

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

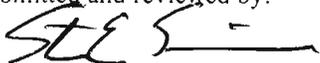
The Texas Transportation Commission (commission) finds it necessary to adopt new §§9.130-9.139, new Subchapter H, relating to grant sanctions and amendments to §31.3 and §31.48 relating to public transportation grant sanctions, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted 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 adopted and are authorized for filing with the Office of the Secretary of State.

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:



for Executive Director

112261 MAY 27 10

Minute
Number

Date
Passed

Adoption Preamble

1
2 The Texas Department of Transportation (department) adopts 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 adopted in association with amendments to 43 TAC §§31.3 and
11 31.48. New §§9.130-9.137 and §9.139 are adopted without changes
12 to the proposed text as published in the March 12, 2010 edition
13 of the *Texas Register* (35 TexReg 2135) and will not be
14 republished. New §9.138 is adopted with changes to the proposed
15 text as published in the March 12, 2010 edition of the *Texas*
16 *Register* (35 TexReg 2135).

17
18 EXPLANATION OF ADOPTED NEW SUBCHAPTER

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

1

2 The department is required by federal law to monitor subgrantee
3 compliance with federal and state laws. For example, Title 23,
4 United States Code, §106 states that the States are responsible
5 for determining that subrecipients of Federal funds under Title
6 23 have adequate project delivery systems for approved projects
7 and sufficient accounting controls to properly manage such
8 Federal funds.

9

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

1 standards by rule to all its subgrantees.

2

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

12

13 The sections will only apply to agreements signed or extended on
14 or after the effective date of the rules.

15

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

23

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

26

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

11
12 New §9.133, Procedure for Imposing Sanctions, provides the
13 procedure for imposing sanctions on subgrantees. The assistant
14 executive director of the department will make the decision to
15 impose a sanction based on the grounds for sanctions listed in
16 §§9.135, 9.136, or 9.137. A subgrantee's adoption and
17 enforcement of an internal compliance program that satisfies 43
18 TAC §1.8 may be considered as a mitigating factor in the
19 decision to impose a sanction. The consideration of the
20 existence of a subgrantee's internal compliance program in the
21 determination of a sanction will serve to encourage use of such
22 a program to prevent and detect noncompliance with applicable
23 laws and procedures, and promote a culture that encourages
24 ethical conduct and a commitment to compliance with the law.

25
26 Within five working days of the assistant executive director's

1 decision to impose a sanction, the subgrantee will be notified
2 by certified mail of the facts and circumstances underlying the
3 sanction, the period of the sanction, the deadline for
4 correction of deficient conditions, if applicable, and the
5 opportunity to appeal the sanction in accordance with 43 TAC
6 §9.138. The rights and remedies of the department relating to
7 an entity are unaffected by the imposition of a sanction on that
8 entity. The conduct of a person on behalf of an entity is
9 attributable to the entity under the subchapter.

10

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

20

21 New §9.135, Withholding Funds or Disallowing Costs, sets forth
22 the grounds on which funds may be temporarily withheld or costs
23 disallowed. Grounds provided by §9.135(a) for temporarily
24 withholding funds from a specific project, part of a project, or
25 subsequent awards to a project or disallowing all or part of the
26 cost of a noncomplying activity or action are: failure to comply

1 with law or the grant or subgrant agreement, failure to submit
2 required reports, significant deficiencies in records, failure
3 to conduct the grant or subgrant project according to the terms
4 of the grant or subgrant, failure to comply with a condition of
5 the grant or subgrant award document, failure to comply with an
6 improvement action plan, or failure to begin project operations
7 as required.

8
9 Grounds provided by §9.135(b) for temporarily withholding funds
10 from or disallowing costs for all projects operated by a
11 subgrantee are: failure to respond to a deficiency described in
12 §9.135(a), failure to return to the department within the
13 required time any unused funds remaining on an expired grant or
14 subgrant, or failure to return to the department any funds that
15 have been improperly accounted for or expended for ineligible
16 purposes.

17
18 Under new §9.135(c), the assistant executive director may
19 release funds or allow costs if the deficiency is corrected, or
20 alternatively, may permanently disallow all or part of the cost
21 of a noncomplying activity or action or suspend or terminate the
22 grant or subgrant under 43 TAC §9.136 if deficiencies are not
23 corrected.

24
25 Section 9.135(d) allows the assistant executive director to
26 immediately impose the sanctions described in the section.

1 Immediately imposed sanctions will not be stayed during an
2 appeal. This authority allows the withholding of additional
3 grant or subgrant awards during the pendency of an appeal of a
4 more severe enforcement action.

5
6 New §9.136, Suspension or Termination for Cause, provides the
7 grounds for which a grant or subgrant may be suspended or
8 terminated. These grounds are the failure of a subgrantee to
9 comply with applicable law or the requirements of the grant or
10 subgrant agreement, award document, acceptance notice,
11 adjustment notice, standard or special conditions, or
12 contractual agreements on which the grant or subgrant is
13 predicated.

