

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

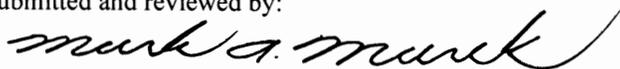
The Texas Transportation Commission (commission) finds it necessary to propose the repeal of §§2.1-2.20, §2.44 and §2.48, and the simultaneous replacement of the repealed sections with new Subchapter A, General Provisions, §§2.1-2.14; new Subchapter C, Environmental Review Process for Highway Projects, §§2.41-2.52; new Subchapter D, Requirements for Classes of Projects, §§2.81-2.86; new Subchapter E, Public Participation, §§2.101-2.110; and new Subchapter F, Requirements for Specific Types of Projects and Programs, §§2.131-2.134 all relating to the environmental review of transportation projects to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed repeals and new sections, attached to this minute order as Exhibits A - H, 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 the repeal of §§2.1-2.20, §2.44 and §2.48 and new §§2.1-2.14, §§2.41-2.52, §§2.81-2.86, §§2.101-2.110, and §§2.131-2.134 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

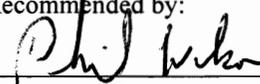
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



Interim Director, Environmental Affairs Division

Recommended by:



Executive Director

112906 NOV 17 11

Minute
Number

Date
Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes the
3 repeal of 43 TAC Chapter 2, Subchapter A, §§2.1-2.20,
4 Environmental Review and Public Involvement for Transportation
5 Projects, and Subchapter C, §§2.44 and 2.48, Additional
6 Requirements for Certain Types of Transportation Projects. The
7 department proposes the simultaneous replacement of the repealed
8 subchapters with new Subchapter A, General Provisions, §§2.1-
9 2.14; new Subchapter C, Environmental Review Process for Highway
10 Projects, §§2.41-2.52; new Subchapter D, Requirements for
11 Classes of Projects, §§2.81-2.86; new Subchapter E, Public
12 Participation, §§2.101-2.110; and new Subchapter F, Requirements
13 for Specific Types of Projects and Programs, §§2.131-2.134.

14

15 EXPLANATION OF PROPOSED REPEALS AND NEW SECTIONS

16 The 82nd Texas Legislature, in passing Senate Bill 548, Senate
17 Bill 1420 and House Bill 630, enacted Transportation Code,
18 Chapter 201, Subchapter I-1, setting forth new requirements for
19 the environmental review of highway projects, and requiring the
20 department to adopt rules implementing Subchapter I-1 not later
21 than March 1, 2012. These same three bills also enacted
22 Transportation Code, §222.006, Environmental Review
23 Certification Process, requiring the department to, by rule,
24 establish a process to certify department district environmental
25 specialists who work on documents related to the environmental

1 review process. This proposed rulemaking implements the recent
2 legislation, and makes other substantive and non-substantive
3 changes to the department's existing environmental review rules
4 intended to improve the efficiency and effectiveness of the
5 environmental review process for transportation projects.
6
7 Most of the proposed rules implementing Transportation Code,
8 Chapter 201, Subchapter I-1 are found in new Subchapter C,
9 §§2.41-2.52, Environmental Review Process for Highway Projects.
10 In accordance with the new statutory subchapter, the rules in
11 new Subchapter C set deadlines on the department's review of
12 certain types of environmental review documents. They also
13 prescribe a process by which the department district, region, or
14 division or local government preparing the environmental review
15 document for a project (the project sponsor), and the entity who
16 will ultimately approve or disapprove that document on the
17 department's behalf (the department delegate), must come to an
18 agreement on the expected content of the document, the roles and
19 responsibilities for related tasks, and the process for
20 informally resolving any disputes, by jointly executing a
21 "project scope," using a standardized checklist, early on in the
22 process. The department expects this and other aspects of the
23 proposed rules to result in more timely environmental reviews,
24 and more efficient and effective collaboration with local
25 government sponsors of highway projects.

1
2 This proposed rulemaking also makes a number of improvements to
3 the existing environmental review rules unrelated to the recent
4 legislation. For example, the proposed rules provide for
5 greater operational flexibility within the department as
6 compared to the existing rules. While many of the current rules
7 are written with the assumption that a department district is
8 preparing the environmental review document, the proposed rules
9 allow a department district, region, or division or a local
10 government with the department's permission to prepare the
11 environmental review document for a given project. Further,
12 while the current rules are generally written with the
13 assumption that the Environmental Affairs Division reviews and
14 approves the document, the proposed rules allow the executive
15 director to delegate this authority as appropriate. For
16 example, under the proposed rules, the executive director could
17 determine that, for a particular project classification, such as
18 blanket categorical exclusions, or even for a particular type of
19 project within that classification, such as resurfacing
20 projects, the district or region environmental personnel should
21 be the department entity that reviews and approves the relevant
22 documentation. The department believes this change will allow
23 it to better adjust its resources to maximize both the quality
24 of environmental review and the efficiency of the process.
25

1 The proposed rules also more clearly differentiate between
2 federal and state requirements. For example, the current rules
3 apply to projects receiving federal aid or requiring federal
4 approval, regardless of which federal agency is involved. This
5 broad approach may not be appropriate in all circumstances
6 because each of the different federal transportation agencies
7 (the Federal Highway Administration, the Federal Aviation
8 Administration, the Federal Railroad Administration, and the
9 Federal Transit Administration) may have different environmental
10 review requirements. The proposed rules clearly indicate that
11 they apply only to (1) state transportation projects, which are
12 those that are neither conducted nor supported by one of the
13 operating administrations of the United States Department of
14 Transportation and (2) transportation projects conducted or
15 supported by the Federal Highway Administration (FHWA) for which
16 FHWA is the lead federal agency and for which FHWA agrees the
17 department may act as the joint lead agency or project sponsor,
18 as the rules have been written with a goal of consistency with
19 FHWA's environmental review requirements. For transportation
20 projects conducted or supported by a federal transportation
21 agency other than FHWA, and for transportation projects
22 conducted or supported by multiple federal transportation
23 agencies for which FHWA is not the lead federal agency, the
24 department delegate and project sponsor will follow not the
25 department's rules, but the environmental review rules of the

1 lead federal agency. The applicability of the proposed rules is
2 addressed more thoroughly in this preamble in the discussion of
3 new §2.3, Applicability; Exceptions, and new §2.6, FHWA
4 Transportation Projects.

5
6 Further, some of the current rules may be confusing because they
7 appear to require compliance with specific federal laws, for
8 example, Section 106 of the National Historic Preservation Act,
9 regardless of whether the project has any federal aspects. The
10 proposed rules are written to avoid that confusion by reciting
11 only state requirements, and referring to federal law only for
12 projects conducted or supported by FHWA.

13
14 The proposed rules do not carry forward current §2.14,
15 Supplemental Environmental Assessment (Supplemental EA), which
16 had been added the last time the department revised Chapter 2 in
17 January of 2007. Since then, the department has not used the
18 procedures under this rule for any project, and the department
19 no longer believes the rule is necessary. Project changes or
20 other developments potentially affecting an environmental
21 assessment (EA) may be addressed using the reevaluation
22 procedures set forth in new §2.85, which has been written to
23 more closely track FHWA's regulations on reevaluations than does
24 the department's current rule.

25

1 Another significant change made in these proposed rules pertains
2 to the process for determining whether a project qualifies as a
3 blanket categorical exclusion (BCE). The current rules require
4 district environmental personnel to perform a site visit for
5 every project categorized as a BCE. However, BCEs are, by
6 definition, projects that, based on the department's experience,
7 have no significant environmental impacts. The proposed rules,
8 therefore, do not require a site visit for BCEs. The department
9 believes that this proposed change will better focus the
10 department's resources, and minimize the potential for delay on
11 projects with no potential for significant environmental
12 impacts. The proposed rules regarding CEs and BCEs also more
13 closely track the recently re-negotiated programmatic agreement
14 between the department and FHWA, which is generally more
15 straightforward than the current rules on those subjects. They
16 also more clearly identify the level of documentation required
17 for processing a transportation project as a CE or BCE. Under
18 the proposed rules, a BCE requires the preparation of a
19 descriptive letter or environmental issues checklist. A
20 descriptive letter or environmental issues checklist may also be
21 used to process a project as a CE; however, if the department
22 delegate determines to hold a public hearing or offer the
23 opportunity for one, a brief environmental review document is
24 required for a CE.

25

1 The proposed rules also encourage the streamlining of
2 environmental review documents. The department's ability to
3 review and approve EAs and environmental impact statements
4 (EISs) may be affected by the sheer length of these documents.
5 In these proposed rules, the department encourages project
6 sponsors to summarize and incorporate by reference environmental
7 reports on discrete issues, rather than repeating all of the
8 information from those reports in the body of the environmental
9 review document.

10

11 The proposed rules also include updates to reflect changes in
12 law made since the last time the Chapter 2 rules were adopted.
13 For example, references in the current Chapter 2 rules to the
14 Texas Review and Comment System (TRACS) are not carried forward
15 in this proposed rulemaking. On March 25, 2011, the Office of
16 the Governor announced the repeal of Title 1, Part 1, Chapter 5,
17 Subchapter B of the Texas Administrative Code, relating to TRACS
18 because it determined that TRACS is no longer necessary or
19 efficient in light of current advancements in technology. See
20 36 *Texas Register* 1970 (March 25, 2011).

21

22 In addition to these specific changes, this proposed rulemaking
23 makes various other substantive and non-substantive changes as
24 compared to the current Chapter 2 rules to improve the
25 organization, accuracy, clarity, and readability of the rules,

1 and to make the department's environmental review process more
2 efficient and effective.

3

4 SUBCHAPTER A, GENERAL PROVISIONS

5 New Subchapter A, General Provisions, contains rules and
6 definitions generally applicable to the department's
7 environmental review of transportation projects. It also
8 implements Transportation Code, §222.006, Environmental Review
9 Certification Process.

10

11 New §2.1 identifies the state statutes implemented by Chapter 2.

12

13 New §2.2 explains that the department will protect, preserve,
14 and, when practicable, enhance the environment, and further
15 elaborates on the department's environmental policy.

16

17 New §2.3 explains that Chapter 2 applies to transportation
18 projects conducted, funded, or approved by the department,
19 including those transportation projects conducted, funded, or
20 approved by FHWA. More specifically, using this section, a
21 project sponsor or department delegate may determine whether
22 Chapter 2 applies to a particular project by first determining
23 whether it is a "transportation project," as defined in new
24 §2.5, and if it is, then determining if it is a "state
25 transportation project" or "FHWA transportation project" both of

1 which are defined in new §2.5. If it is one of those types of
2 transportation projects, and it is conducted by the department,
3 is funded in whole or in part by the department, or requires
4 Texas Transportation Commission (commission) or department
5 approval, it will be subject to Chapter 2, unless one of the
6 following two exceptions set forth in the section applies.
7 First, certain transportation projects funded with toll revenue
8 and local toll projects developed under the statutory sections
9 cited at new §2.3(b)(1) are not subject to the proposed sections
10 because the environmental review of such a project is conducted
11 not by the department, but by the entity responsible for
12 implementing the project. The provisions on local toll projects
13 have been updated to reflect changes made by Senate Bill 19
14 (Acts of the 82nd Legislature, Regular Session). Second, the
15 department's actions undertaken in its capacity as a nonfederal
16 sponsor of the Gulf Intracoastal Waterway are subject only to
17 the requirements of new §2.132.

18
19 Because the proposed sections have been written with a goal of
20 consistency with FHWA's environmental review requirements, but
21 not with the environmental review requirements of other federal
22 transportation agencies, the proposed sections apply to a
23 transportation project conducted or supported by a federal
24 transportation agency only if that federal agency is FHWA. New
25 §2.3 clarifies that if a federal transportation agency other

1 than FHWA is conducting or supporting a transportation project,
2 or if there are multiple federal transportation agencies and
3 FHWA is not the lead federal agency, Chapter 2 does not apply,
4 and the project sponsor and department delegate must comply with
5 the environmental review rules of the lead federal agency.

6
7 A transportation project that is not conducted or supported by
8 any federal transportation agency, but requires a federal
9 agency's approval, such as a state highway project funded solely
10 with state funds that requires an individual permit issued by
11 the United States Army Corps of Engineers (Corps), is considered
12 to be a state transportation project under the rules (see the
13 definition of "state transportation project" in new §2.5). In
14 this situation, new Chapter 2 would govern the department's
15 environmental review process, but the project sponsor would be
16 required to comply with the Corps' rules regarding issuance of
17 individual permits under the Clean Water Act by new §2.4, Other
18 Applicable Laws. That section provides that a sponsor of a
19 transportation project must ensure compliance not only with
20 Chapter 2, but also with any other applicable local, state, or
21 federal laws that apply by their own force. It is not
22 practicable to list every local, state, and federal law
23 potentially applicable to a transportation project, and an
24 incomplete list of those laws is of limited usefulness and
25 potentially misleading. Therefore, the proposed rules generally

1 require compliance with all applicable laws.

2

3 New §2.5 sets forth definitions of key terms and phrases used in
4 Chapter 2. The definition of an acronym, such as "BCE,"
5 provides the associated term and directs the reader to the
6 section of Chapter 2, in which the acronym is explained in
7 detail.

8

9 This section defines three phrases that are fundamental to
10 understanding the applicability of the proposed rules. The
11 first is "transportation project," which is defined as "[a]
12 project to construct, maintain or improve a highway, rest area,
13 toll facility, aviation facility, public transportation
14 facility, rail facility, ferry, or ferry landing." The
15 definition goes on to include a federally funded "transportation
16 enhancement," a defined term under federal law. The department
17 believes that this plain English definition is an improvement
18 over the one found in the current version of the rules.

19

20 Two other key defined terms are "state transportation project"
21 and "FHWA transportation project." The definitions of these
22 terms are noteworthy because, as explained in new §2.3, Chapter
23 2 applies only to state transportation projects and FHWA
24 transportation projects conducted or funded in whole or in part
25 by the department or requiring commission or department

1 approval. An "FHWA transportation project" is defined as "[a]
2 transportation project conducted or supported by FHWA, such as
3 by providing federal funds or by granting access to the
4 interstate highway system, for which FHWA is the lead federal
5 agency, and for which FHWA agrees the department may act as the
6 joint lead agency or project sponsor." The phrase, "conducted
7 or supported," is adapted from federal law describing the
8 purpose of the National Environmental Protection Act (NEPA). A
9 "state transportation project" is defined as "[a] transportation
10 project that is not conducted or supported, such as by providing
11 federal funds or by granting access to the interstate highway
12 system, by one of the operating administrations of the United
13 States Department of Transportation."

14
15 New §2.6 explains that, for a project conducted or supported by
16 FHWA, the department delegate and project sponsor will comply
17 with FHWA's rules concerning the environmental review of the
18 project, as appropriate, in addition to the requirements of this
19 chapter. To the extent there is a conflict between FHWA's rules
20 and the requirements of this chapter, FHWA's rules will control.
21 The section also clarifies that, for a project conducted or
22 supported by FHWA, the entity with the authority to issue final
23 approval of an environmental review document, or a descriptive
24 letter or environmental issues checklist prepared for a
25 categorical exclusion, blanket categorical exclusion, or

1 programmatic categorical exclusion (CE/BCE/PCE documentation),
2 is FHWA. The section further acknowledges that a qualifying
3 project may be considered to be approved by FHWA under a
4 programmatic agreement if it meets specified criteria.

5
6 New §2.7 introduces use of the term "project sponsor" to denote
7 the entity that accepts responsibility for preparing the
8 environmental review document or CE/BCE/PCE documentation and
9 for performing related tasks for a given project. Use of this
10 new term fulfills two purposes. The first is related to
11 implementation of new Transportation Code, Chapter 201,
12 Subchapter I-1, enacted by the 82nd Texas Legislature.
13 Subchapter I-1 requires the adoption of rules governing the
14 environmental review of highway projects that apply regardless
15 of whether the entity preparing the environmental review
16 document or CE/BCE/PCE documentation is a department entity or a
17 local government. Use of "project sponsor" allows the
18 department to write implementing rules that interchangeably
19 apply to a department entity or local government, depending on
20 which is preparing the environmental review document or
21 CE/BCE/PCE documentation for a project.

22
23 Secondly, use of "project sponsor" allows the department's rules
24 to generically refer to the entity preparing an environmental
25 review document or CE/BCE/PCE documentation, without

1 specifically identifying it to the exclusion of other types of
2 entities that might fulfill that role. For example, many of the
3 current rules assume that the environmental review document or
4 CE/BCE/PCE documentation is prepared by a department district,
5 but it is possible for a department region or division to assume
6 that responsibility for certain types of projects. For these
7 reasons, the rules are being revised throughout to generically
8 refer to the entity preparing the environmental review document
9 or CE/BCE/PCE documentation as the project sponsor.

10

11 As explained in new §2.7, the project sponsor for a given
12 project may be a department district, region, or division, or,
13 for a highway project, a local government. Under new
14 Transportation Code, §201.751(4), the types of local governments
15 that are eligible to be project sponsors are municipalities,
16 counties, groups of adjoining counties, counties acting under
17 Transportation Code, Chapter 284, regional tollway authorities
18 operating under Transportation Code, Chapter 366, regional
19 mobility authorities operating under Transportation Code,
20 Chapter 370, local government corporations, and transportation
21 corporations created under Transportation Code, Chapter 431. A
22 local government may serve as a project sponsor only if approved
23 by the department. Approval of a local government as a project
24 sponsor will be made in consideration of the criteria set forth
25 in new §2.47(d).

1
2 A private entity may develop environmental review documents or
3 CE/BCE/PCE documentation for a department district, region, or
4 division's use, but may not be a project sponsor. If a private
5 entity develops an environmental review document or CE/BCE/PCE
6 documentation for a department district, region, or division's
7 use, the district, region, or division using the environmental
8 review document or CE/BCE/PCE documentation will be the project
9 sponsor.

10
11 New §2.8 introduces use of the term "department delegate" to
12 denote the entity within the department to which the executive
13 director has delegated authority to make decisions on the
14 department's behalf regarding the approval of an environmental
15 review document or CE/BCE/PCE documentation. As explained
16 earlier, the department proposes to transition from the
17 prescriptive approach taken in the current rules, to allowing
18 the executive director to determine which entity within the
19 department has authority to act on the department's behalf with
20 respect to different classes of transportation projects. For
21 example, the executive director might determine that, while it
22 is appropriate for department districts to have approval
23 authority over certain types of projects, it is appropriate for
24 some other operational unit to have approval authority over
25 other types. This approach will also allow the executive

1 director to respond to project-specific circumstances that may
2 call for a re-assignment of this responsibility. Under the
3 section, the executive director could make these types of
4 adjustments pertaining to the department's internal conduct of
5 its affairs without having to undertake formal notice-and-
6 comment rulemaking.

7
8 The section provides for the possibility that, for certain
9 classes of transportation projects, the executive director might
10 designate a district, region, or division as both the project
11 sponsor and the department delegate, in which event that
12 district, region, or division would be responsible for both (1)
13 preparing the environmental review document or CE/BCE/PCE
14 documentation, and (2) conducting the required reviews of and
15 making a final decision regarding approval or disapproval of the
16 environmental review document or CE/BCE/PCE documentation on the
17 department's behalf.

18
19 New §2.9 explains that requests for deviations from the
20 requirements of Chapter 2 for emergency circumstances, such as
21 floods, will be handled by the department delegate. The section
22 also identifies appropriate limits on such a deviation.

23
24 New §2.10, explains how deadlines under Chapter 2 are
25 calculated.

1
2 New §2.11 implements Transportation Code, §222.006, by requiring
3 district employees who prepare or review environmental studies
4 or reports, environmental review documents, or CE/BCE/PCE
5 documentation to complete certification training conducted by a
6 certification program manager appointed by the department's
7 executive director. To allow time for the certification program
8 manager to develop the certification training, and for district
9 employees to complete the training with minimal interruption to
10 department business, the section allows up to one year from the
11 rules' estimated effective date, March 15, 2012, or the date of
12 hire, whichever is later, to complete the training. In
13 accordance with new Transportation Code, §222.006, the section
14 also prescribes a recertification requirement.

15
16 New §2.12 sets forth the department's requirements for
17 coordinating transportation projects with "participating
18 agencies," which are defined as agencies, departments, or other
19 units of federal, state, local, or Indian tribal government that
20 may have an interest in or jurisdiction over a transportation
21 project. The section explains how participating agencies for a
22 particular transportation project will be identified, and
23 specifies that, at a minimum, they must include the Texas
24 Commission on Environmental Quality, the Texas Historical
25 Commission, and the Texas Parks and Wildlife Department, to the

1 extent required by the memoranda of understanding between the
2 department and each of those agencies set forth in Subchapter B
3 of Chapter 2.

4
5 While the section specifies the project sponsor as the default
6 entity responsible for coordinating a transportation project
7 with participating agencies, it recognizes that for a highway
8 project, as explained in new §2.44(d), the project sponsor and
9 department delegate may agree that the department delegate will
10 conduct the coordination, rather than the project sponsor. The
11 section also recognizes that some participating agencies may
12 insist on coordinating transportation projects with an
13 organizational unit of the department that is not the project
14 sponsor, in which event that organizational unit, rather than
15 the project sponsor, will coordinate the project with the
16 participating agency. Regarding the sequencing of coordination
17 in relation to other environmental review tasks, for highway
18 projects, the project sponsor and department delegate will agree
19 in the project scope on whether any coordination should be done
20 before submission of an environmental review document or
21 CE/BCE/PCE documentation to the department delegate, and if so,
22 with which participating agencies. The results of that
23 coordination should be discussed in the environmental review
24 document or CE/BCE/PCE documentation.

25

1 New §2.13 requires the project sponsor of a transportation
2 project to seek to avoid and minimize environmental impacts. It
3 further authorizes the project sponsor to, when impacts cannot
4 be avoided and efforts to minimize them have been exhausted,
5 propose compensatory mitigation in consultation with the
6 department delegate and any appropriate agency or agencies. The
7 section recites the statutory provisions authorizing the
8 department to undertake compensatory mitigation, and explains
9 that local government sponsors may propose as compensatory
10 mitigation any of the actions that the department is authorized
11 by statute to undertake, and any others authorized by law. The
12 section also clarifies that nothing in Chapter 2 prevents a
13 local government sponsor from seeking to use a department-funded
14 mitigation bank for compensatory mitigation on a project
15 concerning a segment of the state highway system. Subsection
16 (c)(2) is added to implement Government Code, Chapter 403,
17 Subchapter Q, added by Senate Bill 1, 82nd legislature, First
18 Called Session, authorizing the comptroller to develop a habitat
19 conservation plan or candidate conservation plan, and to
20 designate certain state agencies including the department to
21 develop a plan.

