement,~~  
15 ~~is easily corrected, and does not create legal, safety, or other~~  
16 ~~hazards to employees, passengers, or other members of the~~  
17 ~~public. An example of a minor deficiency is failure to submit a~~  
18 ~~required report. In these cases, the department will issue a~~  
19 ~~warning letter to the subrecipient describing the deficiency and~~  
20 ~~allowing the subrecipient 45 calendar days to comply with an~~  
21 ~~established plan of corrective action. If the subrecipient does~~  
22 ~~not comply in the prescribed manner, the department may exercise~~  
23 ~~its contract termination rights, direct the disposition of~~

1 ~~equipment purchased with grant funds, or both. Subrecipients~~  
2 ~~that have been cited for minor deficiencies that are not~~  
3 ~~corrected will be ineligible to receive financial assistance~~  
4 ~~from the department for a period of two years from the date of~~  
5 ~~the certified notification letter.]~~

6       ~~[(2) Major deficiencies. A major deficiency is cited~~  
7 ~~when the department finds that a subrecipient has pursued~~  
8 ~~actions that are illegal or that pose a safety hazard to~~  
9 ~~employees, passengers, or other members of the public. Examples~~  
10 ~~include failure to maintain required insurance coverage,~~  
11 ~~violation of charter regulations, and nonpayment of~~  
12 ~~subcontractors or vendors. In these cases, the department will~~  
13 ~~issue a certified letter advising the subrecipient to address~~  
14 ~~the deficiency immediately. The subrecipient's compliance will~~  
15 ~~be verified by department personnel. If the subrecipient does~~  
16 ~~not comply in the prescribed manner, the department will, within~~  
17 ~~ten working days, exercise its contract termination rights,~~  
18 ~~direct the disposition of equipment purchased with grant funds,~~  
19 ~~or both. Subrecipients that have been cited for major~~  
20 ~~deficiencies that were not corrected will be ineligible to~~  
21 ~~receive financial assistance from the department for a period of~~  
22 ~~two years from the date of the certified notification letter.]~~