14
15 Section 9.136(b) requires the suspension to be based on a
16 finding that deficient conditions make it unlikely that the
17 objectives of the grant or subgrant will be accomplished,
18 deficient conditions cannot be corrected within an acceptable
19 period, or the subgrantee has repeatedly failed to correct or
20 timely correct deficient conditions.

21
22 Under §9.136(c) a suspension imposed may be withdrawn if the
23 assistant executive director receives satisfactory evidence that
24 the deficient conditions have been corrected.

25
26 Section 9.136(d) requires a termination to be based on a finding

1 that deficient conditions make it unlikely that the objectives
2 of the grant or subgrant will be accomplished, deficient
3 conditions cannot be corrected within an acceptable period, or
4 the subgrantee has failed to correct or timely correct deficient
5 conditions indicated in an applicable notice of suspension.

6
7 Section 9.136(e) provides that if a subgrant is terminated, any
8 unexpended and unobligated funds under the grant immediately
9 revert to the department.

10
11 Section 9.136(f) defines the limited conditions under which
12 costs of a subgrantee resulting from obligations incurred during
13 a suspension or termination are allowable.

14
15 New §9.137, Determination of Ineligibility, provides that the
16 assistant executive director may decide that a subgrantee is
17 temporarily ineligible for future subgrant awards if grounds
18 exist for the suspension or termination of a subgrant awarded to
19 the subgrantee, regardless of whether the suspension or
20 termination has been imposed. The assistant executive director
21 may apply the temporary ineligibility immediately and if so,
22 that sanction will not be stayed during an appeal. Similarly,
23 the assistant executive director may decide that a subgrantee is
24 permanently ineligible for future subgrant awards if grounds
25 exist for the termination of a subgrant awarded to the
26 subgrantee. This section authorizes the assistant executive

1 director to take immediate action in cases in which the failure
2 to comply with applicable provisions of law, a grant or
3 subgrant, or an application for a grant or subgrant is
4 egregious.

5
6 New §9.138, Appeal of Sanction, allows a subgrantee to appeal a
7 sanction to the executive director of the department. Within 10
8 working days after the date that the department mailed the
9 sanction notice, the subgrantee must submit a written notice of
10 appeal and may submit accompanying written documentation
11 supporting the appeal. The decision of the executive director
12 is final and is not subject to judicial review.

13
14 In recognition that an appeal may lead to a finding against
15 imposition of a sanction or imposition of a reduced sanction,
16 §9.138(d) provides that an appealed sanction is automatically
17 stayed until the executive director's final decision on the
18 appeal. However, a temporary withholding of funds or
19 disallowance of costs under §9.135(d) or a temporary
20 determination of ineligibility for future grant or subgrant
21 awards under §9.137(a), is not stayed under that provision.

22
23 New §9.139, Lessening Terms or Removal of Sanction, provides
24 that the executive director has the authority to lessen the
25 terms of or remove a sanction at any time.

26

1 PUBLIC TRANSPORTATION ADVISORY COMMITTEE

2 The Public Transportation Advisory Committee (PTAC) recommended
3 the rules for final adoption at its May 14, 2010 meeting, with
4 two comments. First, PTAC questioned the meaning of written
5 notice in new §9.138. In response, new §9.138 is changed to
6 clarify proper delivery of written notice of appeal is by postal
7 or hand delivery to the department. Additionally, PTAC
8 questioned whether incurred costs during the time of a
9 suspension could be reimbursed; this issue is addressed in new
10 §9.136(f).

11

12 COMMENTS

13 Comments on the proposed new sections were received from the
14 Texas Transit Association addressing amendments to 43 TAC
15 §31.48.

16

17 Comment: The association suggested that an appeal process be
18 set up to allow a sanctioned subgrantee to appeal the sanction
19 through the Public Transportation Advisory Committee (PTAC).

20

21 Response: The rules have broader application than public
22 transportation grants. Additionally, PTAC was established by
23 Transportation Code, §455.004 for the purposes of advising and
24 making recommendations to the commission on public
25 transportation matters. It does not act as a decision-making
26 body. Rather than providing for an appeal process through PTAC,

1 language has been added to §9.138 to allow a sanctioned provider
2 to present written documentation and an oral presentation to the
3 executive director in support of an appeal. Additionally, if
4 the subgrantee is dissatisfied with the executive director's
5 final order imposing a temporary or permanent determination of
6 ineligibility, the subgrantee may file a petition with the
7 executive director requesting an administrative hearing under
8 the provisions of 43 TAC §§1.21 et seq.

9

10 STATUTORY AUTHORITY

11 The new sections are adopted under Transportation Code,
12 §201.101, which provides the Texas Transportation Commission
13 with the authority to establish rules for the conduct of the
14 work of the department.

15

16 CROSS REFERENCE TO STATUTE

17 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 of this title (relating to Internal
2 Ethics and 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). For the purposes of this section, written
2 notice may be filed with the department by:

3 (1) sending the document by United States mail or by
4 overnight delivery service to: Executive Director, Texas
5 Department of Transportation, 125 East 11th Street, Austin,
6 Texas 78701; or

7 (2) hand delivering the document to: Executive Director,
8 Texas Department of Transportation, 125 East 11th Street,
9 Austin, Texas.