22

23 New §2.14 specifies that the project sponsor will maintain
24 documentation showing work completed under Chapter 2 in a
25 project file. If the project sponsor is a local government, on

1 approval of the environmental review document or CE/BCE/PCE
2 documentation, the local government will retain the project file
3 or forward it to the department district in which the project is
4 located, as directed by the district.

5

6 SUBCHAPTER C, ENVIRONMENTAL REVIEW PROCESS FOR HIGHWAY PROJECTS

7 New Subchapter C, Environmental Review Process for Highway

8 Projects, implements Transportation Code, Chapter 201,

9 Subchapter I-1, setting forth new requirements for the

10 environmental review of highway projects.

11

12 New §2.41 explains that new Subchapter C will apply in its

13 entirety to all highway projects for which an environmental

14 review document or CE/BCE/PCE documentation for the project has

15 not been provided, in whole or in part, to the department

16 delegate as of March 15, 2012, the proposed rules' anticipated

17 effective date. If a project sponsor has submitted to the

18 department delegate an environmental review document or

19 CE/BCE/PCE documentation, in whole or in part, as of March 15,

20 2012, then Subchapter C applies to the highway project only if

21 the project sponsor notifies the department delegate in writing

22 that it elects to have the project processed under Subchapter C,

23 in which case Subchapter C will apply in its entirety to that

24 project.

25

1 The department believes that the approach set forth in new §2.41
2 will allow for the most orderly transition to processing
3 environmental review documents for highway projects under the
4 new rules. A given highway project will either be subject to
5 all of the procedural requirements and deadlines under
6 Subchapter C, or none of them, depending on whether the
7 department delegate's review of an environmental review document
8 or CE/BCE/PCE documentation has begun on March 15, 2012, and if
9 it has, whether the project sponsor elects to have the project
10 processed under Subchapter C. This will avoid partial
11 application of Subchapter C to a given highway project, such as
12 imposition of the technical review deadlines in new §2.49
13 without the benefit of the other procedural requirements in new
14 Subchapter C, such as a project scope under new §2.44, and
15 administrative completeness review under new §2.48.

16
17 New §2.42 implements Transportation Code, §201.753. The section
18 provides that, with one exception, an environmental review
19 document or CE/BCE/PCE documentation may be prepared for a
20 highway project only if it is identified in the financially
21 constrained portion of the approved state transportation
22 improvement program (STIP) or the financially constrained
23 portion of the approved unified transportation program (UTP), or
24 identified by the commission as being eligible for participation
25 under the subchapter. The sole exception to this limitation is

1 that, as provided in Transportation Code, §201.753(b), a local
2 government may prepare an environmental review document or
3 CE/BCE/PCE documentation for a project that is not identified in
4 the STIP, UTP, or commission order if the local government
5 timely pays a fee to cover the department's costs of reviewing
6 the environmental review document or CE/BCE/PCE documentation.
7 Procedures governing the payment of such a fee by a local
8 government are set forth in new §2.46.

9
10 New §2.43 lists the tasks for which a project sponsor of a
11 highway project will generally be responsible, unless the
12 project sponsor and department delegate agree to alternative
13 roles or responsibilities in accordance with new §2.44(d). This
14 list is based on Transportation Code, §201.756, Local Government
15 Sponsor Responsibilities, but is written to apply regardless of
16 whether the project sponsor is a department entity or a local
17 government. It is also more detailed and comprehensive than the
18 list of local government sponsor responsibilities set forth in
19 Transportation Code, §201.756. Among the project sponsor's
20 responsibilities is the preparation of any environmental report
21 describing or analyzing the results of an environmental study or
22 survey. While other proposed sections, such as new §2.84(b)(4),
23 encourage the preparation of environmental reports and their
24 attachment to environmental review documents as an alternative
25 to lengthy technical explanations of any environmental studies

1 in the body of an environmental review document, and while new
2 §2.43(2) assigns responsibility for preparing any environmental
3 reports to the project sponsor, neither new §2.43 nor any other
4 proposed section requires the preparation of separate
5 environmental reports.

6
7 New §2.44 implements Transportation Code, §201.754. It requires
8 a project sponsor to, in collaboration with the department
9 delegate, prepare a detailed project scope before the project
10 sponsor prepares and submits an environmental review document or
11 CE/BCE/PCE documentation to the department delegate for its
12 review. The section specifies that the project scope must be
13 prepared using a standardized checklist approved by the
14 department, and sets forth its required content. Among the
15 required contents of a project scope is a list of issues to be
16 addressed in the environmental review document or CE/BCE/PCE
17 documentation, and a statement of the anticipated classification
18 of the project under Subchapter D. The section also provides
19 that FHWA may be a party to a project scope if its approval of
20 the highway project will be required.

21
22 The development of an agreed-upon project scope is required by
23 statute to be a collaborative process conducted by the project
24 sponsor and department delegate. For the purposes of this
25 section, a project sponsor includes a local government that

1 proposes to serve as a project sponsor and intends to seek the
2 department's approval of such a designation under §2.47. The
3 section requires the department delegate and project sponsor to
4 meet to discuss the preparation of the project scope within 30
5 days after the project sponsor submits to the department
6 delegate a proposed project scope, unless the project sponsor
7 and department delegate agree that no meeting is necessary, or
8 agree to postpone the meeting. If the project sponsor and
9 department delegate have not agreed upon a project scope within
10 60 days of the project sponsor's submittal of its proposed
11 project scope, the department delegate will provide the project
12 sponsor with its proposed project scope, and the parties may
13 proceed to dispute resolution as provided by new §2.52. Any
14 unresolved disagreements about any of the issues covered in the
15 project scope must be resolved, using the dispute resolution
16 procedures set forth in new §2.52, before the deadline for
17 submitting the agreed-upon project scope set by §2.44(g).

18

19 The department views the project scope as an essential component
20 of its new environmental review process for highway projects. A
21 primary purpose of the project scope is to allow the department
22 delegate and project sponsor an opportunity to, at the outset,
23 jointly determine which coordination, public participation,
24 environmental studies, and other tasks will be required for
25 environmental clearance of the project. The department believes

1 that requiring agreement on the essential components of an
2 environmental review early in the process will significantly
3 reduce the need for extensive revision of environmental review
4 documents resulting from misunderstandings about the expected
5 content of the document.

6
7 The section also allows the department delegate to undertake
8 tasks that would normally be the responsibility of the project
9 sponsor under new §2.43. For example, the project sponsor and
10 department delegate might agree that the department delegate,
11 rather than the project sponsor, will conduct coordination with
12 a particular resource agency. To minimize the potential for
13 misunderstandings about which entity is responsible for which
14 tasks, the section provides that any agreements to deviate from
15 the default project sponsor responsibilities set forth in new
16 §2.43 must be clearly identified in the project scope. Finally,
17 the section describes the circumstances in which an agreed-upon
18 project scope must be amended.

19
20 New §2.45 explains that the project sponsor may submit to the
21 department delegate any environmental reports as they are
22 developed in the course of preparing the environmental review
23 document, and that the department delegate will identify in
24 writing any deficiencies, flaws, or omissions within 60 days of
25 the receipt of such a report, unless the project sponsor and

1 department delegate agree to extend that deadline.

2

3 As explained earlier, this proposed rulemaking will not require
4 the preparation of any separate environmental reports that are
5 not otherwise required by law. Several of the sections in
6 proposed Subchapter D encourage project sponsors to prepare
7 separate environmental reports documenting environmental studies
8 or analyses, summarize them in an environmental review document
9 for a given project, and append them to that environmental
10 review document. However, project sponsors will still have the
11 option of documenting any environmental studies or analyses in
12 the body of an environmental document, as opposed to preparing
13 separate environmental reports. If a project sponsor opts to
14 prepare separate environmental reports documenting environmental
15 studies or analyses, new §2.45 will provide a procedural
16 mechanism for having them reviewed by the department delegate in
17 advance of preparation and submittal of the environmental review
18 document. The department strongly encourages project sponsors
19 to take advantage of this opportunity because advance review of
20 environmental reports will significantly reduce the potential
21 for extensive revision of the environmental review document to
22 address deficiencies, flaws, or omissions that can be
23 identified early in the process.

24

25 New §2.46 implements Transportation Code, §201.753(b) and (c).

1 A local government may pay the department a fee to cover the
2 department's costs to contract with a consulting company or
3 companies to review an environmental document or CE/BCE/PCE
4 documentation prepared by the local government. There are two
5 reasons why a local government might pay a fee under this
6 section. The first is to allow the department delegate to
7 review an environmental review document or CE/BCE/PCE
8 documentation prepared by the local government that it would
9 otherwise not be able to under new §2.42(a) because the project
10 is not identified in the financially constrained portion of the
11 approved STIP or UTP, and is not identified in a commission
12 order as being eligible for participation under Subchapter C.
13 Note that, while payment of a fee under this section will allow
14 the department delegate to review a document that it otherwise
15 could not because it is not identified in the STIP or UTP or in
16 a commission order, it does not avoid other consequences of a
17 project not being identified in planning documents. For
18 example, the department delegate will not forward to FHWA an
19 environmental review document or CE/BCE/PCE documentation for a
20 project in a non-attainment area that is not in a plan for which
21 a conformity determination has been made under the Federal Clean
22 Air Act. The second reason is to prevent the department
23 delegate from deferring review of an environmental review
24 document under new §2.51.

25

1 The section explains the procedure by which the local government
2 requests calculation of, and the department delegate calculates
3 a fee for a given project. The department anticipates that it
4 would calculate a fee for a given project based on an estimate
5 from a consulting company or companies, and by estimating the
6 cost to the department of staff time spent coordinating and
7 supervising the consulting company or companies' review. Under
8 Transportation Code, §201.753(b), the local government must pay
9 to the department delegate any fee concurrently with the
10 submittal of the notice required by new §2.47; therefore, a
11 local government's request for calculation of a fee for a
12 project must be submitted in advance of that notice. The
13 section allows the department delegate 30 days to respond to a
14 local government's request for calculation of a fee. It further
15 explains that the department delegate will recalculate the fee,
16 and the local government shall pay to the department delegate
17 any cost increases, if at any time there are changes to the
18 project description or project classification that significantly
19 increase the department's costs of reviewing the environmental
20 review document or CE/BCE/PCE documentation. The section also
21 provides for a reconciliation of the amount of the fee paid and
22 the actual cost of reviewing a document at the conclusion of
23 review. The local government will pay any additional costs
24 incurred by the department delegate beyond the fee paid, and the
25 department delegate will return to the local government any

1 excess funds paid. Payment of a fee by a local government does
2 not obligate the department delegate to contract out the review
3 of a document. When a document for which a fee was paid is
4 submitted for administrative completeness review, which could
5 occur many months after the local government submits its notice
6 and fee under new §2.47, the department delegate could decide
7 that its resources would be better allocated by conducting the
8 review itself, in which event the department delegate would
9 return the entire fee to the project sponsor.

10

11 New §2.47 implements Transportation Code, §201.755. It requires
12 a local government proposing to serve as the project sponsor for
13 a highway project to provide written notice to the department
14 delegate. The notice must include (1) the project scope agreed
15 on by the department delegate and project sponsor; (2) a request
16 for verification of the decision made in the project scope
17 regarding the anticipated classification of the project under
18 Subchapter D; and (3) a statement whether the project sponsor is
19 paying a fee under new §2.46, and if so, a check in the amount
20 calculated by the department delegate must accompany the notice.

21

22 The department recognizes that, because the anticipated project
23 classification will be documented in the project scope and
24 because the project sponsor will be required to later submit a
25 notice with a request for verification of that classification,

1 the department delegate will essentially be determining the
2 classification twice. However, this is necessary given that
3 Transportation Code, §201.755 requires a local government to,
4 after preparation of the project scope in collaboration with the
5 department delegate, submit a notice requesting classification
6 of the project. Therefore, the request for classification
7 required by the statute, will, in practice, be a request for
8 verification of the classification made in the course of
9 preparing the project scope. Both the initial classification
10 and verification of that classification in response to the
11 notice required by new §2.47 are subject to change pending the
12 results of technical review. While the department delegate
13 should exercise its best professional judgment in making the
14 initial classification and verification based on information
15 provided by the local government, a situation may arise in which
16 it is not evident to the department delegate until it is
17 conducting its technical review of a CE document that the
18 project does not qualify for that classification.

19
20 The section provides that the department delegate will respond
21 within 30 days of receiving a notice submitted by a local
22 government, verifying the classification of the project.
23 Regarding approval of a local government as a project sponsor,
24 the section requires the department delegate to make its
25 determination based on a consideration of the specific factors.

1 While the department anticipates that most requests by local
2 governments to be project sponsors will be approved, it reserves
3 the right to deny such a request if, for example, a local
4 government proposes to take responsibility for preparing an EIS
5 for a significant project but has no demonstrated ability or
6 resources to do so.

7

8 New §2.48 implements Transportation Code, §§201.757 and 201.758
9 by requiring the department delegate to determine whether an
10 environmental review document submitted by a project sponsor is
11 administratively complete before undertaking technical review.
12 This section does not apply to BCEs, PCEs and CEAs for which a
13 descriptive letter or environmental issues checklist, rather
14 than an environmental review document, is prepared.

15

16 The primary purpose of an administrative completeness review is
17 to determine whether or not the environmental review document
18 has been prepared in accordance with the project scope. For
19 example, if a project scope called for an archeological survey
20 to be conducted and discussed in an environmental review
21 document or an attached environmental report, and such a
22 discussion is not provided, the department delegate could not
23 conclude that the document is administratively complete. Using
24 this example, the purpose of the administrative completeness
25 review would not be to determine whether an archeological survey

1 was done properly or whether the project sponsor's conclusions
2 from the survey are sound; those types of considerations would
3 be more relevant in the technical review under new §2.49.
4 Rather, the purpose of the administrative completeness review
5 would be to determine whether the survey was done and whether it
6 had been documented as required by the project scope.

7
8 New §2.48 sets forth the requirements for determining that an
9 environmental review document is administratively complete. It
10 also sets a deadline for the department delegate to determine
11 whether a document is administratively complete of 20 days from
12 receipt of the document. If the department delegate determines
13 that an environmental review document is not administratively
14 complete, it must, in writing, inform the project sponsor and
15 explain its basis for that determination in reasonable detail.
16 If the project sponsor re-submits a revised or amended
17 environmental review document, the department delegate will have
18 another 20 days to determine whether the revised or amended
19 version is administratively complete. The section also requires
20 the department delegate to undertake all reasonable efforts to
21 cooperate with the project sponsor to ensure that the
22 environmental review document is administratively complete.

23
24 Finally, §2.48 sets a deadline on the project sponsor's
25 submittal of an EA or final environmental impact statement

1 (FEIS) for administrative completeness review of two years
2 before the date planned for publishing notice to let the
3 construction contract for the project as indicated in the
4 financially constrained portion of the STIP or UTP or a
5 commission order identifying the project as being eligible for
6 environmental review. The need for this deadline relates to new
7 §2.51, Deferral of Review. That section, in accordance with
8 Transportation Code, §201.752(e), provides the department
9 delegate with flexibility to defer the processing of an EA or
10 FEIS if it determines that it lacks the resources to timely
11 process all documents it receives, in which event the
12 administrative completeness and technical review deadlines would
13 not apply to the deferred document. However, the section also
14 provides that the department delegate must render an
15 environmental decision on a document not later than one year
16 before the date planned for publishing notice to let the
17 construction contract for the project as indicated in the STIP,
18 UTP, or commission order. In order to preserve the department
19 delegate's ability to defer the processing of an EA or FEIS, and
20 still comply with the requirement to complete review one year
21 before the date planned for publishing letting notice, there
22 must be an earlier deadline for submittal of the document to the
23 department delegate. The submittal deadline set in new §2.48,
24 two years before the date planned for publishing letting notice,
25 provides the department with a reasonable opportunity to meet

1 the deadline for completing review on a deferred document. This
2 deadline does not apply to a project for which a local
3 government has paid a fee under new §2.46, because the
4 department delegate will not have the option to defer the
5 processing of a document for which a fee has been paid.
6
7 New §2.49 requires the department delegate to undertake a
8 technical review of an environmental review document or
9 CE/BCE/PCE documentation. For an environmental review document,
10 the technical review begins when the department delegate
11 determines the document is administratively complete. The
12 purpose of a technical review of an environmental review
13 document is to confirm that the document is (1) comprehensive in
14 its treatment of all required subject areas; (2) written in a
15 professional and understandable manner; (3) based on sound
16 reasoning and accepted scientific and engineering principles;
17 and (4) legally sufficient, including satisfying the
18 requirements of Subchapter D. For a BCE, PCE, or CE for which a
19 descriptive letter or environmental issues checklist is
20 prepared, the technical review begins when the project sponsor
21 provides the letter or checklist to the department delegate for
22 its review, and the purpose of the review is to determine
23 whether the letter or checklist shows that the project qualifies
24 as a BCE, PCE, or CE. The section clarifies that a department
25 may conclude that an environmental review document or CE/BCE/PCE

1 documentation cannot be approved because it does not meet the
2 stated requirements.
3
4 New §2.50 implements Transportation Code, §§201.759 and 201.760.
5 It imposes the deadlines for the department delegate to complete
6 technical reviews of PCEs, CEs, EAs, final EISs, and
7 reevaluations set forth in Transportation Code, §201.759. For
8 state transportation projects, the department delegate may, by
9 written communication to the project sponsor, decline to approve
10 an environmental review document or CE/BCE/PCE documentation at
11 the conclusion of technical review. The consequences of
12 disapproval of an environmental review document or CE/BCE/PCE
13 documentation will depend on the reason given by the department
14 delegate. If disapproval is for a problem that can be cured
15 with a new environmental review document or CE/BCE/PCE
16 documentation, the project sponsor will be allowed to submit one
17 for administrative completeness review and technical review in
18 accordance with these proposed rules. For FHWA transportation
19 projects, the department delegate will be required to forward
20 the environmental review document or CE/BCE/PCE documentation to
21 FHWA at the conclusion of technical review with an appropriate
22 recommendation, which may be a recommendation to disapprove the
23 document if the department delegate determines that it is
24 deficient.
25

1 The proposed section also provides for the suspension of the
2 technical review deadlines (1) to allow the project sponsor to
3 correct deficiencies or errors or make revisions as directed by
4 the department delegate; (2) to allow the project sponsor and
5 department delegate to address any additional work regarding the
6 highway project, such as design changes; or (3) to allow the
7 project sponsor and department delegate to resolve any issues
8 raised by the department's legal counsel. The section also
9 provides for suspension of the technical review deadlines by
10 agreement of the project sponsor and department delegate.

11
12 Regarding the department delegate's review of an environmental
13 review document or CE/BCE/PCE documentation, the department
14 appreciates the need to minimize multiple rounds of comment,
15 revision, and review of a single document. While there is no
16 limit on the number of times the technical review of a document
17 may be suspended, the section requires the department delegate
18 to provide to the project sponsor any comments on an
19 environmental review document or CE/BCE/PCE documentation in a
20 single set of comments, if possible. If at any time during
21 technical review the classification of the project under
22 Subchapter D changes, the section requires termination of
23 technical review, and submittal of a new environmental review
24 document or CE/BCE/PCE documentation for administrative
25 completeness review and technical review in accordance with

1 these proposed rules.

2

3 New §2.51 implements Transportation Code, §201.752(e). It
4 allows the department delegate to defer the processing of an EA
5 or FEIS if it determines that it lacks the resources to timely
6 process all documents it receives, in which event the
7 administrative completeness and technical review deadlines would
8 not apply to the deferred document. The only types of documents
9 that may be deferred under the section are EAs and FEISs. The
10 department delegate does not have the option of deferring review
11 of a CE, BCE, PCE, or reevaluation or review of an EA or FEIS
12 for which a local government has paid a fee under new §2.46.

13

14 The department delegate must make a decision to defer review of
15 an EA or FEIS within 20 days of receipt of the document, and
16 must notify the project sponsor of a decision to defer in
17 writing. Even if the department delegate defers review of an EA
18 or FEIS, it must render an environmental decision on a document
19 not later than one year before the date planned for publishing
20 notice to let the construction contract for the project as
21 indicated in the STIP, UTP, or commission order. The section
22 clarifies that there is no waiting period for letting after an
23 environmental decision on a document has been rendered. In
24 other words, while the department delegate is required to render
25 an environmental decision on a deferred document at least one

1 year before the planned date for publishing letting notice,
2 after it has rendered an environmental decision, the department
3 may, in accordance with other rules and policies, let the
4 project at any time.

5
6 New §2.52 implements Transportation Code, §201.752(d). It
7 prescribes a process for the project sponsor and department
8 delegate to resolve any disputes concerning the preparation of
9 the project scope, sufficiency of an environmental report or
10 environmental review document, classification of a project, or
11 any other kind of dispute arising under Subchapter C. If a
12 dispute arises, the section requires the project sponsor and
13 department delegate to first attempt to informally resolve it
14 using the procedures set forth in the project scope for the
15 given project. Each project scope will be required to have a
16 dispute escalation ladder designating individuals representing
17 the project sponsor and department delegate, and a deadline for
18 resolving the dispute at each step of the dispute escalation
19 ladder. For a given dispute, the individuals listed on the
20 first step of the dispute escalation ladder would attempt to
21 resolve the dispute. If they are unable to do so by the
22 specified deadline, the individuals listed on the second step of
23 the dispute escalation ladder, which would typically be at a
24 higher level of management within their respective
25 organizations, would attempt to resolve the dispute, and so on.

1
2 The section also prescribes the procedures for resolving a
3 dispute if the project sponsor and department delegate are
4 unable to do so using the procedures specified in the project
5 scope. If the project sponsor is a department district, region,
6 or division, the project sponsor or department delegate may
7 request that the department's executive director resolve the
8 dispute. The section requires the executive director to resolve
9 any dispute within 60 days of receiving a request for dispute
10 resolution from the project sponsor or department delegate. If
11 the project sponsor is a local government, the local government
12 or department delegate will ask their respective attorneys to
13 meet and attempt to resolve the dispute. If that is
14 unsuccessful, the project sponsor or department delegate may
15 refer the dispute to a mediator or other formal dispute
16 resolution professional. The project sponsor and department
17 delegate will share equally in any costs of formal dispute
18 resolution, and it must be completed within 60 days of the date
19 on which the project sponsor or department delegate requests it.

20

21 SUBCHAPTER D, REQUIREMENTS FOR CLASSES OF PROJECTS

22 New Subchapter D, Requirements for Classes of Projects, sets
23 forth the department's requirements for CEs, BCEs, EAs, EISs,
24 reevaluations, and supplemental EISs prepared for transportation
25 projects.

1
2 New §2.81 concerns the preparation of categorical exclusion
3 documentation for a transportation project that does not
4 individually or cumulatively have a significant environmental
5 impact. The section clarifies the documentation needed in order
6 to approve a project as a categorical exclusion. The
7 documentation may be in the form of a descriptive letter or an
8 environmental issues checklist. However, if the department
9 delegate, based on the nature of the project, requires the
10 project sponsor to afford an opportunity for hearing or requires
11 a public hearing, the project sponsor must instead prepare a
12 brief environmental review document discussing and analyzing the
13 potential environmental impacts. The section contains the same
14 restrictions on the classification of a project as a categorical
15 exclusion as found in the current rules.

16
17 This section on categorical exclusions and all the following
18 sections in new Subchapter D more clearly differentiate the
19 requirements for a state transportation project versus an FHWA
20 transportation project. For each section, the first subsection
21 describes the requirements that apply to both state
22 transportation projects and to FHWA transportation projects.
23 The last subsection in each section describes the additional
24 federal requirements that apply for an FHWA transportation
25 project only. If federal law or a programmatic agreement with

1 FHWA conflicts with this chapter, the federal law or
2 programmatic agreement provision controls to the extent of the
3 conflict.
4
5 New §2.82 concerns the preparation of blanket categorical
6 exclusion documentation for a transportation project that is
7 similar to past projects that did not involve significant
8 environmental impacts. The section covers the processing of
9 only a blanket categorical exclusion rather than, as in the
10 current rules, blanket categorical exclusion and categorical
11 exclusions in one section. The new section organizes the
12 approval criteria in the manner of a checklist so that the
13 preparation and review of documentation may be more efficient.
14 It clarifies that the approval documentation will be in the form
15 of a descriptive letter or an environmental issues checklist
16 showing compliance with the section. As explained earlier, the
17 section more closely tracks the re-negotiated programmatic
18 agreement between the department and FHWA, which is generally
19 more straightforward than the current rules. The examples of
20 projects that may qualify as a blanket categorical exclusion in
21 subsections (c) and (d) are taken from the programmatic
22 agreement. While the examples in subsection (d) are labeled
23 "[a]dditional examples of BCE," in the programmatic agreement
24 those same examples are labeled "programmatic categorical
25 exclusions." The department believes this is reasonable because

1 in the programmatic agreement the substantive standards and the
2 procedures used for processing a project are the same, whether a
3 project is classified as a blanket categorical exclusion or a
4 programmatic categorical exclusion. The section relates to the
5 processing of a state transportation project. For an FHWA
6 transportation project, subsection (f)(3) provides that the
7 project sponsor and department delegate must comply with federal
8 law including any programmatic agreement. Therefore, the
9 additional reporting requirements in the current programmatic
10 agreement with FHWA concerning projects identified as
11 programmatic categorical exclusions will be complied with.

12
13 In addition to the general public participation requirements in
14 Subchapter E, which are covered later, that may apply to a BCE,
15 the approval checklist in §2.82(b) includes paragraph (1)(F) and
16 (G). Paragraph (1)(F) provides if there is any controversy
17 concerning the project, the project sponsor will carry out
18 public participation to address the controversy following the
19 requirements in §2.101. Paragraph (1)(G) provides the project
20 sponsor must determine if public participation is required under
21 Transportation Code, §203.022(a), and if necessary must have
22 carried out the public participation. This implements
23 Transportation Code, §203.022(a), which requires notice and an
24 opportunity for comment for projects that concern the addition
25 of one or more vehicular lanes. This type of project is within

1 the description of projects that may be classified as a BCE, or
2 PCE for an FHWA transportation project, and so the statutory
3 public participation requirements may apply. The current rule
4 that implements Transportation Code, §203.022(a) applies to all
5 classifications of projects that include the addition of a
6 vehicular lane or the construction of a highway at a new
7 location. However, the more limited scope of the proposed
8 section, which applies only to BCEs, is appropriate because
9 other proposed sections for the other classes of projects
10 contain more stringent public participation requirements that
11 satisfy Transportation Code, §203.022(a).

12
13 New §2.83 concerns the preparation of an environmental
14 assessment for a transportation project to determine the nature
15 and extent of environmental impacts and whether the preparation
16 of an EIS is necessary. The section generally follows the
17 requirements in the current rules, with some changes made to
18 differentiate between state and federal requirements, as
19 described earlier.

20
21 New §2.84 concerns the preparation of an environmental impact
22 statement for a transportation project if there are likely to be
23 significant environmental impacts. The section generally
24 follows the requirements in the current rule, with some changes
25 made to differentiate between state and federal requirements, as

1 described earlier.

2

3 New §2.85 concerns the preparation of a reevaluation for a
4 transportation project. Section 2.85 has been written to more
5 closely track FHWA's regulations on reevaluations than does the
6 department's current rule. Whereas the current rule requires
7 the preparation of reevaluations of documents or notices of
8 continuous activity every three years, regardless of whether any
9 action is being taken on a project, the proposed rule requires
10 the project sponsor and department delegate to consider whether
11 a record of decision (ROD), finding of no significant impact
12 (FONSI), or categorical exclusion (CE) designation remains valid
13 only when some action on the project is being taken in the form
14 of a request for a major approval or grant from the department.
15 The department believes that this change will help better focus
16 its environmental review resources by eliminating the
17 preparation of unnecessary paperwork.

18

19

20 New §2.86 concerns the preparation of a supplemental
21 environmental impact statement. The proposed section generally
22 follows the requirements in the current rule, with some changes
23 made to differentiate between state and federal requirements, as
24 described earlier.

25

1 SUBCHAPTER E, PUBLIC PARTICIPATION

2 New Subchapter E, Public Participation, sets forth the
3 department's requirements for conducting public participation
4 for transportation projects.

5

6 New §2.101 provides the public participation requirements for a
7 transportation project classified as a CE. The proposed section
8 generally follows the requirements in the current rule. For
9 purposes of uniformity, the notification of availability of the
10 public hearing transcript and comment and response report is
11 changed to track similar requirements found in the section on
12 public participation requirements for an environmental
13 assessment.

14

15 This section on public participation requirements for a
16 categorical exclusion and all of the following sections in new
17 Subchapter E, set forth the public participation requirements
18 for each type of transportation project, and the implementation
19 of more general public participation requirements in the
20 Transportation Code, in separate sections rather than having all
21 the requirements in one section as in the current rules.

22

23 New §2.102 sets forth the public participation requirements for
24 a transportation project classified as an EA. The proposed
25 section generally follows the requirements in the current rule.

1 A requirement was added to give notice of availability of the
2 draft EA to the participating agencies, which requirement
3 generally tracks the FHWA requirement in 23 C.F.R. §771.119(d).
4
5 New §2.103 sets forth the public participation requirements for
6 a transportation project classified as an EIS or Supplemental
7 EIS. The section generally follows the requirements in the
8 current rule. For the purposes of uniformity, the notification
9 of availability of the FEIS was changed to track similar
10 requirements found in the section on public participation
11 requirements for an environmental assessment, notice of
12 availability of the public hearing transcript, and comment and
13 response report. Subsection (i) is added to implement
14 Transportation Code, §201.811(b), added by Senate Bill 1420
15 (82nd legislature), concerning the required documentation and
16 reporting of the number of positive, negative, or neutral public
17 comments received regarding all environmental impact statements.
18
19 New §2.104 sets forth the public participation requirements in
20 Transportation Code, §203.022(b), for certain projects if
21 conditions relating to land use, traffic volumes, and traffic
22 patterns have changed significantly since the project was
23 originally subject to public review and comment. The section
24 generally follows the requirements in the current rule. The
25 reference to Parks and Wildlife Code, Chapter 26, has been

1 deleted because a rule is not needed to set forth the statutory
2 requirement to hold a hearing for any new taking of public land
3 designated and used as a park, recreation area, wildlife refuge,
4 historic site, or scientific area.

5
6 New §2.105 sets forth the public participation requirements in
7 Transportation Code, §203.022(c), for certain projects on the
8 beginning of construction. The section generally follows the
9 requirements in the current rule.

10

11 New §2.106 concerns the holding of a meeting with affected
12 property owners. The proposed section generally follows the
13 requirements in the current rule.

14

15 New §2.107 concerns the holding of a public meeting. The
16 proposed section generally follows the requirements in the
17 current rule.

18

19 New §2.108 concerns the affording of an opportunity for public
20 hearing. The proposed section generally follows the
21 requirements in the current rule.

22

23 New §2.109 concerns the holding of a public hearing. The
24 proposed section generally follows the requirements in the
25 current rule.

1
2 New §2.110 concerns additional public participation following
3 completion of public participation for a project as specified in
4 §§2.101 - 2.109. The section generally follows the requirements
5 in the current rule.

6
7 SUBCHAPTER F, REQUIREMENTS FOR SPECIFIC TYPES OF PROJECTS AND
8 PROGRAMS

9 New Subchapter F, Requirements for Specific Types of Projects
10 and Programs, sets forth the department's environmental review
11 requirements for activities that, because of their unique
12 characteristics, have environmental review requirements
13 different than those generally applicable to transportation
14 projects.

15
16 New §2.131 implements Parks and Wildlife Code, §§26.001 and
17 26.002, by requiring the department delegate to hold a public
18 hearing and make certain determinations before approving the use
19 or taking of public land that is designated and used as a park,
20 recreation area, scientific area, wildlife refuge, or historic
21 site. The new section also implements Natural Resources Code,
22 §183.057 by requiring the department to hold a public hearing
23 and make certain determinations before approving the use or
24 taking of private land encumbered by an agricultural
25 conservation easement. The section also prescribes the

1 environmental review requirements for early or advance
2 acquisition of real property, including the acquisition of
3 property before approval of an environmental review document or
4 CE/BCE/PCE documentation.

5
6 New §2.132 concerns the department's work as the non-federal
7 sponsor of the Gulf Intracoastal Waterway. The section is
8 reorganized for the purposes of clarity compared to the current
9 rule. As discussed earlier, except for this section, Chapter 2
10 will not apply to the environmental review of a GIWW project.

11
12 New §2.133 identifies ten department maintenance programs and
13 requires the department to undertake an environmental review of
14 each of them. The section requires the department to conduct an
15 environmental review under the chapter for each program at least
16 every ten years. Under the current rules, the department is
17 required to reassess an environmental review every five years,
18 but the term "reassess" is not defined. The change to the ten-
19 year review requirement is reasonable because the department's
20 experience is that the reviews under the section have taken
21 several years, and because the requirement clarifies what the
22 department must do within that period. The section further
23 provides that no individual environmental review of a
24 maintenance project is required under Chapter 2 if the project
25 is part of a program for which a review has been conducted in

1 accordance with new §2.133. However, an individual
2 environmental review will be required under Chapter 2 for a
3 maintenance project that is conducted or supported by FHWA,
4 unless FHWA has approved an environmental review of the program
5 under which the project is undertaken.

6
7 New §2.134 specifies that approval of a transportation project
8 located in whole or part within the coastal boundary, as defined
9 by 31 TAC §503.1, is an action subject to the Texas Coastal
10 Management Program (31 TAC Part 16), and that such a project may
11 not be approved if it is found to be inconsistent with the goals
12 and policies of the Program. The section recognizes Senate Bill
13 656, Acts of the 82nd Legislature, Regular Session, which
14 abolished the Coastal Coordination Council and transferred all
15 of its powers and duties to the General Land Office effective
16 September 1, 2011, by indicating that the department will refer
17 certain actions to the General Land Office rather than the
18 Coastal Coordination Program. The section specifies that the
19 threshold for referring actions to the General Land Office is
20 the approval of transportation projects and programs requiring
21 an environmental impact statement. The section also specifies
22 the threshold for referring to the General Land Office actions
23 concerning the Gulf Intracoastal Waterway. Despite the fact
24 that the Coastal Coordination Council has been abolished, this
25 section contains citations to rules adopted by the Coastal

1 Coordination Council because Senate Bill 656 provides that the
2 rules of the Coastal Coordination Council are continued in
3 effect as rules of the General Land Office until superseded by a
4 rule of the General Land Office, and the General Land Office has
5 not yet promulgated superseding rules.

6

7 FISCAL NOTE

8 James Bass, Chief Financial Officer, has determined that for
9 each of the first five years the repeals and new sections are in
10 effect, there will be fiscal implications for state government,
11 and also for local governments electing to participate as
12 project sponsors, as a result of enforcing or administering the
13 repeals and new sections. During the first five years, the
14 department estimates that it will incur additional personnel
15 costs as follows: 2012 - \$886,212; 2013 - \$818,331; 2014 -
16 \$805,870; 2015 - \$805,870; and 2016 - \$805,870, for a total
17 increase during the five years of \$4,122,156.

18

19 Local governments choosing to participate as project sponsors
20 would incur costs associated with collaborative scoping and
21 other aspects of the environmental review process for highway
22 projects under the new sections, which costs would depend on the
23 specific circumstances of each highway project. However, this
24 type of participation by local governments is entirely optional.

25

1 Because this proposed rulemaking is intended, in part, to make
2 the department's environmental review process more efficient,
3 the department also anticipates some reductions in costs to the
4 state, and to local governments electing to participate as
5 project sponsors, as a result of enforcing or administering the
6 repeals and new sections. However, cost reductions associated
7 with realized efficiencies of the department's environmental
8 review process are difficult to estimate and cannot be
9 quantified.

10

11 Mark A. Marek, P.E., Interim Director of the department's
12 Environmental Affairs Division, has certified that there will be
13 no significant impact on local economies or overall employment
14 as a result of enforcing or administering the repeals and new
15 sections.

16

17 PUBLIC BENEFIT AND COST

18 Mr. Marek has determined that, for each of the first five years
19 the repeals and new sections are in effect, multiple public
20 benefits are expected. First, the procedures for environmental
21 review will be easier to understand, for example, by more
22 clearly differentiating between federal and state requirements
23 and by more clearly identifying the level of documentation
24 required for processing a transportation project as a CE or BCE.
25 This should help both staff and the public track compliance with

1 environmental review requirements, and reduce delays associated
2 with resolving contrary interpretations of the existing rules.

3

4 The new sections also ensure that the department complies with
5 state law by implementing Senate Bill 548, Senate Bill 1420, and
6 House Bill 630 (82nd legislature), all pertaining to the
7 environmental review process for highway projects. The
8 processes and requirements of this recent legislation and
9 implementing rules in proposed Subchapter C are expected to
10 result in more timely environmental reviews of highway projects,
11 and more efficient and effective collaboration with local
12 government sponsors of highway projects.

13

14 Proposed new §2.11, Employee Certification Process, will ensure
15 that the department's district employees who work on
16 environmental review documents and CE/BCE/PCE documentation are
17 better trained in the applicable requirements and procedures.
18 This is expected to increase the effectiveness of the
19 department's environmental reviews of transportation projects.

20

21 The proposed rules also provide for greater operational
22 flexibility within the department as compared to the existing
23 rules. The department believes this change will allow it to
24 better adjust its resources to maximize both the quality of
25 environmental review and the efficiency of the process. The

1 proposed rules are expected to further focus the department's
2 resources on projects that are most likely to have significant
3 environmental impacts by, for example, encouraging the
4 streamlining of environmental review documents, reducing the
5 need to prepare reevaluations or other paperwork every three
6 years after the approval of an environmental review document,
7 and eliminating the requirement to conduct site visits for all
8 BCEs.

9
10 There are no anticipated economic costs for persons required to
11 comply with the sections as proposed. There will be no adverse
12 economic effect on small businesses.

13
14 TAKINGS IMPACT ASSESSMENT

15 The department has evaluated this proposed repeal and adoption
16 of rules to determine whether Government Code, Chapter 2007
17 (Private Real Property Rights Preservation Act) requires the
18 department to complete a takings assessment. The department has
19 determined that the proposed repeal and adoption of rules does
20 not affect private real property in a manner that requires the
21 takings assessment.

22
23 COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

24 The department determined that this rulemaking relates to
25 actions subject to the Texas Coastal Management Program (CMP)

1 under the Coastal Coordination Act of 1991, as amended (Natural
2 Resources Code, §§33.201 et seq.), because it concerns the
3 department's rules on the environmental review of transportation
4 projects. The department reviewed this action for consistency
5 with the CMP goals and policies under the rules promulgated by
6 the Coastal Coordination Council, which remain in effect until
7 superseded by a rule of the General Land Office. The department
8 has determined that the action is consistent with applicable CMP
9 goals and policies.

10

11 A CMP goal applicable to this rulemaking is that transportation
12 projects shall comply with certain practices concerning the
13 siting of a project to lessen the impacts on coastal natural
14 resources (see 31 TAC §501.31). The proposed rules concern the
15 method by which to evaluate the environmental impacts of a
16 transportation project, and do not dictate the siting of a
17 project. However, proposed new §2.134, Coastal Management
18 Program, specifies that approval of a transportation project
19 located in whole or in part within the coastal boundary is an
20 action subject to the Texas Coastal Management Program, and that
21 such a project may not be approved if it is found to be
22 inconsistent with the goals and policies of the CMP. The
23 proposed rules are consistent with CMP goals and policies by
24 specifically incorporating them in this manner. Another CMP
25 goal applicable to this rulemaking is that the use of taking of

1 public land shall comply with Parks and Wildlife Code, Chapter
2 26 (see 31 TAC §501.29). The rulemaking is consistent with this
3 goal because proposed new §2.131(a), Special Right-of-Way
4 Acquisition, implements the statutory requirements.

5
6 A copy of this rulemaking will be submitted to the General Land
7 Office for its comments on the consistency of the proposed
8 rulemaking with the CMP. The department requests that the
9 public also give comment on whether the proposed rulemaking is
10 consistent with the CMP.

11
12 PUBLIC HEARING

13 Pursuant to the Administrative Procedure Act, Government Code,
14 Chapter 2001, the Texas Department of Transportation will
15 conduct a public hearing to receive comments concerning the
16 proposed repeals and new sections. The public hearing will be
17 held at 10:00 a.m. on January 9, 2012 at 200 East Riverside
18 Drive, Room 1A.1, Austin, Texas 78704, and will be conducted in
19 accordance with the procedures specified in 43 TAC §1.5. Those
20 desiring to make comments or presentations may register starting
21 at 9:30 a.m. Any interested persons may appear and offer
22 comments, either orally or in writing; however, questioning of
23 those making presentations will be reserved exclusively to the
24 presiding officer as may be necessary to ensure a complete
25 record. While any person with pertinent comments will be

1 granted an opportunity to present them during the course of the
2 hearing, the presiding officer reserves the right to restrict
3 testimony in terms of time and repetitive content.
4 Organizations, associations, or groups are encouraged to present
5 their commonly held views and identical or similar comments
6 through a representative member when possible. Comments on the
7 proposed text should include appropriate citations to sections,
8 subsections, paragraphs, etc. for proper reference. Any
9 suggestions or requests for alternative language or other
10 revisions to the proposed text should be submitted in written
11 form. Presentations must remain pertinent to the issues being
12 discussed. A person may not assign a portion of his or her time
13 to another speaker. Persons with disabilities who plan to
14 attend this meeting and who may need auxiliary aids or services
15 such as interpreters for persons who are deaf or hearing
16 impaired, readers, large print or Braille, are requested to
17 contact the Government and Public Affairs Division, 125 East
18 11th Street, Austin, Texas 78701-2483, (512) 463-6086 at least
19 five working days prior to the hearing so that appropriate
20 services can be provided.

21

22 SUBMITTAL OF COMMENTS

23 Written comments on the proposed repeal of §§2.1-2.20, §2.44,
24 and §2.48 and new sections §§2.1-2.14, §§2.41-2.52, §§2.81-2.86,
25 §§2.101-2.110 and §§2.131-2.134 may be submitted to Mark A.

1 Marek, P.E., Interim Director, Environmental Affairs Division,
2 Texas Department of Transportation, 125 East 11th Street,
3 Austin, Texas 78701-2483. The deadline for receipt of comments
4 is 5:00 p.m. on January 11, 2012.

5

6 STATUTORY AUTHORITY

7 The repeals and new sections are proposed under Transportation
8 Code, §201.101, which authorizes the commission to establish
9 rules for the conduct of the work of the department, and more
10 specifically, Transportation Code, §91.033, which authorizes the
11 department to adopt rules concerning the environmental
12 processing of a rail project; Transportation Code, §201.604,
13 which requires the department to promulgate rules providing for
14 its review of transportation projects that are not subject to
15 review under the National Environmental Policy Act (42 U.S.C.
16 §4321 et seq.); Transportation Code, §201.762(b), which requires
17 the department to promulgate rules implementing Transportation
18 Code, Chapter 201, Subchapter I-1, regarding environmental
19 review of highway projects, not later than March 1, 2012;
20 Transportation Code, §222.006, which requires the department to
21 promulgate rules establishing a process to certify department
22 district environmental specialists to work on all documents
23 related to state and federal environmental review processes; and
24 Transportation Code, §203.022, which requires the department to
25 promulgate rules concerning public participation during the

1 environmental processing of certain projects.

2

3 CROSS REFERENCE TO STATUTE

4 Transportation Code §91.033, §91.034, §201.604, §201.606,

5 §201.607, §201.610, §201.611, §201.617, §§201.751-201.761,

6 §201.762(b), §203.021, §203.022 and §222.006; Parks and Wildlife

7 Code, §§26.001 and 26.002; and Natural Resources Code, §183.057.

1 SUBCHAPTER A. GENERAL PROVISIONS

2 §2.1. Purpose of Rules. This chapter implements Transportation
3 Code, §91.033, §91.034, §201.604, §201.606, §201.607, §201.610,
4 §201.611, §201.617, §§201.751-201.761, §201.762(b), §203.021,
5 §203.022 and §222.006; Parks and Wildlife Code §§26.001 and
6 26.002; and Natural Resources Code, §183.057.