10 (b) The subgrantee may submit with the notice of appeal
11 written documentation in support of the appeal. The subgrantee
12 may alternatively request an in person meeting with the
13 executive director for the purpose of presenting written
14 documentation and oral presentation in support of the appeal and
15 answering questions posed by the executive director. The
16 meeting will be scheduled at the executive director's earliest
17 convenience.

18 (c) The executive director will consider any written
19 documentation submitted by a subgrantee and any oral
20 presentation given by a subgrantee in support of an appeal and
21 will make a decision on the subgrantee's appeal and issue a
22 final order.

23 (d) A sanction, other than a withholding of funds or

1 disallowance of costs under §9.135(d) of this subchapter
2 (relating to Withholding Funds or Disallowing Costs) or a
3 temporary determination of ineligibility for future subgrant
4 awards under §9.137(a) of this subchapter (relating to
5 Determination of Ineligibility), is automatically stayed from
6 the date that the department receives the subgrantee's notice of
7 appeal until the executive director's decision under subsection
8 (c) of this section. On entry of a final order by the executive
9 director imposing the sanction, the full term of the sanction
10 will be imposed on the date of the final order unless the
11 executive director expressly orders that a lesser sanction be
12 imposed.

13 (e) If the subgrantee is unsatisfied with the executive
14 director's final order imposing a temporary or permanent
15 determination of ineligibility, the subgrantee may file a
16 petition with the executive director requesting an
17 administrative hearing under the provisions of §§1.21 et seq. of
18 this title (relating to Procedures in Contested Cases). To be
19 effective, the petition must be received by the executive
20 director within 10 working days after the date that the
21 executive director issues a final order.

22 (f) The decision of the executive director under subsection
23 (c) of this section is final and not subject to judicial review,

1 except as provided under subsection (e) of this section.

2

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

Adoption Preamble

The Texas Department of Transportation (department) adopts amendments to §31.3 and §31.48, concerning public transportation. These amendments are adopted in association with new 43 TAC §§9.130 - 9.139. The amendments to §31.3 and §31.48 are adopted without changes to the proposed text as published in the March 12, 2010 issue of the *Texas Register* (35 TexReg 2149) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

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

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

1
2 Amendments to §31.3, Definitions, make a nonsubstantive change
3 to the definition of the term "executive director." The change
4 makes the definition consistent with the definition of that term
5 in other chapters of the title.

6
7 Amendments to §31.48, Project Oversight, delete language in
8 subsection (d) describing actions to be imposed in cases of
9 noncompliance with federal and state program requirements and
10 instead, provide that failure to comply with federal or state
11 law, standard or special grant or subgrant conditions, or
12 contractual agreements on which the grant or subgrant award is
13 predicated, is subject to actions under new 43 TAC Chapter 9,
14 Subchapter H. Section 31.48(a)-(c) is unchanged.

15
16 The sections in Chapters 9 and 31 were presented to the Public
17 Transportation Advisory Committee (PTAC) on February 5, 2009,
18 and recommended for adoption by the Committee on March 4, 2009.
19 The Public Transportation Advisory Committee recommended the
20 rules for final adoption at its May 14, 2010 meeting, with two
21 comments. First, PTAC questioned the meaning of written notice
22 in new §9.138. In response, new §9.138 is changed to clarify
23 proper delivery of written notice of appeal is by postal or hand
24 delivery to the department. Additionally, PTAC questioned
25 whether incurred costs during the time of a suspension could be

1 reimbursed; this issue is addressed in new §9.136(f).

2

3 COMMENTS

4 Comments on the proposed new sections were received from the
5 Texas Transit Association addressing amendments to 43 TAC
6 §31.48.

7

8 Comment: The association suggested that an appeal process be
9 set up to allow a sanctioned subgrantee to appeal the sanction
10 through the Public Transportation Advisory Committee (PTAC).

11

12 Response: The rules have broader application than public
13 transportation grants. Additionally, PTAC was established by
14 Transportation Code, §455.004 for the purposes of advising and
15 making recommendations to the commission on public
16 transportation matters. It does not act as a decision-making
17 body. Rather than providing for an appeal process through PTAC,
18 language has been added to §9.138 to allow a sanctioned provider
19 to present written documentation and an oral presentation to the
20 executive director in support of an appeal. Additionally, if
21 the subgrantee is dissatisfied with the executive director's
22 final order, the subgrantee may file a petition requesting an
23 administrative hearing under the provisions of 43 TAC §§1.21 et
24 seq.

25

1 STATUTORY AUTHORITY

2 The amendments are adopted under Transportation Code, §201.101,
3 which provides the Texas Transportation Commission with the
4 authority to establish rules for the conduct of the work of the
5 department.

6

7 CROSS REFERENCE TO STATUTE

8 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 of this title (relating to Grant
9 Sanctions) [~~observe and comply with federal and state program~~
10 ~~requirements will cause the department to find that subrecipient~~
11 ~~in noncompliance and take actions as specified in this~~
12 ~~subsection].~~

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

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

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