7

8 §2.2. Environmental Policy. The Texas Transportation
9 Commission (commission) and the Texas Department of
10 Transportation (department) will protect, preserve, and, when
11 practicable, enhance the environment. The focus will be on the
12 human environment including the earth's systems, consisting of
13 water, air, land, plants, people, and animals and the
14 interrelationships that exist among these, including ecological,
15 socio-economic, and archeological/cultural resources.
16 Particular emphasis will be placed on avoidance, minimization,
17 and compensation for adverse environmental impacts. Social and
18 environmental concerns will be balanced with economic growth.
19 The commission and the department will fully integrate
20 environmental and public participation considerations into
21 department policies, procedures, and decision-making practices,
22 and will do so in a systematic, interdisciplinary manner.

23

1 §2.3. Applicability; Exceptions.

2 (a) Application of chapter. This chapter prescribes the
3 environmental review and public participation requirements for:

4 (1) a state transportation project or FHWA transportation
5 project conducted by the department;

6 (2) a state transportation project or FHWA transportation
7 project of a private or public entity that is funded in whole or
8 in part by the department; or

9 (3) a state transportation project or FHWA transportation
10 project of a private or public entity that requires commission
11 or department approval.

12 (b) Exceptions.

13 (1) Notwithstanding subsection (a) of this section, this
14 chapter does not apply to a transportation project that is:

15 (A) not on the state highway system and that the
16 department funds solely with money held in a project subaccount
17 created under Transportation Code, §228.012; or

18 (B) developed by a county under Transportation Code,
19 §228.011, or developed by a local toll project entity under
20 Transportation Code, Chapter 373, and that is not on the state
21 highway system and for which the department does not use funds
22 other than funds derived solely from money held in a project
23 subaccount created under Transportation Code, §228.012.

1 (2) An agreement entered into by the department for a
2 transportation project excepted under paragraph (1)(A)(ii) of
3 this section must require that the entity responsible for
4 implementing the project will comply with all environmental
5 review and public participation requirements applicable to that
6 entity under other state and federal law in connection with the
7 project.

8 (3) Notwithstanding subsection (a) of this section only
9 §2.132 of this chapter (relating to Gulf Intracoastal Waterway
10 Projects) applies to a project concerning the Gulf Intracoastal
11 Waterway.

12 (c) Compliance with rules of federal transportation agency
13 other than FHWA. For transportation projects conducted or
14 supported by a federal transportation agency other than FHWA,
15 and for transportation projects conducted or supported by
16 multiple federal transportation agencies and for which FHWA is
17 not the lead federal agency, the department delegate and project
18 sponsor will comply with the environmental review rules of the
19 lead federal agency, and not the rules in this chapter.

20
21 §2.4. Other Applicable Laws. For a transportation project, in
22 addition to the requirements in this chapter, the project
23 sponsor will ensure compliance with all other applicable local,

1 state, and federal laws.

2

3 §2.5. Definitions. The following words and terms, when used in
4 this chapter, have the following meanings, unless the context
5 clearly indicates otherwise.

6 (1) Affected local government--The governing body of a
7 county or municipality in which a project is located.

8 (2) BCE (Blanket categorical exclusion)--Is covered by
9 §2.82 of this chapter (relating to Blanket Categorical
10 Exclusions).

11 (3) Best management practices--Practices that are
12 determined to be the most efficient, practical, and cost
13 effective measures to guide a particular activity or address a
14 particular problem.

15 (4) CE (Categorical Exclusion)--Is covered by §2.81 of
16 this chapter (relating to Categorical Exclusions).

17 (5) CE/BCE/PCE documentation--A descriptive letter or
18 environmental issues checklist showing that a transportation
19 project qualifies as a categorical exclusion (CE), a blanket
20 categorical exclusion (BCE), or a programmatic categorical
21 exclusion (PCE).

22 (6) Commission--The Texas Transportation Commission.

23 (7) DEIS (Draft Environmental Impact Statement)--Is

1 covered by §2.84 of this chapter (relating to Environmental
2 Impact Statements).

3 (8) Department--The Texas Department of Transportation.

4 (9) Disposal plan--An operationally suitable method for
5 the placement of dredged material that avoids or minimizes
6 adverse environmental impacts.

7 (10) District--One of the 25 geographical districts into
8 which the department is divided.

9 (11) Division--One of the department's divisions listed
10 on the department's organizational chart.

11 (12) EA (Environmental Assessment)--Is covered by §2.83
12 of this chapter (relating to Environmental Assessments).

13 (13) EIS (Environmental Impact Statement)--Is covered by
14 §2.84 of this chapter (relating to Environmental Impact
15 Statements).

16 (14) Environmental Affairs Division--The Environmental
17 Affairs Division of the department, or its successor
18 organizational unit within the department.

19 (15) Environmental report--A report, form, checklist, or
20 other documentation analyzing an environmental issue in the
21 context of a specific transportation project or presenting a
22 thorough summary of an environmental study conducted in support
23 of an environmental review document, or demonstrating compliance

1 with a specific environmental requirement.

2 (16) Environmental review document--A document prepared
3 to demonstrate that a project qualifies as a categorical
4 exclusion when the department delegate requires a public hearing
5 or opportunity for one, an environmental assessment, an
6 environmental impact statement, a reevaluation, or a
7 supplemental environmental impact statement. An environmental
8 review document includes any attached environmental reports.

9 (17) Environmental studies--The investigations of
10 potential environmental impacts to determine the environmental
11 process to be followed and to assist in the preparation of an
12 environmental review document or CE/BCE/PCE documentation. The
13 term includes studies conducted during transportation planning
14 and project development, and studies conducted to evaluate
15 alternatives.

16 (18) EPICs (Environmental permits, issues, and
17 commitments)--Any permit, issue, coordination commitment, or
18 mitigation obligation necessary to address, offset, or
19 compensate for social, economic, or environmental impacts of a
20 project, including sole source aquifer coordination, wetland
21 permits, stormwater permits, traffic noise abatement, threatened
22 or endangered species coordination, or archeological permits,
23 and any mitigation or other commitment associated with the

1 project.

2 (19) Essential fish habitat--Waters and substrate
3 designated as essential fish habitat by a Regional Fishery
4 Management Council established under the Federal Magnuson-
5 Stevens Fishery Conservation and Management Act.

6 (20) FEIS (Final Environmental Impact Statement)--Is
7 covered by §2.84 of this chapter (relating to Environmental
8 Impact Statements).

9 (21) FHWA--The United States Department of Transportation
10 Federal Highway Administration.

11 (22) FHWA transportation project--A transportation
12 project conducted or supported by FHWA, such as by providing
13 federal funds or by granting access to the interstate highway
14 system, for which FHWA is the lead federal agency, and for which
15 FHWA agrees the department may act as the joint lead agency or
16 project sponsor.

17 (23) FONSI (Finding of No Significant Impact)--Is covered
18 by §2.83 of this chapter (relating to Environmental
19 Assessments).

20 (24) Highway project--A project that is:

21 (A) for the construction or maintenance of a highway on
22 the state highway system; or

23 (B) for the construction or maintenance of a highway

1 not on the state highway system but that is funded wholly or
2 partly with federal money.

3 (25) Human environment--The natural and physical
4 environment, and the relationship of people with that
5 environment.

6 (26) MAPO (Meeting with Affected Property Owners)--Is
7 covered by §2.106 of this chapter (relating to Meeting with
8 Affected Property Owners (MAPO)).

9 (27) Need and purpose--The transportation issue that a
10 proposed project seeks to address and the justification for the
11 expenditure of public funds.

12 (28) NEPA--The National Environmental Policy Act,
13 codified at 42 United States Code §§4321, et seq.

14 (29) NOI (Notice of Intent)--Is covered by §2.103 of this
15 chapter (relating to Public Participation for an Environmental
16 Impact Statement or Supplemental Environmental Impact
17 Statement).

18 (30) PCE (Programmatic categorical exclusion)--A type of
19 categorical exclusion provided for in a programmatic agreement
20 with FHWA.

21 (31) Region--One of the department's four regional
22 support centers.

23 (32) ROD (Record of Decision)--Is covered by §2.84 of

1 this chapter (relating to Environmental Impact Statements).

2 (33) SEIS (Supplemental Environmental Impact Statement)--
3 Is covered by §2.86 of this chapter (relating to Supplemental
4 Environmental Impact Statements).

5 (34) Significantly--As used in reference to the
6 significance of the impact of a project, has the meaning as that
7 term is used and has been interpreted under NEPA and its related
8 regulations, including 40 Code of Federal Regulations §1508.27.

9 (35) State highway system--The system of highways
10 designated by the commission under Transportation Code,
11 §203.002.

12 (36) State transportation project--A transportation
13 project that is not conducted or supported, such as by providing
14 federal funds or by granting access to the interstate highway
15 system, by one of the operating administrations of the United
16 States Department of Transportation.

17 (37) Toll project--Has the meaning assigned by
18 Transportation Code, §201.001.

19 (38) Transportation enhancement--An activity that is
20 listed under 23 United States Code §101(a)(35), relates to a
21 transportation project, and is eligible for federal funding
22 under 23 United States Code §133.

23 (39) Transportation project--A project to construct,

1 maintain or improve a highway, rest area, toll facility,
2 aviation facility, public transportation facility, rail
3 facility, ferry, or ferry landing. A transportation enhancement
4 is also a transportation project.

5

6 §2.6. FHWA Transportation Projects.

7 (a) Applicable requirements. For an FHWA transportation
8 project, the department delegate and project sponsor will comply
9 with FHWA's regulations concerning the environmental review of
10 the project, as appropriate, in addition to the requirements of
11 this chapter. To the extent there is a conflict between FHWA's
12 regulations and the requirements of this chapter, FHWA's rules
13 will control.

14 (b) Issuance of approval; delegation of authority.

15 (1) For an FHWA transportation project, the entity with
16 the authority to issue final approval of an environmental review
17 document, or make a final determination that a project qualifies
18 as a CE, BCE, or PCE, is FHWA.

19 (2) Notwithstanding paragraph (1) of this subsection, the
20 department delegate may, if provided by a programmatic agreement
21 with FHWA, consider certain projects satisfying criteria
22 specified in that programmatic agreement as deemed approved by
23 FHWA.

1

2 §2.7. Project Sponsor.

3 (a) Project sponsor required. Each transportation project
4 must have a project sponsor that accepts responsibility for
5 preparing the environmental review document or CE/BCE/PCE
6 documentation, and performing related tasks.

7 (b) Project sponsor for projects developed by the
8 department.

9 (1) For transportation projects developed by the
10 department, the project sponsor will be the department district,
11 region, or division that is developing the project.

12 (2) A district, region, or division may allow a private
13 entity to develop an environmental review document or CE/BCE/PCE
14 documentation for the district, region, or division's use, but a
15 private entity may not be a project sponsor.

16 (c) Local government as project sponsor. A local
17 governmental entity that is eligible under this subsection may
18 be a project sponsor for a highway project under Subchapter C of
19 this chapter (relating to Environmental Review Process for
20 Highway Projects) if the department approves the notice
21 submitted by the local government under §2.47 of this chapter
22 (relating to Notice by Local Government; Classification of
23 Project). To be eligible, an entity must be a municipality; a

1 county; a group of adjoining counties; a county acting under
2 Transportation Code, Chapter 284; a regional tollway authority
3 operating under Transportation Code, Chapter 366; a regional
4 mobility authority operating under Transportation Code, Chapter
5 370; a local government corporation; or a transportation
6 corporation created under Transportation Code, Chapter 431.

7

8 §2.8. Department Delegate.

9 (a) Designation of department delegate. For each class of
10 transportation project under Subchapter D of this chapter
11 (relating to Requirements for Classes of Projects), the
12 department's executive director will designate the department
13 district, region, division, or other operational unit of the
14 department that has the authority to review and approve on the
15 department's behalf work conducted under this chapter, including
16 an environmental review document. The executive director may
17 designate exceptions to any delegation made under this section
18 for specific projects or types of projects.

19 (b) Dual roles permitted. The department's executive
20 director may designate a district, region, or division as both
21 the project sponsor and the department delegate for a project.
22 If a district, region, or division has both of those roles and
23 this chapter requires the project sponsor to submit a document

1 to the department delegate, the district, region, or division
2 will place documentation in the project file showing completion
3 of the task by the date specified.

4

5 §2.9. Emergency Action Procedures.

6 (a) Any request for deviations from the procedures in this
7 chapter because of emergency circumstances will be handled on a
8 case by case basis by the department delegate. Emergency
9 circumstances include natural disasters, such as floods,
10 hurricanes, tidal waves, earthquakes, severe storms, landslides,
11 or catastrophic failures from any cause.

12 (b) All applicable state and federal emergency
13 environmental permitting and approval processes will be
14 followed.

15 (c) The work will be limited to actions that are directly
16 related to public health and safety and that are necessary to
17 minimize loss of public infrastructure.

18 (d) The project file must contain copies of all
19 coordination and approvals obtained.

20

21 §2.10. Computation of Time. In computing a period of days for
22 the purposes of this chapter, unless otherwise provided by
23 statute, the period begins on the day after the act, event, or

1 default in question and ends at the end of the last day of that
2 designated period, unless that day is a Saturday, Sunday, or
3 legal holiday on which the office of the executive director is
4 closed, in which event the period ends at the end of the next
5 day that is not a Saturday, Sunday, or legal holiday. All time
6 periods and deadlines are expressed in calendar days, unless
7 expressly provided otherwise.

8

9 §2.11. Employee Certification Process.

10 (a) Certification required. A person who is employed by a
11 department district and prepares or reviews environmental
12 studies or reports, environmental review documents or CE/BCE/PCE
13 documentation must successfully complete certification training
14 under this section.

15 (b) Certification program manager. The department's
16 executive director will appoint a certification program manager
17 to implement the requirements of this section on an agency-wide
18 basis.

19 (c) Timing. A person must successfully complete the
20 training within one year after the date that the person begins
21 employment in a district, except that if the person is employed
22 by a district on March 15, 2012, the person must complete the
23 training before March 15, 2013.

1 (d) Recertification. To maintain certification under this
2 section, a person must submit to the certification program
3 manager before the second anniversary of the date that the
4 person was certified, or most recently recertified under this
5 section, documentation that the person has attended a minimum
6 number of hours of training related to the preparation and
7 review of environmental studies and reports, environmental
8 review documents, and CE/BCE/PCE documentation, within that two-
9 year period. The certification program manager will set the
10 minimum number of hours of training required to be completed in
11 each two-year period.

12

13 §2.12. Project Coordination.

14 (a) Participating agencies. A participating agency is any
15 agency, department, or other unit of federal, state, local, or
16 Indian tribal government, including a local flood control
17 authority, that may have an interest in a transportation
18 project, or that is a regulatory agency with jurisdiction over
19 an aspect of the project. The project sponsor and department
20 delegate will, in collaboration, identify the participating
21 agencies for a project.

22 (b) Identification of participating agencies. The
23 identification of participating agencies for a project will take

1 into account the nature and extent of the project, the
2 jurisdiction and interests of the agencies, whether the agencies
3 have previously expressed interest in similar projects, and any
4 laws requiring coordination with specific agencies. At a
5 minimum, the project sponsor will designate as participating
6 agencies the Texas Commission on Environmental Quality, the
7 Texas Historical Commission, and the Texas Parks and Wildlife
8 Department, to the extent provided for in the respective
9 memoranda of understanding under Subchapter B of this chapter
10 (relating to Memoranda of Understanding with Natural Resource
11 Agencies).

12 (c) Project sponsor responsibilities. Except as provided
13 in subsection (d) of this section, or for a highway project
14 unless otherwise agreed to by the project sponsor and department
15 delegate in accordance with §2.44(d) of this chapter (relating
16 to Project Scope), the project sponsor will:

17 (1) initiate coordination with participating agencies;

18 and

19 (2) advise the participating agencies of the proposed
20 schedule for the completion of the environmental review process.

21 (d) Exception for requirements of a resource agency. If a
22 participating agency is a resource agency that declines to
23 coordinate a project with the project sponsor and instead

1 requests to coordinate with a particular organizational unit of
2 the department, then that organizational unit will coordinate
3 with the agency.

4 (e) Purpose. The purpose of coordination is to solicit and
5 consider participating agencies' input on the following:

6 (1) the characteristics of the project;

7 (2) alternatives meeting the project's established need
8 and purpose, including evaluation of the no-build alternative;

9 (3) potential social, economic, and environmental
10 impacts;

11 (4) project features, mitigation measures, and
12 alternatives that might avoid, minimize, or compensate for
13 adverse environmental impacts; and

14 (5) other environmental reviews, permits, and other
15 approvals, as well as consultation requirements that should be
16 done as part of the environmental review process.

17 (f) Completion of coordination. For highway projects, the
18 project sponsor and the department delegate will identify in the
19 project scope which coordination with participating agencies, if
20 any, should be done before submission of the environmental
21 review document or CE/BCE/PCE documentation. Any coordination
22 so identified must be completed before the project sponsor
23 submits to the department delegate the environmental review

1 document or CE/BCE/PCE documentation. An environmental review
2 document or CE/BCE/PCE documentation will describe the results
3 of any coordination conducted and a summary of the contacts with
4 participating agencies and the comments received up to the date
5 of submittal.

6

7 §2.13. Mitigation.

8 (a) The project sponsor will seek to avoid and minimize
9 environmental impacts.

10 (b) If adverse environmental impacts cannot be avoided, and
11 efforts to minimize those impacts have been exhausted, the
12 project sponsor may, in consultation with the department
13 delegate and appropriate agency or agencies, propose
14 compensatory mitigation, in accordance with this section, that
15 will be included in an environmental review document.

16 Compensatory mitigation may rectify impacts by repairing,
17 rehabilitating, or restoring the affected environment, or by
18 replacing or providing for substitute resources or environments.

19 (c) For a transportation project developed by the
20 department, the project sponsor may propose as compensatory
21 mitigation any of the actions described by this subsection.

22 (1) Under Transportation Code, §201.606, if the
23 department acquires for a transportation project property that

1 is habitat of one or more species listed as endangered under the
2 Endangered Species Act (16 U.S.C. §1531 et seq.) and the
3 property is within the boundaries of a regional habitat
4 conservation plan, the department may participate in the
5 regional habitat conservation plan.

6 (2) If the comptroller has designated the department to
7 undertake functions under Government Code, Chapter 403,
8 Subchapter Q (relating to Support for Habitat Protection
9 Measures), the department may develop or coordinate the
10 development of a habitat conservation plan or candidate
11 conservation plan in accordance with that subchapter, or
12 undertake any other actions authorized under that subchapter.

13 (d) For a highway project developed by the department, the
14 project sponsor may propose as compensatory mitigation any of
15 the actions described by this subsection, in addition to those
16 described in subsection (c) of this section.

17 (1) Under Transportation Code, §201.617, if authorized by
18 the appropriate regulatory agency or agencies, the department
19 may undertake any of the following as compensatory mitigation
20 for adverse environmental impacts that are a direct result of
21 the construction, improvement, or maintenance of a state highway
22 or the construction, improvement or maintenance of a facility
23 used in connection with the construction, maintenance, or

1 operation of a state highway:

2 (A) payment of a fee to an appropriate public agency or
3 private entity in lieu of acquiring or agreeing to manage
4 property;

5 (B) the transfer of any interest in real property to an
6 appropriate public agency or private entity with or without
7 monetary consideration if the property is used or is proposed to
8 be used for mitigation purposes; or

9 (C) a contractual agreement with any public or private
10 entity for the management of property owned by the department
11 and used for mitigation purposes.

12 (2) Under Transportation Code, §201.617, before the
13 department acquires by purchase or condemnation real property to
14 mitigate an adverse environmental impact that is the direct
15 result of a state highway improvement project, the department
16 will, if authorized by the appropriate regulatory authority,
17 offer to purchase a conservation easement from the owner of the
18 real property. If the landowner does not accept the offer
19 before the 61st day after the date the offer is made, the
20 department may acquire the property by purchase or condemnation.

21 (3) Under Transportation Code, §201.610, the department
22 may erect a sound barrier to reduce noise from a road or highway
23 on the state highway system.

1 (e) For highway projects for which a local government is
2 the project sponsor and is responsible for mitigation, the local
3 government may, in consultation with the department delegate and
4 the appropriate agency or agencies, propose compensatory
5 mitigation in any of the forms listed in subsection (c) or (d)
6 of this section, or in any other form authorized by law. If the
7 project concerns a segment of the state highway system, this
8 chapter does not prevent a local government sponsor from seeking
9 to use a department-funded mitigation bank for compensatory
10 mitigation on a given project. However, use of such a
11 mitigation bank, and the terms of that use, will be decided by
12 the department at its sole discretion.

13

14 §2.14. Project File. The project sponsor will maintain the
15 documentation showing work completed under this chapter in a
16 project file. If the project sponsor is a local government,
17 upon approval of the environmental review document or CE/BCE/PCE
18 documentation, the local government will retain the project file
19 or forward it to the district in which the project is located,
20 as directed by the district.

1 SUBCHAPTER C. ENVIRONMENTAL REVIEW PROCESS FOR HIGHWAY PROJECTS

2 §2.41. Applicability.

3 (a) This subchapter applies in its entirety to all highway
4 projects for which an environmental review document or
5 CE/BCE/PCE documentation for the project has not been provided,
6 in whole or in part, to the department delegate as of March 15,
7 2012.

8 (b) For highway projects for which an environmental review
9 document or CE/BCE/PCE documentation has been provided, in whole
10 or in part, to the department delegate as of March 15, 2012,
11 this subchapter applies only if the project sponsor notifies the
12 department delegate in writing that it elects to have the
13 project processed under this subchapter, in which case the
14 subchapter applies in its entirety.

15

16 §2.42. Environmental Review Limited to Certain Projects.

17 (a) The project sponsor may prepare an environmental review
18 document or CE/BCE/PCE documentation for a highway project only
19 if the highway project is identified in:

20 (1) the financially constrained portion of:

21 (A) the approved state transportation improvement
22 program; or

1 (B) the approved unified transportation program; or

2 (2) a commission order as being eligible for

3 participation under this subchapter.

4 (b) Notwithstanding subsection (a) of this section, a local

5 government may prepare an environmental review document or

6 CE/BCE/PCE documentation for a highway project that is not

7 identified in a program or by the commission as described by

8 subsection (a) of this section if:

9 (1) the local government submits with its notice under

10 §2.47 of this subchapter (relating to Notice by Local

11 Government; Classification of Project) a fee in an amount

12 established under §2.46 of this subchapter (relating to Optional

13 Payment of Fee by Local Government); and

14 (2) the department delegate designates the local

15 government as the project sponsor under §2.47(d) of this

16 subchapter.

17 (c) If a highway project is identified in the financially

18 constrained portion of the approved state transportation

19 improvement program or the approved unified transportation

20 program on the date that the department delegate issues its

21 written response to a notice submitted by a local government

22 sponsor in accordance with §2.47 of this subchapter, it will be

1 treated as being identified in the respective program for
2 purposes of the department delegate's review under this
3 subchapter even if it is later removed from the respective
4 program.

5

6 §2.43. Project Sponsor Responsibilities. Unless the project
7 sponsor and department delegate agree in the project scope to
8 alternative roles and responsibilities in accordance with
9 §2.44(d) of this subchapter (relating to Project Scope), the
10 project sponsor for a highway project is responsible for:

11 (1) preparing the project scope, in collaboration with
12 the department delegate, in accordance with §2.44 of this
13 subchapter;

14 (2) preparing any environmental reports supporting an
15 environmental review document, and performing all related
16 studies and surveys;

17 (3) preparing the environmental review document or
18 CE/BCE/PCE documentation in accordance with Subchapter D of this
19 chapter (relating to Requirements for Classes of Projects);

20 (4) preparing all materials for and obtaining all
21 required EPICs;

22 (5) preparing all materials for coordination with

1 resource agencies and performing the activities required under
2 §2.12 of this chapter (relating to Project Coordination);

3 (6) preparing all materials for and conducting all
4 required and appropriate public participation in accordance with
5 Subchapter E of this chapter (relating to Public Participation);
6 and

7 (7) arranging, paying for, and performing all mitigation
8 of project impacts undertaken in accordance with §2.13 of this
9 chapter (relating to Mitigation).

10

11 §2.44. Project Scope.

12 (a) Project scope required. The project sponsor, in
13 collaboration with the department delegate, will prepare a
14 detailed project scope that describes the preparation of the
15 environmental review document or CE/BCE/PCE documentation and
16 performance of related tasks. A district, region, or division
17 that has dual roles as both project sponsor and department
18 delegate satisfies this requirement by placing the project scope
19 in the project file. For purposes of this section, a project
20 sponsor includes a local government that proposes to serve as a
21 project sponsor and intends to seek the department's approval of
22 such a designation under §2.47 of this subchapter (relating to

1 Notice by Local Government; Classification of Project).

2 (b) Form. The project scope must be prepared using a
3 standardized checklist approved by the department that reflects
4 the requirements of subsection (c) of this section.

5 (c) Content. The project scope must include:

6 (1) a description of the project, including
7 characteristics relevant to environmental review;

8 (2) issues that must be addressed in the environmental
9 review document for the project;

10 (3) a statement of the anticipated classification of the
11 project under Subchapter D of this chapter (relating to
12 Requirements for Classes of Projects);

13 (4) identification of the department delegate, including
14 the department employee with authority to issue approvals under
15 this chapter on behalf of the department delegate;

16 (5) the name and contact information for the persons to
17 whom communications between the project sponsor and department
18 delegate should be addressed;

19 (6) obligations to coordinate with participating
20 agencies;

21 (7) planned surveys or studies, including a description
22 of additional tasks that may be required pending the results of

1 such surveys or studies;

2 (8) planned public participation;

3 (9) a list of state and federal approval authorities;

4 (10) a list of permits anticipated for the project;

5 (11) any other tasks that the department delegate and
6 project sponsor jointly determine must be undertaken by the
7 project sponsor, including tasks that must be completed before
8 submission of the environmental review document or CE/BCE/PCE
9 documentation and tasks that must be completed later;

10 (12) a plan showing the stages and persons responsible
11 for engaging in informal dispute resolution under §2.52(a) of
12 this subchapter (relating to Dispute Resolution Process) if a
13 dispute arises concerning the preparation or review of the
14 environmental review document or CE/BCE/PCE documentation, with
15 a deadline for completing each stage of informal dispute
16 resolution; and

17 (13) a non-binding schedule that shows when the project
18 sponsor will submit any environmental reports under §2.45 of
19 this subchapter (relating to Optional Early Submittal of
20 Environmental Reports), conduct early communications with
21 resource agencies, conduct coordination with participating
22 agencies, conduct public participation, submit the environmental

1 review document or CE/BCE/PCE documentation for the department
2 delegate's review, and perform any other tasks outlined in the
3 project scope.

4 (d) Optional agreement between project sponsor and
5 department. Notwithstanding any provision of this subchapter,
6 the project scope may include the department delegate's
7 agreement to complete a task that §2.43 of this subchapter
8 (relating to Project Sponsor Responsibilities) otherwise directs
9 is the responsibility of the project sponsor. Any such
10 agreement must clearly identify the task that the department
11 delegate has agreed to complete.

12 (e) Participation by FHWA. For a highway project for which
13 an environmental decision requires FHWA approval, the FHWA may
14 also be a party to the project scope.

15 (f) Collaboration on preparation; dispute resolution. The
16 project sponsor and department delegate will meet to discuss the
17 preparation of the project scope not later than the 30th day
18 after the date that the project sponsor submits its proposed
19 project scope to the department delegate, unless before the end
20 of the 30-day period, the department delegate and project
21 sponsor agree that there is no need to meet to finalize the
22 project scope or agree to meet at a specified later date. If

1 the project sponsor and department delegate do not agree on the
2 project scope, the department delegate will complete a proposed
3 project scope not later than the 60th day after the date that
4 the project sponsor submits its proposed project scope to the
5 department delegate. The project sponsor and the department
6 delegate will resolve any disagreements regarding the project
7 scope using the process set forth in §2.52 of this subchapter,
8 before the deadline set forth in subsection (g) of this section.

9 (g) Deadline for agreed upon project scope.

10 (1) If the project sponsor is a department district,
11 region, or division, the project scope must be prepared and
12 agreed to in writing by the project sponsor and the department
13 delegate before the project sponsor submits an environmental
14 review document or CE/BCE/PCE documentation to the department
15 delegate for its review.

16 (2) A local government that submits notice under §2.47 of
17 this subchapter (relating to Notice by Local Government;
18 Classification of Project) must submit as part of the notice the
19 project scope prepared and agreed to in writing by the project
20 sponsor and the department delegate.

21 (h) Amendment of project scope. If, after completion of
22 the project scope, there is a change in the description of the

1 project, or any other change that affects how the project
2 sponsor will satisfy the requirements of this chapter, the
3 project scope must be amended accordingly. An amendment must be
4 agreed to in writing by the project sponsor and the department
5 delegate.

6 (i) Change in project scope during preparation of an EIS.
7 If the process under §2.103(b)(2)(A) of this chapter (relating
8 to Public Participation for an Environmental Impact Statement or
9 Supplemental Environmental Impact Statement) leads to changes,
10 the project scope under this section must be amended in writing.

11

12 §2.45. Optional Early Submittal of Environmental Reports.

13 (a) Submittal. The project sponsor may submit to the
14 department delegate any environmental reports as they are
15 developed in the course of preparing an environmental review
16 document.

17 (b) Review. The department delegate will review an
18 environmental report submitted under this section and inform the
19 project sponsor in writing of any deficiencies, flaws, or
20 omissions within 60 days of receipt of the environmental report.
21 The project sponsor and department delegate may agree to extend
22 this deadline.

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§2.46. Optional Payment of Fee by Local Government.

(a) Applicability. This section applies to a local government that proposes to submit a notice under §2.47 of this subchapter (relating to Notice by Local Government; Classification of Project) requesting that it be designated the project sponsor for a highway project, and also proposes to pay to the department a fee to cover the cost to review an environmental review document or CE/BCE/PCE documentation.

(b) Effect of payment. Payment of a fee under this section allows a project sponsor that is a local government to prepare, and the department to review, an environmental review document or CE/BCE/PCE documentation for a highway project that does not meet the requirements of §2.42(a) of this subchapter (relating to Environmental Review Limited to Certain Projects). The department may not defer under §2.51 of this subchapter (relating to Deferral of Review) its review of an environmental review document or CE/BCE/PCE documentation for which a local government has paid a fee under this section.

(c) Determination of fee. The amount of the fee will be determined in accordance with this subsection.

(1) After the project scope is approved under §2.44 of

1 this subchapter (relating to Project Scope), the local
2 government will submit to the department delegate a written
3 request for calculation of a fee for review of the environmental
4 review document or CE/BCE/PCE documentation.

5 (2) The department delegate will determine the fee for
6 the review of the environmental review document or CE/BCE/PCE
7 documentation based on the department's costs to contract for
8 that work.

9 (3) The department delegate will provide written notice
10 to the local government of the fee within 30 days after the date
11 of the receipt of the request. The project sponsor and
12 department delegate may agree to extend this deadline.

13 (d) Timing of payment. A local government must pay to the
14 department any fee under this section at the time the entity
15 submits notice under §2.47 for the highway project.

16 (e) Recalculation of fee. The department will recalculate
17 the fee if, at any time, there are changes to the project
18 description or the project classification that significantly
19 increase the department's costs to review the environmental
20 review document or CE/BCE/PCE documentation. The local
21 government shall pay to the department any cost increases
22 calculated under this subsection.

1 (f) Deposit and use. A fee received by the department
2 under this section will be deposited in the state highway fund
3 and used to pay costs incurred under this subchapter.

4 (g) Additional payment; return of excess funds. If the
5 department determines that the actual cost of reviewing a
6 document was more than the fee collected, the local government
7 will submit the additional payment to the department. If the
8 department determines that the fee collected is in excess of the
9 actual cost of reviewing a document, the excess funds paid by
10 the local government shall be returned.

11

12 §2.47. Notice by Local Government; Classification of Project.

13 (a) Written notice required. A local government that
14 proposes to serve as the project sponsor for a highway project
15 will provide written notice to the department delegate
16 identified in the project scope.

17 (b) Content of notice. A notice under this section must
18 include:

19 (1) the project scope prepared under §2.44 of this
20 subchapter (relating to Project Scope);

21 (2) a request for verification of the decision made in
22 the project scope regarding classification of the project under

1 Subchapter D of this chapter (relating to Requirements for
2 Classes of Projects); and

3 (3) a statement regarding the optional payment of a fee
4 under §2.46 of this subchapter (relating to Optional Payment of
5 Fee by Local Government) and, if the local government opts to
6 pay a fee, a check in the amount calculated under §2.46 of this
7 subchapter.

8 (c) Classification of project. Within 30 days of receipt
9 of a notice under this section, or some other deadline agreed to
10 by the project sponsor and department delegate, the department
11 delegate will issue a letter to the local government responding
12 to its request for verification of the classification of the
13 project made in the project scope. This verification of
14 classification is subject to change pending the results of the
15 department's technical review under §2.49 of this subchapter
16 (relating to Technical Review).

17 (d) Approval of local government as project sponsor. The
18 department delegate will, in its sole discretion, determine
19 whether the local government may be designated the project
20 sponsor based on the nature and extent of the local government's
21 and the department's involvement in the project, and whether the
22 local government possesses the required resources and a

1 demonstrated ability to prepare the environmental review
2 document or CE/BCE/PCE documentation and perform related tasks.
3 If the department delegate agrees that the local government may
4 be the project sponsor, it will issue its decision in writing,
5 direct that preparation of the environmental review document or
6 CE/BCE/PCE documentation may begin, and identify the point of
7 contact and address to which the environmental review document
8 or CE/BCE/PCE documentation and other communications related to
9 environmental review of the project should be submitted.

10

11 §2.48. Administrative Completeness Review.

12 (a) Administrative completeness required. All
13 environmental review documents must be determined to be
14 administratively complete by the department delegate before it
15 begins a technical review. This section does not apply to BCEs,
16 PCEs and CEs for which a descriptive letter or environmental
17 issues checklist is prepared because, for these projects, there
18 is no environmental review document.

19 (b) Initiation of review. To initiate administrative
20 completeness review of an environmental review document, the
21 project sponsor will submit the document to the department
22 delegate with a signed cover letter stating that the document is

1 administratively complete, ready for technical review, and
2 compliant with all applicable requirements.

3 (c) Project sponsor's deadline to submit certain types of
4 documents.

5 (1) Applicability. This subsection applies to EAs, and
6 FEISS, but does not apply if the project sponsor is a local
7 government that has paid a fee under §2.46 of this subchapter
8 (relating to Optional Payment of Fee by Local Government).

9 (2) Deadline. The project sponsor will submit to the
10 department delegate for administrative completeness review any
11 environmental review document subject to this subsection at
12 least two years before the date planned for publishing notice to
13 let the construction contract for the project, as indicated in
14 whichever of the following documents was most recently approved:

15 (A) the financially constrained portion of:

16 (i) the approved state transportation improvement
17 program; or

18 (ii) the approved unified transportation program; or

19 (B) a commission order identifying the project as being
20 eligible for environmental review.

21 (3) Date planned for publishing letting notice. If the
22 date planned for publishing letting notice described in

1 paragraph (2) of this subsection is identified in the applicable
2 document only by the fiscal year, for the purposes of this
3 subsection the date is September 1 of the previous year. If it
4 is identified only by the calendar year, for the purposes of
5 this subsection the date is January 1 of that year. If it is
6 identified only by month and year, for the purposes of this
7 section it is the first day of that month.

8 (4) No waiting period for letting contract. This
9 subsection does not require that the project sponsor wait any
10 amount of time after the department delegate renders an
11 environmental decision under §2.49 of this subchapter (relating
12 to Technical Review) before letting the construction contract
13 for the project.

14 (d) Requirements for administrative completeness. The
15 department delegate will not determine an environmental review
16 document to be administratively complete unless it determines
17 that:

18 (1) the description of the project is the same as shown
19 in the project scope prepared under §2.44 of this subchapter
20 (relating to Project Scope) including any amendments of the
21 project scope;

22 (2) the document contains a discussion of each issue

1 required to be addressed in the document by the project scope;

2 (3) all surveys and studies required by the project scope
3 have been completed and are documented in the environmental
4 review document, and any environmental reports prepared have
5 been submitted to the department delegate;

6 (4) all coordination with participating agencies required
7 by the project scope to be completed before approval of the
8 environmental review document has been completed, and both
9 participating agencies' comments and the project sponsor's
10 responses to those comments are documented in the environmental
11 review document;

12 (5) any other tasks required by the project scope before
13 submission of the environmental review document have been
14 completed and documented; and

15 (6) any other tasks required by the project scope to be
16 undertaken after approval of the environmental review document
17 are appropriately identified in writing.

18 (e) Deadline for determination. Not later than the 20th
19 day after the date the department delegate receives the project
20 sponsor's environmental review document for administrative
21 completeness review, the department delegate will:

22 (1) issue a letter confirming that the document is

1 administratively complete and ready for technical review; or
2 (2) decline to issue a letter confirming that the
3 document is administratively complete and ready for technical
4 review, and instead send a written response to the project
5 sponsor specifying in reasonable detail the basis for the
6 department delegate's conclusions, including a listing of any
7 required information determined by the department delegate to be
8 missing from the document.

9 (f) Cooperation by department delegate. If the department
10 delegate declines to issue a letter confirming that an
11 environmental review document is administratively complete under
12 subsection (e) of this section, the department delegate will
13 undertake all reasonable efforts to cooperate with the project
14 sponsor in a timely manner to ensure that the environmental
15 review document is administratively complete.

16 (g) Re-submittal. The project sponsor may revise and re-
17 submit any environmental review document determined by the
18 department delegate to not be administratively complete. The
19 department delegate will, in accordance with subsection (e) of
20 this section, issue a determination letter on the re-submitted
21 document not later than the 20th day after the date the
22 department delegate receives it. There is no limit on the

1 number of times an environmental review document may be revised
2 and re-submitted under this subsection.

3

4 §2.49. Technical Review.

5 (a) Descriptive letter or environmental issues checklist.

6 For BCEs, PCEs and CEs for which a descriptive letter or
7 environmental issues checklist is prepared, the department
8 delegate will begin a technical review of the CE/BCE/PCE
9 documentation when it is received from the project sponsor.

10 (b) Environmental review document. The department delegate
11 will begin a technical review of an environmental review
12 document when the department delegate determines that it is
13 administratively complete under §2.48 of this subchapter
14 (relating to Administrative Completeness Review).

15 (c) Purpose. The purpose of a technical review is for the
16 department delegate to confirm that:

17 (1) for a BCE, PCE or CE for which a descriptive letter
18 or environmental issues checklist is prepared, the documentation
19 provided by the project sponsor shows that the project qualifies
20 as a BCE, PCE or CE, as applicable; or

21 (2) for all other projects, the environmental review
22 document prepared by the project sponsor is:

1 (A) comprehensive in its treatment of all required
2 subject areas;

3 (B) written in a professional and understandable
4 manner;

5 (C) based on sound reasoning and accepted scientific
6 and engineering principles; and

7 (D) legally sufficient, including satisfying the
8 requirements of Subchapter D of this chapter (relating to
9 Requirements for Classes of Projects).

10 (d) Disapproval. The department delegate may conclude that
11 the environmental review document or CE/BCE/PCE documentation
12 cannot be approved because it does not meet the requirements of
13 this section.

14

15 §2.50. Deadlines for Completing Certain Types of Technical
16 Reviews; Suspension of Review Deadlines.

17 (a) Deadlines. This subsection sets out the deadlines that
18 apply to the department delegate's technical review.

19 (1) PCEs. For a highway project classified as a PCE, the
20 department delegate will verify whether the project qualifies as
21 a PCE not later than the 60th day after the date the project
22 sponsor submits the descriptive letter or environmental issues

1 checklist.

2 (2) CEs. For a highway project classified as a CE, the
3 department delegate will render an environmental decision not
4 later than the 90th day after it receives the descriptive letter
5 or environmental issues checklist, or, for CEs for which an
6 environmental review document is prepared, not later than the
7 90th day after it determines that the environmental review
8 document is administratively complete under §2.48 of this
9 subchapter (relating to Administrative Completeness Review).

10 For purposes of this paragraph, the department delegate renders
11 an environmental decision by:

12 (A) approving documentation showing the project meets
13 applicable CE criteria under §2.81 of this chapter (relating to
14 Categorical Exclusions) or declining in writing to do so; or

15 (B) for an FHWA transportation project, by forwarding
16 such documentation to FHWA with an appropriate recommendation.

17 (3) EAs. This paragraph provides the deadlines for a
18 highway project that requires the preparation of an EA.

19 (A) Comment deadline. The department delegate will
20 provide to the project sponsor any department comments on the
21 EA, if possible, in a single set of comments, not later than the
22 90th day after the day that the department delegate determines

1 that the EA is administratively complete under §2.48 of this
2 subchapter.

3 (B) Environmental decision deadline. The department
4 delegate will render an environmental decision not later than
5 the 60th day after the later of:

6 (i) the date that the department delegate receives
7 from the project sponsor a revised EA responsive to and in
8 satisfaction of comments provided by the department delegate
9 under subparagraph (A) of this paragraph; or

10 (ii) the date the public participation process
11 concludes, which if a public hearing is held, is the date that
12 the project sponsor submits to the department delegate the
13 documentation of public hearing required by §2.109 of this
14 chapter (relating to Public Hearing).

15 (4) Rendering an environmental decision on an EA. For
16 the purposes of paragraph (3)(B) of this subsection, the
17 department delegate renders an environmental decision by:

18 (A) issuing a written FONSI, as provided by §2.83 of
19 this chapter (relating to Environmental Assessments) or
20 declining in writing to do so; or

21 (B) for an FHWA transportation project, forwarding the
22 EA and other documentation to FHWA with an appropriate

1 recommendation.

2 (5) EISs. For a highway project that requires an EIS,
3 the department delegate will render an environmental decision
4 not later than the 120th day after the date the department
5 delegate determines that the project sponsor's draft of the
6 final EIS is administratively complete under §2.48 of this
7 subchapter. For purposes of this paragraph, the department
8 delegate renders an environmental decision by:

9 (A) signing and dating the FEIS cover page as provided
10 for by §2.84 of this chapter (relating to Environmental Impact
11 Statements) or declining in writing to do so; or

12 (B) for an FHWA transportation project, forwarding the
13 FEIS to FHWA with an appropriate recommendation.

14 (6) Reevaluations. For a highway project that requires a
15 reevaluation, the department delegate will render an
16 environmental decision not later than the 120th day after the
17 date the department delegate determines that the reevaluation
18 document is administratively complete under §2.48 of this
19 subchapter. For the purposes of this paragraph, the department
20 delegate renders an environmental decision by:

21 (A) signing and dating the reevaluation or declining in
22 writing to do so; or

1 (B) for an FHWA transportation project, forwarding the
2 reevaluation to FHWA with an appropriate recommendation.

3 (b) Suspension of technical review deadlines.

4 (1) Amendments, corrections and revisions.

5 (A) If, at any time during its technical review, the
6 department delegate identifies deficiencies, errors, or needed
7 revisions in an environmental review document or CE/BCE/PCE
8 documentation, the department delegate will notify, in writing,
9 the project sponsor that it is suspending its technical review,
10 and identify any needed amendments, corrections, and revisions.
11 The department delegate will provide to the project sponsor any
12 comments, if possible, in a single set of comments.

13 (B) The project sponsor may make any corrections or
14 revisions to the environmental review document or CE/BCE/PCE
15 documentation identified by the department delegate, and re-
16 submit the revised documentation in whole or in part, as
17 appropriate, for continuation of technical review.

18 (C) Any disagreements over corrections or revisions to
19 an environmental review document or CE/BCE/PCE documentation
20 will be resolved in accordance §2.52 of this subchapter
21 (relating to Dispute Resolution Process).

22 (D) The department delegate's compliance with the

1 deadlines set forth in subsection (a) of this section is
2 suspended from the time the department delegate provides written
3 notice under subparagraph (A) of this paragraph until the time
4 the project sponsor re-submits the environmental review document
5 or CE/BCE/PCE documentation, in whole or in part, in accordance
6 with subparagraph (B) of this paragraph.

7 (2) Additional work regarding highway project.

8 (A) If, at any time during technical review, the
9 project becomes the subject of additional work, including a
10 design change or identification and resolution of new
11 significant issues, the project sponsor will notify the
12 department delegate in writing.

13 (B) Compliance with the deadlines set forth in
14 subsection (a) of this section is suspended from the time the
15 project sponsor provides written notice until the project
16 sponsor gives written notice to the department delegate that the
17 additional work is completed and, if appropriate, submits a
18 revised environmental review document or CE/BCE/PCE
19 documentation, in whole or in part, reflecting the outcome of
20 the additional work.

21 (C) If as a result of additional work the
22 classification of the project changes, technical review under

1 this section is terminated, and the project sponsor may submit
2 the new environmental review document or CE/BCE/PCE
3 documentation to the department delegate under §2.48 of this
4 subchapter.

5 (3) Issues raised by the department's legal counsel. If,
6 at any time during technical review, the department delegate
7 provides written notice to the project sponsor of an issue
8 concerning compliance with applicable law identified by the
9 department's legal counsel, compliance with the deadlines set
10 forth in subsection (a) of this section is suspended from the
11 time the department delegate provides that notice until the time
12 that the project sponsor provides a satisfactory written
13 response to the department delegate and, if appropriate, submits
14 a revised environmental review document or CE/BCE/PCE
15 documentation, in whole or in part, reflecting any warranted
16 changes.

17 (4) Number of suspensions. There is no limit on the
18 number of times technical review of an environmental review
19 document or CE/BCE/PCE documentation may be suspended as
20 provided by this subsection.

21 (5) Suspension by agreement. The project sponsor and
22 department delegate may suspend compliance with the deadlines

1 set forth in subsection (a) of this section at any time by
2 written agreement, in which case the deadlines are suspended
3 until the project sponsor and department delegate lift the
4 suspension and resume technical review by written agreement.

5

6 §2.51. Deferral of Review.

7 (a) Deferral. Not later than 20 days after the date that
8 the project sponsor submits an EA or FEIS, the department
9 delegate may defer undertaking administrative completeness
10 review and technical review of the document if the department
11 delegate, in its sole discretion, determines that it lacks
12 resources to timely review and process all environmental review
13 documents and CE/BCE/PCE documentation that have been, or are
14 expected to be submitted for review. On deferral, the review
15 deadlines set forth in §2.48 of this subchapter (concerning
16 Administrative Completeness Review) and §2.50 of this subchapter
17 (concerning Deadlines for Completing Certain Types of Technical
18 Reviews; Suspension of Review Deadlines) do not apply.

19 (b) Projects eligible for deferral. The only types of
20 environmental review documents that are subject to possible
21 deferral under this section are EAs and FEISs. However, the
22 department delegate may not defer review of an EA or EIS for any

1 project for which a local government sponsor has paid a fee
2 under §2.46 of this subchapter (relating to Optional Payment of
3 Fee by Local Government).

4 (c) Notice to project sponsor. The department delegate
5 will provide written notice to the project sponsor of any
6 determination to defer review of a document under this section.

7 (d) Deadline for review of deferred projects. The
8 department delegate will render an environmental decision on a
9 project for which review of the environmental review document is
10 deferred under this section not later than one year before the
11 date that is planned for publishing notice to let the
12 construction contract for the project, as indicated in whichever
13 of the following documents was most recently approved:

14 (1) the financially constrained portion of the approved:

15 (A) state transportation improvement program; or

16 (B) unified transportation program; or

17 (2) a commission order identifying the project as being
18 eligible for environmental review.

19 (e) Date planned for publishing letting notice. If the
20 date planned for publishing letting notice described in
21 subsection (d) of this section is identified in the applicable
22 document only by the fiscal year, for the purposes of this

1 subsection the date is September 1 of the previous year. If it
2 is identified only by the calendar year, for the purposes of
3 this subsection the date is January 1 of that year. If it is
4 identified only by month and year, for the purposes of this
5 section it is the first day of that month.

6 (f) No waiting period for letting. Subsection (d) of this
7 section does not require the project sponsor to wait any amount
8 of time after the department delegate renders an environmental
9 decision before letting the construction contract for the
10 project.

11

12 §2.52. Dispute Resolution Process.

13 (a) Informal resolution. The project sponsor and
14 department delegate will attempt to informally resolve any
15 dispute concerning implementation of this subchapter before
16 using other methods of dispute resolution. The informal dispute
17 resolution procedures described in the project scope will be
18 implemented.

19 (b) Project sponsor is a department district, region, or
20 division. If a project sponsor is a department district,
21 region, or division, a dispute between the project sponsor and
22 department delegate concerning implementation of this subchapter

1 that cannot be resolved informally under subsection (a) of this
2 section will be brought to the attention of and resolved by the
3 department's executive director within 60 days after that date
4 that the project sponsor or department delegate requests
5 resolution.

6 (c) Project sponsor is a local government. If the project
7 sponsor is a local government, disputes between the project
8 sponsor and department delegate concerning implementation of
9 this subchapter that cannot be resolved informally under
10 subsection (a) of this section will be resolved according to the
11 procedures set out in this subsection.

12 (1) The project sponsor and department delegate will ask
13 their respective attorneys to meet and attempt to resolve the
14 dispute.

15 (2) If the project sponsor's and department delegate's
16 respective attorneys are unable to resolve the dispute, the
17 project sponsor or department delegate may refer the dispute to
18 mediation or other alternative dispute resolution process for
19 resolution. The project sponsor and the department will share
20 equally the expenses of the mediation or other alternative
21 dispute resolution process.

22 (3) Any mediation or other alternative dispute resolution

1 process must be concluded not later than the 60th day after the
2 first date that either the project sponsor or the department
3 delegate requests dispute resolution under subsection (c)(2) of
4 this section.

1 SUBCHAPTER D. REQUIREMENTS FOR CLASSES OF PROJECTS

2 §2.81. Categorical Exclusions.

3 (a) Applicability.

4 (1) This section applies to a transportation project that
5 is classified by the department delegate as a CE. A CE is a
6 project that does not individually or cumulatively have a
7 significant environmental impact.

8 (2) This section applies to a transportation project that
9 is a state transportation project or an FHWA transportation
10 project, except that subsection (d) of this section applies only
11 if the project is an FHWA transportation project.

12 (3) This section does not apply to the purchase of an
13 option to acquire real property, or to the exercise of an option
14 or other early and advance acquisition of land. The required
15 environmental review for those types of transactions is
16 specified in §2.131 of this chapter (relating to Special Right-
17 of-Way Acquisition).

18 (b) Approval for classification as CE.

19 (1) If the project sponsor satisfies the requirements of
20 this subsection the department delegate may approve the
21 classification of a transportation project as a CE.

22 (2) The project sponsor will submit to the department

1 delegate documentation that is a descriptive letter or an
2 environmental issues checklist showing compliance with the
3 section. However, if the department delegate requires an
4 opportunity for hearing under §2.108 of this chapter (relating
5 to Opportunity for Public Hearing) or a public hearing under
6 §2.109 (relating to Public Hearing), the project sponsor must
7 submit, instead of a letter or checklist, a brief environmental
8 review document discussing and analyzing the potential
9 environmental impacts. If the department delegate determines
10 that a transportation project qualifies as a CE, it will
11 document that determination in the project file.

12 (3) The descriptive letter, environmental issues
13 checklist, or environmental review document must show that the
14 project does not violate the restrictions in subsection (c) of
15 this section and that significant environmental impacts will not
16 result based on the results of an evaluation of the project.
17 The project sponsor must indicate if coordination is required,
18 and if so, the portion of coordination that can be completed
19 before final approval of the environmental review document has
20 been completed. The descriptive letter, environmental issues
21 checklist, or environmental review document must summarize all
22 EPICs. EPICs that will be performed during construction must be

1 included in the plans, specifications, and estimates.

2 (c) Restrictions on classification.

3 (1) A CE project directly, indirectly, or cumulatively,
4 may not:

5 (A) induce significant impacts to planned growth or
6 land use for the area;

7 (B) cause any significant environmental impacts to any
8 natural, cultural, recreational, historic, or other resource;

9 (C) cause any significant impacts to air, noise, or
10 water quality;

11 (D) relocate significant numbers of people; or

12 (E) cause significant impacts on travel patterns.

13 (2) The CE action may not involve unusual circumstances
14 or lead to:

15 (A) significant environmental impacts;

16 (B) substantial controversy on environmental grounds;

17 (C) significant impact on properties protected under
18 Parks and Wildlife Code, Chapter 26, Government Code §442.016,
19 or the Texas Antiquities Code (Natural Resources Code, Chapter
20 191); or

21 (D) inconsistencies with federal or state law.

22 (d) FHWA transportation projects.

1 (1) For an FHWA transportation project, in addition to
2 subsections (a) through (c) of this section, the department
3 delegate and project sponsor must comply with any federal laws
4 applicable to the processing of the project as a CE.

5 (2) If the department has a programmatic agreement with
6 FHWA regarding the review and approval of categorically excluded
7 transportation projects, the project sponsor and department
8 delegate will comply with the terms of the agreement. If
9 federal law or a programmatic agreement conflicts with this
10 chapter, the federal law or programmatic agreement provision
11 controls to the extent of the conflict.

12 (3) A programmatic agreement may allow that FHWA's
13 approval is deemed granted if the department delegate finds that
14 a project is within the conditions for approval for a project
15 specified in the agreement. If, however, a programmatic
16 agreement requires that approval be issued by FHWA, or if the
17 department has no programmatic agreement with FHWA, the
18 department delegate will, at the conclusion of technical review,
19 forward the descriptive letter, environmental issues checklist,
20 or environmental review document to FHWA with an appropriate
21 recommendation.

22

1 §2.82. Blanket Categorical Exclusions.

2 (a) Applicability.

3 (1) This section applies to a transportation project that
4 is classified by the department delegate as a BCE because the
5 project is similar to past projects that did not involve
6 significant environmental impacts.

7 (2) This section applies to a state transportation
8 project or an FHWA transportation project, except that
9 subsection (f) of this section applies only if the project is an
10 FHWA transportation project.

11 (b) Approval for classification as BCE.

12 (1) The department delegate may determine that a
13 transportation project be processed as a BCE under this section
14 if:

15 (A) the project is listed in subsection (c) or (d) of
16 this section, or based on department experience, the project is
17 similar to other projects that did not involve significant
18 environmental impacts;

19 (B) the project satisfies the restrictions on
20 classification for CEs set forth in §2.81(c) of this subchapter
21 (relating to Categorical Exclusions);

22 (C) the project satisfies the restrictions on

1 classification for BCEs in subsection (e) of this section;

2 (D) the project does not use public land designated and
3 used as a park, recreation area, wildlife refuge, historic site,
4 or scientific area under Parks and Wildlife Code, Chapter 26;

5 (E) the project sponsor determined whether coordination
6 is required, and if necessary, has carried out the coordination;

7 (F) the project sponsor has determined whether there is
8 any controversy concerning the project, and if necessary, has
9 carried out appropriate public participation to address the
10 controversy following the requirements in §2.101 of this chapter
11 (relating to Public Participation for a Categorical Exclusion);
12 and

13 (G) the project sponsor has determined whether public
14 participation is required under Transportation Code,
15 §203.022(a), and if necessary, has carried out the public
16 participation;

17 (2) The project sponsor will submit to the department
18 delegate documentation that is a descriptive letter or an
19 environmental issues checklist showing compliance with this
20 section. If the department delegate determines that a
21 transportation project qualifies as a BCE, it will document that
22 determination in the project file.

1 (3) The department delegate may group the processing of
2 several projects that are of the same kind.

3 (c) Examples of BCE. A project normally qualifies as a BCE
4 if the project is:

5 (1) an activity that does not involve or lead directly to
6 construction, such as a planning or technical study, a grant for
7 a training or research program, a research activity, approval of
8 a unified work program and any findings required in the planning
9 process, approval of statewide programs, approval of project
10 concepts, or engineering to define the elements of a proposed
11 action or alternatives so that social, economic, and
12 environmental effects can be assessed;

13 (2) approval of utility installations along or across a
14 transportation facility;

15 (3) construction of bicycle or pedestrian lanes, paths,
16 or facilities;

17 (4) an activity included in the state's "highway safety
18 plan";

19 (5) for FHWA transportation projects only, the transfer
20 of federal lands under 23 U.S.C. §317 when the subsequent action
21 is not an FHWA action;

22 (6) installation of noise barriers or alterations to an

- 1 existing publicly owned building to provide for noise reduction;
- 2 (7) landscaping;
- 3 (8) installation of fencing, signs, pavement markings,
- 4 small passenger shelters, traffic signals, or railroad warning
- 5 devices if no substantial land acquisition or traffic disruption
- 6 will occur;
- 7 (9) emergency repairs;
- 8 (10) acquisition of scenic easements;
- 9 (11) for FHWA transportation projects only, determination
- 10 of payback under 23 C.F.R. Part 480 for property previously
- 11 acquired with federal-aid participation;
- 12 (12) improvements to an existing rest area or truck weigh
- 13 stations;
- 14 (13) a ridesharing activity;
- 15 (14) bus or rail car rehabilitation;
- 16 (15) alterations to a facility or vehicle to make it
- 17 accessible for elderly and handicapped persons;
- 18 (16) program administration, technical assistance, or
- 19 operating assistance to transit authorities to continue existing
- 20 service or increase service to meet routine changes in demand;
- 21 (17) the purchase of vehicles by the department if the
- 22 use of the vehicles can be accommodated by an existing facility

1 or by a new facility that itself is within a CE;

2 (18) track or rail bed maintenance and improvements that
3 is carried out within existing right-of-way;

4 (19) purchase and installation of operating or
5 maintenance equipment located within the transit facility and
6 with no significant impacts off the site;

7 (20) promulgation of rules, regulations, or directives;

8 (21) a project consisting of work classified as a seal
9 coat, overlay, resurfacing, rehabilitation, or restoration done
10 within existing right-of-way on an existing road and completely
11 within the footprint of existing base course, or within 10 feet
12 of each side of existing edge of pavement within previously
13 disturbed right-of-way, or within the flowlines of the ditches,
14 whichever is greater;

15 (22) a highway traffic operation improvement project,
16 including the installation of ramp metering control devices and
17 lighting; or

18 (23) approval for disposal of excess right-of-way or for
19 joint or limited use of right-of-way if the proposed use does
20 not have significant adverse impacts.

21 (d) Additional examples of BCE. Additionally, a project
22 normally qualifies as a BCE if the project is:

1 (1) the modernization of a highway by resurfacing,
2 restoration, rehabilitation, reconstruction, adding shoulders,
3 or adding auxiliary lanes, such as parking, weaving, turning, or
4 climbing lanes;

5 (2) a highway safety or traffic operations improvement
6 project, including the installation of ramp metering control
7 devices and lighting;

8 (3) bridge rehabilitation, reconstruction, or replacement
9 or the construction of grade separation to replace an existing
10 at-grade railroad crossing or a new grade separation at an
11 existing intersection for safety improvement if no additional
12 capacity is included;

13 (4) a transportation corridor fringe parking facility;

14 (5) construction of a new truck weigh station or rest
15 area;

16 (6) approval for disposal of excess right-of-way or for
17 joint or limited use of right-of-way, if the proposed use does
18 not have significant adverse impacts;

19 (7) construction of a new bus storage or maintenance
20 facility in an area used predominantly for industrial or
21 transportation purposes if the construction is not inconsistent
22 with existing zoning and is located on or near a street with

1 adequate capacity to handle anticipated bus and support vehicle
2 traffic;

3 (8) approval for changes in access control;

4 (9) rehabilitation or reconstruction of an existing rail
5 or bus building and ancillary facility if only minor amounts of
6 additional land are required and there is not a substantial
7 increase in the number of users;

8 (10) construction of a bus transfer facility that is an
9 open area consisting of passenger shelters, boarding areas,
10 kiosks, and related street improvements if the facility is
11 located in a commercial area or other high activity center in
12 which there is adequate street capacity for projected bus
13 traffic;

14 (11) construction of a rail storage or maintenance
15 facility in an area used predominantly for industrial or
16 transportation purposes if the construction is not inconsistent
17 with existing zoning and there is no significant noise impact on
18 the surrounding community; or

19 (12) a project that adds capacity by adding through lanes
20 on an existing highway within existing right-of-way in areas
21 that are outside the metropolitan planning organization (MPO)
22 metropolitan area boundary (MAB) for MPOs that are in attainment

1 of air quality standards, or outside the non-attainment or
2 maintenance area boundaries for those MPOs that do not meet air
3 quality standards, but not if transportation corridor
4 preservation acquisition was done or if right-of-way acquisition
5 was done by hardship or donation or for protection of an
6 individual parcel.

7 (e) Restrictions on classification. The project must
8 satisfy the restrictions on designation for BCEs in this
9 subsection.

10 (1) New right-of-way, other land acquisition, and
11 displacements are covered by this paragraph.

12 (A) The project may not involve acquisition of more
13 than 30 acres of right-of-way for new land holdings for
14 transportation related facilities, such as a safety rest area,
15 intersection, maintenance yard, or border safety inspection
16 facility.

17 (B) The project may not involve acquisition of more
18 than minor amounts of temporary or permanent, adjacent or
19 contiguous right-of-way or land holdings. For the purposes of
20 this subparagraph, a minor amount is an amount that is not more
21 than the greater of six acres per linear mile or 30 acres of the
22 existing right-of-way acreage within the project's limits or the

1 greater of 20 percent of the land area or 30 acres of a
2 transportation related facility, such as safety rest area,
3 intersection, maintenance yard, or border safety inspection
4 facility.

5 (C) For FHWA transportation projects only, the action
6 will follow the requirements of the Uniform Relocation Act, 42
7 United States Code §§4601, et seq.

8 (D) No commercial or residential displacements may
9 result from the acquisitions.

10 (2) For FHWA transportation projects only, the project
11 will not involve a use of properties protected by Section 4(f) of
12 the Department of Transportation Act, 49 United States Code
13 §§303. Any de minimus actions will be received, processed and
14 approved, if appropriate, by FHWA before a project is allowed to
15 be processed as a PCE.

16 (3) The project may not have been determined by the state
17 historical preservation officer to have an adverse effect on any
18 property determined eligible for the National Register of
19 Historical Places.

20 (4) The project may not be subject to an individual
21 Section 408, Section 404, or Section 10 permit, or Nationwide
22 Permit 23 issued by the United States Army Corps of Engineers.

1 (5) The project may not be subject to a Section 9 permit
2 issued by the United States Coast Guard (USCG). Further, any
3 required USCG advanced approval or lighting exemption
4 concurrence must be received before an action goes to letting.

5 (6) The project will not lead to a determination of other
6 than "no effect" or "may affect, not likely to adversely affect"
7 for federally listed resources under regulations implementing
8 the Endangered Species Act (16 U.S.C. §1531 et seq.). Federally
9 listed resources are defined as federally listed threatened or
10 endangered species, proposed threatened or endangered species,
11 designated critical habitat, and proposed designated critical
12 habitat. Essential fish habitat must meet the equivalent level
13 of effect as applicable under the laws and regulations governing
14 that program.

15 (7) The project may not cause construction in, across, or
16 adjacent to the specific section of the Rio Grande River
17 designated as a component of the Rio Grande in the National
18 System of Wild and Scenic Rivers.

19 (8) The project may not involve known hazardous materials
20 impacts anticipated to adversely affect construction activities,
21 and will not involve the acquisition of known unresolved
22 contaminated sites where the department could reasonably expect

1 to assume liability for corrective action upon acquisition.

2 (9) The project must be consistent with the Coastal Zone
3 Management Plan as determined by the appropriate federal or
4 state agencies.

5 (10) The project must conform to all applicable laws,
6 regulations, implementation plans, or other applicable federal
7 and state air quality requirements under the federal and state
8 Clean Air Acts.

9 (f) FHWA transportation projects.

10 (1) For an FHWA transportation project, in addition to
11 subsections (a) through (e) of this section, the project sponsor
12 and department delegate must comply with any federal laws
13 applicable to the processing of the project as a BCE. If the
14 department has a programmatic agreement with FHWA regarding the
15 review and approval of categorically excluded projects, the
16 department delegate and project sponsor will comply with the
17 terms of the agreement. If federal law or a programmatic
18 agreement conflicts with this chapter, the federal law or
19 programmatic agreement controls to the extent of the conflict.

20 (2) A programmatic agreement may allow that FHWA's
21 approval is considered granted if the department delegate finds
22 that a project is within the conditions for approval for a

1 project specified in the agreement. If, however, a programmatic
2 agreement requires that approval be issued by FHWA, the
3 department delegate will comply with the processing requirements
4 set forth in the programmatic agreement.

5 (3) The department will process a project as a BCE only
6 if the department and FHWA have a programmatic agreement on the
7 processing of a BCE. If the department has a programmatic
8 agreement with FHWA that designates the types of projects listed
9 in subsection (d) of this section as a PCE, the department will
10 process such a project as a PCE following the requirements in
11 the programmatic agreement.

12

13 §2.83. Environmental Assessments.

14 (a) Applicability.

15 (1) This section applies to a transportation project that
16 the department delegate has not classified as a CE, BCE, or PCE,
17 and that does not clearly require the preparation of an EIS, or
18 if the department delegate believes an EA would assist in
19 determining the need for an EIS.

20 (2) This section applies to a transportation project that
21 is a state transportation project or an FHWA transportation
22 project, except that subsection (i) of this section applies only

1 if the project is an FHWA transportation project.

2 (b) Purpose and content.

3 (1) An EA describes the need for the project, any
4 alternatives considered, and the extent of environmental impact,
5 including direct, indirect, and cumulative impacts. The project
6 sponsor will conduct environmental studies and prepare an EA to
7 determine the nature and extent of environmental impacts, and to
8 provide full disclosure of project impacts to the public.

9 (2) If the EA shows that the environmental impacts are
10 not significant, the EA will conclude with a FONSI. If the EA
11 shows that the impacts are significant, the EA will conclude
12 that an EIS is required.

13 (c) Coordination. The project sponsor will comply with
14 §2.12 of this chapter (relating to Project Coordination), and
15 will include in the EA the results of coordination and a summary
16 of the contacts with participating agencies and the comments
17 received.

18 (d) Public participation. The project sponsor will comply
19 with §2.102 of this chapter (relating to Public Participation
20 for an Environmental Assessment) and will include in the EA the
21 results of public participation and the comments received.

22 (e) Organization of EA. To the maximum extent possible, an

1 EA should summarize, incorporate by reference, and include as
2 appendices any separately prepared environmental reports
3 supporting the EA's conclusions, rather than repeat the detailed
4 information from environmental reports in the body of the EA.

5 (f) Circulation of draft EA. The draft EA is subject to
6 the department delegate's approval before it is made available
7 to the public as a department document. For highway projects
8 processed under Subchapter C of this chapter (relating to
9 Environmental Review Process for Highway Projects), the EA is
10 considered approved for public review on the department
11 delegate's completing the technical review of the draft EA under
12 §2.49 of this chapter (relating to Technical Review) and
13 §2.50(a)(3)(A) of this chapter (relating to Deadlines for
14 Completing Certain Types of Technical Reviews; Suspension of
15 Review Deadlines). The project sponsor will comply with §2.102
16 of this chapter concerning notice of the draft EA.

17 (g) Change in determination of impact. If the department
18 delegate determines at any point during the environmental
19 studies that the project may have a significant impact on
20 social, economic, or environmental concerns, the department
21 delegate will direct the project sponsor to prepare an EIS.

22 (h) Preparation of FONSI.

1 (1) Finding of no significant impact (FONSI) means a
2 document that is issued by the department delegate that briefly
3 presents the reasons why the transportation project will not
4 have a significant effect on the human environment and,
5 therefore, for which an environmental impact statement will not
6 be prepared. A FONSI will include the EA, or a summary of it,
7 and will reference any other environmental documents related to
8 the FONSI. If the EA is included, the FONSI may incorporate
9 discussion in the EA by reference rather than repeating it.

10 (2) The department delegate will review the EA, any
11 proposed mitigation measures, coordination with participating
12 agencies, and if a public hearing was held, the summary and
13 analysis, and the comment and response report. The department
14 delegate, if appropriate, will explain the decision in a written
15 FONSI, including how the EA and other environmental documents,
16 coordination, and public participation affected the decision.

17 (3) The project sponsor will give notice of availability
18 of a FONSI in accordance with §2.102 of this chapter.

19 (i) FHWA transportation project. For an FHWA
20 transportation project, in addition to the requirements of
21 subsections (a) through (h) of this section, the department
22 delegate and project sponsor must comply with any federal laws

1 applicable to the processing of the project as an EA. If
2 federal law conflicts with this chapter, federal law controls to
3 the extent of the conflict. At the conclusion of the technical
4 review, the department delegate will forward the environmental
5 review document and any other relevant documentation to FHWA
6 with an appropriate recommendation.

7

8 §2.84. Environmental Impact Statements.

9 (a) Applicability.

10 (1) This section applies to a transportation project if
11 there are likely to be significant environmental impacts. The
12 project sponsor will prepare an EIS that is a detailed public
13 disclosure document that evaluates the impacts of the project.

14 (2) This section applies to a transportation project that
15 is a state transportation project or an FHWA transportation
16 project, except that subsection (f) of this section applies only
17 if the project is an FHWA transportation project.

18 (b) Content.

19 (1) An EIS must include:

20 (A) a discussion of the need and purpose for the
21 project;

22 (B) an evaluation of all reasonable alternatives

1 satisfying the need and purpose, their associated social,
2 economic, and environmental impacts, an evaluation of
3 alternatives eliminated from detailed study, and a determination
4 of the preferred alternative;

5 (C) a summary of studies conducted to determine the
6 nature and extent of environmental impacts;

7 (D) a description of the environmental impact of the
8 project, any unavoidable adverse environmental impacts and
9 associated measures to minimize harm, and any irreversible and
10 irretrievable commitments of resources involved if the project
11 is implemented;

12 (E) a description of the direct, indirect, and
13 cumulative effects of the project; and

14 (F) a discussion of compliance with all applicable laws
15 or reasonable assurances that the requirements can be met, and a
16 description of the mitigation measures that are to be
17 incorporated as EPICs into the project.

18 (2) Coordination. The project sponsor will comply with
19 §2.12 of this chapter (relating to Project Coordination), and
20 will include in the EIS the results of coordination conducted
21 before final approval of the EIS and a summary of the contacts
22 with participating agencies and the comments received.

1 (3) Public participation. The project sponsor will
2 comply with §2.103 of this chapter (relating to Public
3 Participation for an Environmental Impact Statement or
4 Supplemental Environmental Impact Statement) and will include in
5 the EIS the results of public participation and the comments
6 received.

7 (4) Organization. To the maximum extent possible, an EIS
8 should summarize, incorporate by reference and include as
9 appendices any separately prepared environmental reports
10 supporting the EIS's conclusions, rather than repeat the
11 detailed information from environmental reports in the body of
12 the EIS.

13 (c) Processing the EIS.

14 (1) The project sponsor will in the following order:

15 (A) publish a notice of intent and develop a
16 coordination plan under §2.103 of this chapter;

17 (B) conduct public participation and coordination in
18 the manner and at the times prescribed by law;

19 (C) prepare the draft EIS (DEIS);

20 (D) publish the notice of availability of the DEIS;

21 (E) conduct the public hearing;

22 (F) prepare the final EIS (FEIS);

1 (G) publish the notice of availability of the FEIS; and

2 (H) prepare a draft record of decision (ROD).

3 (2) The project sponsor will prepare a supplemental DEIS,
4 a supplemental FEIS, or both if required by §2.86 of this
5 subchapter (relating to Supplemental Environmental Impact
6 Statements).

7 (d) Preparation of DEIS.

8 (1) The project sponsor will prepare a DEIS that meets
9 the requirements of subsection (b) of this section. A preferred
10 alternative may be designated, if appropriate. The preferred
11 alternative may be developed to a higher level of detail than
12 other alternatives. The higher level detail must be limited to
13 work necessary for preliminary design, as described by paragraph
14 (5) of this subsection. The department delegate will review,
15 and will approve the development of the preferred alternative to
16 a higher level of detail if appropriate, and only if that
17 development does not prevent the department from making an
18 impartial decision as to whether to accept another alternative
19 under consideration in the environmental review process.

20 (2) The DEIS is subject to the department delegate's
21 approval before it is made available to the public as a
22 department document. For highway projects processed under

1 Subchapter C of this chapter (relating to Environmental Review
2 Process for Highway Projects), the DEIS is approved for public
3 review on the department delegate's completing the technical
4 review of the DEIS under §2.49 of this chapter (relating to
5 Technical Review).

6 (3) After the department delegate approves the DEIS, the
7 project sponsor will circulate the DEIS and give notice of its
8 availability in accordance with §2.103 of this chapter.

9 (4) After the DEIS is circulated, public hearing held,
10 and comments reviewed, the project sponsor will prepare an FEIS,
11 or a supplemental DEIS if required.

12 (5) For the purposes of paragraph (1) of this subsection,
13 preliminary design is the part of design work on a project that
14 supports one or more of the activities listed in this paragraph
15 but does not include an activity that is an irreversible
16 commitment of resources that forecloses the implementation of
17 reasonable and prudent alternatives. The activities include:

18 (A) evaluation of alternative courses of action;

19 (B) preparation of information to satisfy EPICs
20 requirements;

21 (C) work taken to reduce project risks for the final
22 design and construction phase of the project, including

1 geotechnical investigations, utility surveys, hazardous
2 materials assessments, and other investigations and analyses;
3 and

4 (D) work taken to document a base case as part of an
5 effort to define the requirements that apply to final design or
6 construction.

7 (e) Preparation of FEIS.

8 (1) The project sponsor will prepare an FEIS that meets
9 the requirements of subsection (b) of this section and will
10 prepare a public hearing record under §2.109 of this chapter
11 (relating to Public Hearing).

12 (2) After the department delegate approves the FEIS, the
13 project sponsor will circulate the FEIS and publish notice of
14 its availability in accordance with §2.103 of this chapter.

15 (3) The department delegate will complete and sign a
16 record of decision (ROD) not earlier than the 30th day after the
17 date of the publication of the availability of the FEIS notice
18 in the *Texas Register*. The ROD will present the basis for the
19 decision, summarize the department's responses to comments
20 received, and summarize any mitigation measures and commitments.

21 (4) The department delegate will publish notice of the
22 availability of the ROD in accordance with §2.103 of this

1 chapter.

2 (5) Until the required ROD is signed, no further
3 approvals may be given except for administrative activities
4 taken to secure further project funding.

5 (6) If after a ROD is issued for a project the department
6 approves an alternative that was not identified as the preferred
7 alternative, the department delegate will prepare a revised ROD
8 and will publish notice of the availability of the revised ROD
9 in accordance with §2.103 of this chapter.

10 (f) FHWA transportation project. For an FHWA
11 transportation project, in addition to subsections (a) through
12 (e) of this section, the department delegate and project sponsor
13 must comply with any federal laws applicable to the processing
14 of the project as an EIS. If federal law conflicts with this
15 chapter, federal law controls to the extent of the conflict. At
16 the conclusion of technical review, the department delegate will
17 forward the environmental review document and any other relevant
18 documentation to FHWA with an appropriate recommendation.

19

20 §2.85. Reevaluations.

21 (a) Applicability.

22 (1) This section applies to a transportation project that

1 is classified by the department delegate as a CE, EA, or EIS.

2 (2) This section applies to a transportation project that
3 is a state transportation project or an FHWA transportation
4 project, except that subsection (d) of this section applies only
5 if the project is an FHWA transportation project.

6 (b) Purpose and content.

7 (1) A reevaluation of a DEIS will be prepared by the
8 project sponsor in cooperation with the department delegate if
9 an acceptable FEIS is not submitted to the department delegate
10 within three years after the date that the DEIS is circulated.
11 The purpose of this reevaluation is to determine whether or not
12 a supplement to the DEIS or a new DEIS is needed.

13 (2) A reevaluation of a FEIS will be required before
14 further approvals may be granted if major steps to advance the
15 project, such as authority to undertake final design, authority
16 to acquire a significant portion of the right-of-way, or
17 approval of the plans, specifications, and estimates, have not
18 occurred within three years after the date of the approval of
19 the FEIS, FEIS supplement, or the last major department approval
20 or grant.

21 (3) After approval of the ROD, FONSI, or CE designation,
22 the project sponsor will consult with the department delegate

1 before requesting any major approvals or grants from the
2 department to establish whether or not the approved
3 environmental document or CE designation remains valid for the
4 project. These consultations will be documented if determined
5 necessary by the department delegate.

6 (c) Coordination. The department delegate may require the
7 project sponsor to carry out coordination under §2.12 of this
8 chapter (relating to Project Coordination).

9 (d) FHWA transportation project. For an FHWA
10 transportation project, in addition to subsections (a) through
11 (c) of this section, the department delegate and project sponsor
12 must comply with any federal laws applicable to the processing
13 of the reevaluation. If federal law conflicts with this
14 chapter, federal law controls to the extent of the conflict. At
15 the conclusion of technical review, the department delegate will
16 forward the environmental review document and any other relevant
17 documentation to FHWA with an appropriate recommendation.

18

19 §2.86. Supplemental Environmental Impact Statements.

20 (a) This section applies to a transportation project that
21 is a state transportation project or an FHWA transportation
22 project, except that subsection (g) of this section applies only

1 if the project is an FHWA transportation project.

2 (b) A DEIS, FEIS, or supplemental EIS may be supplemented
3 at any time. An EIS will be supplemented if the department
4 delegate determines that:

5 (1) changes to the project would result in significant
6 environmental impacts that were not evaluated in the EIS; or

7 (2) new information or circumstances relevant to
8 environmental concerns and bearing on the project or its impacts
9 would result in significant environmental impacts not evaluated
10 in the EIS.

11 (c) A supplemental EIS will not be necessary if:

12 (1) the changes to the project, new information, or new
13 circumstances result in a lessening of adverse environmental
14 impacts evaluated in the EIS without causing other environmental
15 impacts that are significant and were not evaluated in the EIS;
16 or

17 (2) the department delegate decides to approve an
18 alternative fully evaluated in an approved final EIS but not
19 identified as the preferred alternative, in which event a
20 revised ROD will be prepared and circulated in accordance with
21 §2.84 of this chapter (relating to Environmental Impact
22 Statements) and §2.103 of this chapter (relating to Public

1 Participation for an Environmental Impact Statement or
2 Supplemental Environmental Impact Statement).

3 (d) If the department delegate is uncertain of the
4 significance of the new impacts, the project sponsor will
5 develop appropriate environmental studies or, if the department
6 delegate considers appropriate, an EA to assess the impacts of
7 the changes, new information, or new circumstances. If, based
8 on the studies, the department delegate determines that a
9 supplemental EIS is not necessary, the department delegate must
10 indicate that determination in the project file.

11 (e) A supplement is to be developed using the same process
12 and format (i.e., DEIS, FEIS, and ROD) as an original EIS,
13 except that scoping is not required.

14 (f) In some cases, a supplemental EIS may be required to
15 address issues of limited scope, such as the extent of proposed
16 mitigation or the evaluation of location or design variations
17 for a limited portion of the overall project. In such an event,
18 the preparation of a supplemental EIS does not necessarily:

- 19 (1) prevent the granting of new approvals;
20 (2) require the withdrawal of previous approvals; or
21 (3) require the suspension of any project activities not
22 directly affected by the supplement.

1 (g) If the changes in question are of such a magnitude as
2 to require a reassessment of the entire project, or more than a
3 limited portion of the overall project, the department delegate
4 will suspend any activities that would have an adverse
5 environmental impact or limit the choice of reasonable
6 alternatives, until the supplemental EIS is completed.

7 (h) For an FHWA transportation project, in addition to the
8 requirements of subsections (a) through (g) of this section, the
9 department delegate and project sponsor must comply with any
10 federal laws applicable to the processing of the supplemental
11 EIS. If federal law conflicts with this chapter, federal law
12 controls to the extent of the conflict. At the conclusion of
13 technical review, the department delegate will forward the
14 environmental review document and any other relevant
15 documentation to FHWA with an appropriate recommendation.

1 SUBCHAPTER E. PUBLIC PARTICIPATION

2 §2.101. Public Participation for a Categorical Exclusion.

3 (a) Requirements.

4 (1) The project sponsor will hold a Meeting with Affected
5 Property Owners (MAPO) under §2.106 of this subchapter (relating
6 to Meeting with Affected Property Owners (MAPO)) if required
7 under that section.

8 (2) The project sponsor may hold a public meeting under
9 §2.107 of this subchapter (relating to Public Meeting) if
10 appropriate.

11 (3) The project sponsor will provide an opportunity for
12 public hearing under §2.108 of this subchapter (relating to
13 Opportunity for Public Hearing) if appropriate and will hold a
14 public hearing under §2.109 of this subchapter (relating to
15 Public Hearing) if appropriate.

16 (4) The project sponsor will prepare a transcript of any
17 hearing and a certification that a required hearing or hearing
18 opportunity was offered. If a transcript is prepared, it will
19 be accompanied by copies of all written statements from the
20 public, including those submitted at the public hearing or
21 during an announced period after the public hearing. The
22 project sponsor also will prepare a report that summarizes all

1 comments and that a gives a response to each comment. The
2 project sponsor will provide notice of availability of the
3 documentation required by this paragraph and information on how
4 to obtain copies. The project sponsor will provide, at a
5 minimum, notice to the metropolitan planning organization,
6 publish notice in a local newspaper having general circulation
7 in the area affected by the project, and provide notice to the
8 local media through press release. If there is no local
9 newspaper in the area affected by the project, the project
10 sponsor will publish notice in any newspaper having general
11 circulation in the area affected by the project.

12 (b) After completion of public participation. Changes to
13 the project may require additional public participation under
14 §2.104 of this subchapter (relating to Additional Public
15 Participation for Projects Affected by Significant Changes).

16
17 §2.102. Public Participation for an Environmental Assessment.

18 (a) Requirements.

19 (1) The project sponsor may hold a public meeting under
20 §2.107 of this subchapter (relating to Public Meeting) if
21 appropriate.

22 (2) On the department delegate's approving the

1 circulation of a draft EA under §2.83 of this chapter (relating
2 to Environmental Assessments), the project sponsor will make the
3 EA available for public inspection at the project sponsor's
4 office. The project sponsor will send notice of availability of
5 the EA, describing the project and its impacts, to the
6 participating agencies identified during coordination.

7 (3) The project sponsor will provide an opportunity for
8 public hearing under §2.108 of this subchapter (relating to
9 Opportunity for Public Hearing) if appropriate and will hold a
10 public hearing under §2.109 of this subchapter (relating to
11 Public Hearing) if appropriate.

12 (4) The project sponsor will prepare a transcript of any
13 hearing and a certification that a required hearing or hearing
14 opportunity was offered. If a transcript is prepared, it will
15 be accompanied by copies of all written statements from the
16 public, including those submitted at the public hearing or
17 during an announced period after the public hearing. The
18 project sponsor also will prepare a report that summarizes all
19 comment and gives a response to each. The project sponsor will
20 provide notice of availability of the documentation required by
21 this paragraph and information on how to obtain copies. The
22 project sponsor will provide, at a minimum, notice to the

1 metropolitan planning organization, publish notice in a local
2 newspaper having general circulation in the area affected by the
3 project, and provide notice to the local media through press
4 release. If there is no local newspaper in the area affected by
5 the project, the project sponsor will publish notice in any
6 newspaper having general circulation in the area affected by the
7 project.

8 (5) If a FONSI is issued concerning the project, the
9 project sponsor will give notice of availability of the FONSI to
10 the metropolitan planning organization and the local media
11 through press release.

12 (b) After completion of public participation. Changes to
13 the project may require additional public participation under
14 §2.104 of this subchapter (relating to Additional Public
15 Participation for Projects Affected by Significant Changes).

16

17 §2.103. Public Participation for an Environmental Impact
18 Statement or Supplemental Environmental Impact Statement.

19 (a) Notice of Intent (NOI).

20 (1) An NOI will be published before the preparation of an
21 EIS or supplemental EIS.

22 (2) The NOI must:

1 (A) briefly describe the project and possible
2 alternatives;

3 (B) describe the proposed scoping process including
4 whether, when, and where any scoping meeting will be held, state
5 that a scoping meeting provides an opportunity for participating
6 agencies and the public to be involved in defining the need for
7 and purpose of the proposed project, and to assist in
8 determining the range of alternatives for consideration in the
9 DEIS;

10 (C) give a proposed schedule for completion of the
11 environmental review process, if available; and

12 (D) give the name and address of the designated
13 department employee who can answer questions about the project
14 and the EIS.

15 (3) The project sponsor will prepare a draft NOI. If the
16 department delegate approves the NOI, the department delegate
17 will submit it for publication in the *Texas Register*. The
18 project sponsor will publish the NOI, at a minimum, in local
19 newspapers having general circulation in the area affected by
20 the project. If there is no local newspaper in the area affected
21 by the project, the project sponsor will publish the NOI in any
22 newspaper having general circulation in the area affected by the

1 project.

2 (b) Coordination plan.

3 (1) A coordination plan is a plan for coordinating public
4 and agency participation in and comment on the environmental
5 review process. After publication of the NOI, the project
6 sponsor will prepare a coordination plan.

7 (2) A coordination plan is intended to involve, through
8 scoping meetings, the participating agencies and the public in
9 the early stages of development of an EIS, and is distinct from
10 the process for preparation of the project scope prepared by a
11 project sponsor and department delegate under §2.44 of this
12 chapter (relating to Project Scope). Except as provided in
13 paragraph (4) of this subsection, a coordination plan must:

14 (A) identify the participating agencies;

15 (B) provide for an initial public scoping meeting that
16 addresses:

17 (i) a draft need and purpose statement, together with
18 backup materials and a request for comments on it;

19 (ii) a draft coordination plan for the entire
20 environmental review process, and a request for comments on it;

21 (iii) the range of alternatives, and the known or
22 potential significant impacts;

1 (iv) a proposed method of alternatives analysis
2 specifying the level of detail for each alternative proposed by
3 the project sponsor, and a request for comments;

4 (v) information for issue identification and
5 resolution, including information regarding the environmental
6 and socioeconomic resources located within the project area and
7 the general locations of the alternatives under consideration;
8 and

9 (vi) identification of the potential participating
10 agencies;

11 (C) provide for a second public scoping meeting that
12 addresses:

13 (i) the approved coordination plan;

14 (ii) the range of alternatives based on the approved
15 need and purpose; and

16 (iii) the method and level of detail used for the
17 alternatives analysis, after taking into consideration input
18 given during the initial public scoping meeting.

19 (D) provide a deadline for comment on the DEIS, which
20 may not be earlier than the 45th day after the day that the DEIS
21 becomes available.

22 (3) A coordination plan may include a schedule for

1 completion of the environmental review process for the project.

2 In establishing the schedule, the project sponsor will consider:

3 (A) the responsibilities of participating agencies
4 under applicable laws;

5 (B) resources available to participating agencies;

6 (C) overall size and complexity of the project;

7 (D) the overall schedule for and cost of the project;

8 and

9 (E) the sensitivity of the natural and historic
10 resources that could be affected by the project.

11 (4) Scoping meetings are not required for a supplemental
12 EIS.

13 (5) The project sponsor must obtain the approval of a
14 coordination plan in accordance with this subparagraph.

15 (A) The project sponsor will submit the draft
16 coordination plan to the department delegate for approval before
17 the initial public scoping meeting.

18 (B) The project sponsor will circulate the approved
19 draft coordination plan to the agencies identified in the
20 coordination plan and invite them to be participating agencies
21 during the environmental review process, to comment on the draft
22 coordination plan, and to comment on a proposed schedule for the

1 completion of the environmental process if one is available.
2 The project sponsor will consider comments by the agencies
3 concerning need and purpose, the range of alternatives, the
4 method of alternatives analysis and level of detail, and the
5 schedule for completing the environmental review process if
6 available. The project sponsor will circulate the approved
7 draft coordination plan to the public under subsection (e) of
8 this section. The project sponsor will consider comments by the
9 public concerning purpose and need and the range of
10 alternatives. The project sponsor will allow not less than 30
11 days for comment on the draft coordination plan and schedule.
12 For an EIS the deadline will be after the date of the initial
13 scoping meeting and before the date of the second scoping
14 meeting. After the comment period, the project sponsor will
15 submit the coordination plan to the department delegate for
16 approval.

17 (6) The project sponsor will give a copy of the approved
18 coordination plan and any approved schedule for completion of
19 the environmental review process to the participating agencies
20 and will make it available to the public.

21 (7) A deadline for comment by agencies and the public
22 established in a coordination plan may be changed in accordance

1 with this paragraph.

2 (A) A deadline may be extended for good cause. The
3 good cause must be documented in the project file.

4 (B) The project sponsor must obtain the concurrence of
5 participating agencies to shorten a deadline, and their
6 concurrence must be documented in the project file.

7 (c) Public meeting. The project sponsor will hold at least
8 one public meeting under §2.107 of this chapter (relating to
9 Public Meeting).

10 (d) Notice of availability of DEIS. Notice of availability
11 of the DEIS will be made under this subsection after the DEIS is
12 approved under §2.84(d) of this chapter (relating to
13 Environmental Impact Statements).

14 (1) The department delegate will publish in the *Texas*
15 *Register* a notice of availability that describes a circulation
16 and comment period of not less than 45 days and that specifies
17 where comments may be sent.

18 (2) The project sponsor will:

19 (A) transmit the DEIS directly to participating
20 agencies;

21 (B) coordinate directly with participating agencies in
22 accordance with memoranda of understanding under Subchapter B of

1 this chapter (relating to Memoranda of Understanding with
2 Natural Resource Agencies), memoranda of agreement, or other
3 formal and informal agreements with those entities;

4 (C) publish in local newspapers a notice of
5 availability that describes a circulation and comment period of
6 not less than 45 days and that specifies where comments may be
7 sent, unless there is no local newspaper in the area affected by
8 the project, in which event the project sponsor will publish the
9 notice of availability in a newspaper having general circulation
10 in the area affected by the project; and

11 (D) coordinate directly with local agencies, including
12 the appropriate metropolitan planning organization.

13 (e) Circulation of draft coordination plan, DEIS, and FEIS.
14 This subsection applies to the circulation of the draft
15 coordination plan that is approved under this section, and to
16 the circulation of the DEIS and FEIS if the respective documents
17 are approved under §2.84 of this chapter (relating to
18 Environmental Impact Statements). The project sponsor will
19 prepare an initial printing of the document in sufficient
20 quantity to meet the request for copies that can be reasonably
21 expected from agencies, organizations, and individuals. Copies
22 will be provided upon request. The project sponsor will place

1 copies of a draft coordination plan or DEIS in appropriate
2 designated public locations, such as local government offices,
3 libraries, or other public institutions. The project sponsor
4 will transmit the FEIS to a person, organization, or agency that
5 made substantive comments on the DEIS or that requests a copy.
6 The project sponsor will give the document to the participating
7 agencies. The project sponsor may charge a fee not to exceed
8 the cost of reproduction. For a lengthy document, the project
9 sponsor or department delegate may provide alternative
10 circulation processes, including the circulation of a summary.

11 (f) Public hearing concerning DEIS. After a DEIS is
12 approved under §2.84(d) of this chapter, the project sponsor
13 will hold a public hearing under §2.109 of this subchapter
14 (relating to Public Hearing) on the DEIS. The project sponsor
15 will make the DEIS available at a designated location for the
16 general public at least 45 days before the date of the public
17 hearing.

18 (g) Notice of availability of FEIS. Notice of availability
19 will be made under this subsection after the FEIS is approved
20 under §2.84 of this chapter.

21 (1) The department delegate will publish notice of
22 availability of the FEIS in the *Texas Register*. The project

1 sponsor will provide, at a minimum, notice of availability of
2 the FEIS to the metropolitan planning organization, publish the
3 notice in a local newspaper having general circulation in the
4 area affected by the project, and provide the notice to the
5 local media through press release. If there is no local
6 newspaper in the area affected by the project, the project
7 sponsor will publish the notice in a newspaper having general
8 circulation in the area affected by the project. The notice
9 will:

10 (A) include information on obtaining copies; and
11 (B) state that the public will have not less than 30
12 days after the date of the publication of the notice in the
13 *Texas Register* to submit comments, and explain how the public
14 may submit comments.

15 (2) The project sponsor will coordinate directly with
16 other governmental entities in accordance with memoranda of
17 understanding under Subchapter B of this chapter, memoranda of
18 agreement, or other formal and informal agreements with those
19 entities.

20 (h) Notice of ROD. The department delegate will publish
21 notice of the ROD in the *Texas Register*. The project sponsor
22 will, at a minimum, publish a notice of availability of the ROD

1 in local newspapers. If there is no local newspaper in the area
2 affected by the project, the project sponsor will publish notice
3 of the ROD in a newspaper having general circulation in the area
4 affected by the project.

5 (i) Public comments. The project sponsor will document the
6 number of positive, negative, or neutral public comments
7 received regarding the project as expressed by the public
8 through the public participation process. Based on
9 documentation submitted by the project sponsor, the department
10 delegate will:

11 (1) present the information to the commission in an open
12 meeting; and

13 (2) report the information on the department's website in
14 a timely manner.

15 (j) After completion of public participation. Changes to
16 the project may require additional public participation under
17 §2.104 of this chapter (relating to Additional Public
18 Participation for Projects Affected by Significant Changes).

19
20 §2.104. Additional Public Participation for Projects Affected
21 by Significant Changes.

22 (a) Under Transportation Code, §203.022(b), the project

1 sponsor will provide an additional opportunity for public
2 participation for a project that has received project approval
3 if:

4 (1) the project involves the addition of one or more
5 vehicular lanes to an existing highway, or to the construction
6 of a highway at a new location; and

7 (2) conditions relating to land use, traffic volumes, and
8 traffic patterns have changed significantly since the project
9 was originally subject to public review and comment.

10 (b) If this section applies the project sponsor will
11 provide an opportunity for public hearing under §2.108 of this
12 chapter (relating to Opportunity for Public Hearing).

13

14 §2.105. Notice of Impending Construction. Under Transportation
15 Code, §203.022(c), the project sponsor will send notice of the
16 impending construction of a project that involves either the
17 addition of at least one travel lane or construction of a
18 project on new location to landowners abutting the roadway as
19 identified by tax rolls, and to affected local governments and
20 public officials.

21

22 §2.106. Meeting with Affected Property Owners (MAPO).

1 (a) The project sponsor will hold one or more MAPOs if a
2 project requires detours, a minimal amount of right-of-way
3 acquisition, or temporary construction easements.

4 (b) The project sponsor will hold a MAPO if a minor
5 location or design revision occurs after the environmental
6 review document or CE/BCE/PCE documentation has been approved
7 and the public participation requirements have been completed.

8 (c) The affected property owners include:

9 (1) property owners adjacent to the project; and

10 (2) other affected property owners, such as a business or
11 governmental entity that may be affected.

12 (d) The project sponsor will maintain the record of a MAPO
13 and forward a summary to the department delegate.

14

15 §2.107. Public Meeting.

16 (a) Meetings with the public and other entities. A project
17 sponsor may hold one or more public meetings with local public
18 officials, interested citizens, the general public, and local,
19 neighborhood, or special interest groups for the purpose of
20 exchanging ideas and collecting input on the need for, and
21 possible alternatives to, a project. The decision to hold a
22 public meeting should be based on the project's type,

1 complexity, and level of public concern that is based on
2 environmental issues. A public meeting will be held during the
3 drafting of a DEIS.

4 (b) Requirements for public meeting. If the project
5 sponsor elects to hold a public meeting or if this section
6 requires a public meeting, the requirements of this subsection
7 apply.

8 (1) The project sponsor will hold the meeting as early as
9 it determines feasible to assure public input into project
10 planning.

11 (2) The meeting will provide a free exchange of project
12 views and concerns.

13 (3) The meeting will be held during project planning and
14 development in order to keep the public informed.

15 (4) The meeting will be held at a time and place
16 convenient to the public in the vicinity of the project.

17 (5) Notice of a public meeting will be appropriate for
18 the anticipated audience to maximize attendance.

19 (6) The project sponsor will maintain a list of elected
20 public officials, individuals, and groups interested in
21 transportation projects, and will provide notification to these
22 individuals and groups of a public meeting.

1 (c) Summary of meeting. After a public meeting the project
2 sponsor will prepare a written summary of the meeting, including
3 the comments received, responses to comments, and modifications,
4 if any, to the project resulting from comments. The summary
5 will be forwarded to the department delegate for review.

6

7 §2.108. Opportunity for Public Hearing.

8 (a) Opportunity to make request.

9 (1) An opportunity to request a public hearing will be
10 given for a project that requires the acquisition of significant
11 amounts of right of way, substantially changes the layout or
12 function of the connecting roadways or of the facility being
13 improved, adds capacity, has a measurable adverse impact on
14 abutting real property, or otherwise causes a substantial
15 social, economic, or environmental effect, or for which the
16 project sponsor or department delegate determines it is in the
17 public interest.

18 (2) An opportunity to request a public hearing will be
19 given for a project if the results of the environmental studies
20 support a FONSI.

21 (3) If a public hearing is not required under §2.109 of
22 this subchapter (relating to Public Hearing), the project

1 sponsor may afford an opportunity for public hearing as another
2 form of public participation.

3 (b) When to provide opportunity. The opportunity to
4 request a public hearing will be given after the department
5 delegate determines the environmental review document or
6 CE/BCE/PCE documentation is technically complete and approves it
7 as a full-disclosure document suitable for public review.

8 (c) Procedural requirements.

9 (1) The project sponsor will publish, at a minimum, two
10 notices of the opportunity to request a public hearing in local
11 newspapers having general circulation. If there is no local
12 newspaper in the area affected by the project, the project
13 sponsor will publish notice in a newspaper having general
14 circulation in the area affected by the project.

15 (A) The first notice will be published at least 30 days
16 before the deadline set by the project sponsor for submission of
17 written requests for holding a public hearing.

18 (B) The second notice will be published not more than
19 20 or less than seven days before the deadline.

20 (2) If a substantial portion of the population that will
21 be affected by the project has limited English proficiency
22 (LEP), the notices also must be published in the primary

1 language of the LEP population in accordance with Presidential
2 Executive Order 13166, Improving Access to Services for Persons
3 with Limited English Proficiency.

4 (3) The project sponsor also will mail notice of the
5 opportunity to request a public hearing to landowners abutting
6 the roadway, as identified by tax rolls, and to affected local
7 governments and public officials.

8 (4) No further action will be taken to hold a public
9 hearing if at the end of the time set for affording an
10 opportunity to request a public hearing no requests have been
11 received or if the project sponsor has addressed the concerns of
12 the persons requesting the public hearing. The project sponsor
13 will submit a certification of the public participation process
14 to this effect to the department delegate.

15 (d) Certification if no hearing held. If, after providing
16 an opportunity for a public hearing, the project sponsor does
17 not hold a public hearing, the project sponsor will submit to
18 the department delegate an original certification of the public
19 participation process signed by an authorized representative of
20 the project sponsor containing a statement that the requirements
21 of this section have been met.

22 (e) Exception. A project sponsor is not required to comply

1 with this section if the project sponsor elects to hold a public
2 hearing.

3

4 §2.109. Public Hearing.

5 (a) Purpose. A public hearing is held to present project
6 alternatives and to encourage and solicit public comment. The
7 hearing will be held after location and design studies are
8 developed and the environmental review document or CE/BCE/PCE
9 documentation is considered technically complete and approved as
10 a full disclosure document suitable for public review by the
11 department delegate.

12 (b) Public hearing required. A project sponsor will hold a
13 public hearing if:

14 (1) a request for hearing is received under §2.108 of
15 this subchapter (relating to Opportunity for Public Hearing);

16 (2) in accordance with Transportation Code, §201.604,
17 between one and nine individuals submit a written request for a
18 hearing and the project sponsor is unable to address the
19 concerns of the individuals, or if ten or more individuals
20 submit a written request for a hearing, except that a public
21 hearing is not required under this paragraph if a public hearing
22 has been held concerning the project before the requests are

1 received or if the hearing requests are received after the
2 environmental review document or CE/BCE/PCE documentation for
3 the project is approved; or

4 (3) the project is:

5 (A) a project with substantial public interest or
6 controversy;

7 (B) an EIS project;

8 (C) a high-profile project;

9 (D) a project that requires the taking of public land
10 designated and used as a park, recreation area, wildlife refuge,
11 historic site or scientific area, as covered in the Parks and
12 Wildlife Code, Chapter 26;

13 (E) a project requiring a public hearing under
14 Transportation Code, §203.021; or

15 (F) a project that requires the taking of private land
16 encumbered by an agricultural conservation easement purchased
17 under Natural Resources Code, Chapter 183.

18 (c) Documents available for public inspection. The project
19 sponsor will make available to the public at designated
20 locations for not less than 30 days before the date of a public
21 hearing the maps, drawings, environmental studies, and documents
22 concerning the project. For an EIS project, the project sponsor

1 will make the DEIS available for not less than 45 days.

2 (d) Notice of public hearing.

3 (1) A notice will contain:

4 (A) the date, time, and location of the hearing;

5 (B) a description of the project termini, need and
6 purpose, improvements, and right of way needs;

7 (C) a reference to maps, drawings, environmental
8 studies and documents, and any other information about the
9 project that is available for public inspection at the
10 designated locations;

11 (D) a reference to the potential for relocation of
12 residences and businesses and the availability of relocation
13 assistance for persons displaced;

14 (E) a statement that written comments may be presented
15 for a period of 10 days after the hearing;

16 (F) the address where written comments may be
17 submitted;

18 (G) whether the project encroaches on a floodplain,
19 wetland, or a sole-source aquifer recharge zone;

20 (H) in accordance with Parks and Wildlife Code,
21 §26.002, a statement, if applicable, that the project will
22 require the taking of public land designated and used as a park,

1 recreation area, wildlife refuge, historic site, or scientific
2 area;

3 (I) in accordance with Natural Resources Code,
4 §183.057, a statement, if applicable, that the project will
5 require the taking of land protected by an agricultural
6 conservation easement; and

7 (J) a statement that provision will be made for persons
8 with special communication or physical needs related to the
9 public hearing if requested.

10 (2) Publication of notice.

11 (A) Except as provided in subparagraph (B) of this
12 paragraph, the project sponsor, at a minimum, will publish a
13 notice twice in local newspapers having general circulation. If
14 there is no local newspaper in the area affected by the project,
15 the project sponsor will publish notice in a newspaper having
16 general circulation in the area affected by the project. The
17 first notice will be published at least 30 days before the date
18 of the hearing. The second notice will be published not more
19 than 20 days or less than seven days before the date of the
20 hearing.

21 (B) For projects requiring the taking of public land
22 designated and used as a park, recreation area, wildlife refuge,

1 historic site, or scientific area under Parks and Wildlife Code,
2 Chapter 26, the project sponsor will publish notice under this
3 subparagraph.

4 (i) The notice must be given in writing to the
5 person, organization, department, or agency that has supervision
6 of the land proposed to be used or taken.

7 (ii) The notice must state clearly the proposed
8 program or project and the date, time, and place for the public
9 hearing. The notice must be given at least 30 days before the
10 date for the public hearing.

11 (iii) Notice must also be given to the public by
12 publishing a notice similar to that specified in this section
13 once a week for three consecutive weeks. The last days of
14 publication may not be less than one week or more than two weeks
15 before the date of the hearing. The notice must be published in
16 a newspaper of general circulation that is published at least
17 six days a week in the county where the land proposed to be used
18 or taken is situated. If such a newspaper does not exist, the
19 notice must be published in a qualifying newspaper that is
20 published in any county adjoining the county where the land is
21 situated. If such a newspaper is not published in any adjoining
22 county, the notice must be published in a qualifying newspaper

1 published in the nearest county to the county where the land is
2 situated.

3 (3) If a substantial portion of the population that will
4 be affected by the project has limited English proficiency
5 (LEP), the project sponsor will also publish notice in the
6 primary language of the LEP population in accordance with
7 Presidential Executive Order 13166, Improving Access to Services
8 for Persons with Limited English Proficiency.

9 (4) The project sponsor will mail notice to landowners
10 abutting the proposed project, as identified by tax rolls, and
11 to affected local governments and public officials.

12 (5) The project sponsor will maintain a list of elected
13 public officials, individuals, and groups interested in
14 transportation projects, and will provide notification to these
15 individuals and groups of a public hearing.

16 (e) Public hearing and comment. The project sponsor will
17 make all testimony given at a public hearing a part of the
18 public hearing record. A person or other entity will submit
19 written comment to the project sponsor not later than 10 days
20 after the date of the close of the public hearing.

21 (f) Documentation of public hearing. If the project
22 sponsor held a public hearing, the project sponsor will submit

1 to the department delegate for review and approval:

2 (1) two copies each of the verbatim transcript, the
3 public hearing summary and analysis, and the comment and
4 response report;

5 (2) the original certification of the public
6 participation process signed by an authorized representative of
7 the project sponsor, containing:

8 (A) general information on the public hearing;

9 (B) a statement regarding consideration of the
10 economic, social, and environmental impacts of the project;

11 (C) a statement regarding consideration of the
12 statutory provisions of the Civil Rights Act of 1964 and the
13 Civil Rights Restoration Act of 1987;

14 (D) a statement regarding the project's consistency
15 with planning goals and objectives; and

16 (E) a statement that the requirements of this section
17 have been met.

18

19 §2.110. After Completion of Public Participation. After
20 completion of the public participation process, the project
21 sponsor will publicize through press releases project specific
22 planning and development decisions in order to keep the public

- 1 informed of any new or continuing issues. Changes to the
- 2 project may require additional public involvement.

1 SUBCHAPTER F. REQUIREMENTS FOR SPECIFIC PROJECTS AND PROGRAMS

2 §2.131. Special Right-of-Way Acquisition.

3 (a) Use or taking of designated public land.

4 (1) The department delegate may approve the use or taking
5 of public land that is designated and used as a park, recreation
6 area, scientific area, wildlife refuge, or historic site only if
7 the department delegate determines:

8 (A) there is no feasible and prudent alternative to the
9 use or taking of the land; and

10 (B) the project includes all reasonable planning to
11 minimize harm to the land as a park, recreation area, scientific
12 area, wildlife refuge, or historic site resulting from the use
13 or taking, including mitigation measures.

14 (2) The department delegate may make a determination
15 required under this subsection only after holding a properly
16 noticed public hearing in accordance with §2.109 of this chapter
17 (relating to Public Hearing).

18 (b) Use or taking of protected private land.

19 (1) The department delegate may approve the use or taking
20 of private land encumbered by an agricultural conservation
21 easement purchased under Natural Resources Code, Chapter 183
22 only if the department delegate determines:

1 (A) there is no feasible and prudent alternative to the
2 use or taking of the land; and

3 (B) the project includes all reasonable planning to
4 minimize harm to the land resulting from the use or taking.

5 (2) The department delegate may make a determination
6 required under this subsection only at a properly noticed public
7 hearing held in accordance with §2.109 of this chapter.

8 (c) Compliance with other requirements. If a project is
9 subject to subsection (a) or (b) of this section, the department
10 delegate and project sponsor also will require compliance with
11 all applicable environmental analysis, documentation, and
12 interagency coordination requirements in this chapter.

13 (d) Early and advance acquisition.

14 (1) The department may not acquire real property by early
15 or advance acquisition without first completing a categorical
16 exclusion analysis, using the standards set forth in this
17 subsection rather than those provided under §2.81 of this
18 chapter (relating to Categorical Exclusions). The department
19 will identify in its categorical exclusion analysis any
20 environmental issues or liabilities associated with the
21 acquisition. The department will not make an early or advance
22 acquisition if it requires relocation or the use or taking of

1 public land that is designated and used as a park, recreation
2 area, scientific area, wildlife refuge, or historic site. The
3 subject of a categorical exclusion analysis under this
4 subsection will be the acquisition of a specific parcel or group
5 of parcels only, and shall not assume or imply approval of the
6 related transportation project. Early or advance acquisition
7 will not influence any aspect of the final environmental
8 decision, including any evaluation of build or no-build
9 alternatives or alternative alignments for the transportation
10 project. A categorical exclusion analysis is not required for a
11 construction project for which there is an approved
12 environmental review document or CE/BCE/PCE documentation.

13 (2) An option is an agreement by which the owner of a
14 property conveys to the department the right to purchase the
15 property on terms specified in the option. Exercising an option
16 is the acquisition of property under an option agreement. The
17 department may acquire an option, exercise an option, or both,
18 before a final decision has been made as to whether the project
19 will be located on the property that is the subject of the
20 option. The department may purchase an option if the department
21 conducts a site assessment and determines that the property does
22 not appear to contain significant contamination of hazardous

1 materials, or other potential environmental concerns. The
2 purchase of an option does not require a categorical exclusion
3 determination. The exercise of an option is a type of early and
4 advance acquisition of property, and the requirements of
5 paragraph (1) of this subsection apply to the exercise.

6

7 §2.132. Gulf Intracoastal Waterway Projects.

8 (a) Definitions. The following words and terms, when used
9 in this section, have the following meanings, unless the context
10 clearly indicates otherwise.

11 (1) Beneficial use project--The productive and positive
12 use of dredged material as proposed by the U.S. Army Corps of
13 Engineers.

14 (2) Federal interagency coordination team--A group
15 established to review proposed federal development projects
16 related to the Gulf Intracoastal Waterway and whose duties
17 include advising on the determinations of consistency with the
18 Texas Coastal Management Program.

19 (3) (GIWW) Gulf Intracoastal Waterway--The main channel,
20 not including tributaries or branches, of the shallow draft
21 navigation channel running from the Sabine River southward along
22 the Texas coast to the Brownsville Ship Channel near Port

1 Isabel.

2 (4) (GIWAC) Gulf Intracoastal Waterway Advisory
3 Committee--An interagency committee comprised of members
4 appointed by the department to represent state agencies having
5 jurisdiction in the protection of the state's natural, historic,
6 and economic resources. The GIWAC is created for the purpose of
7 advising and assisting the department:

8 (A) in developing a unified method to address problems
9 and recommend solutions for the needs of the GIWW, for the
10 protection of the environment and the state's natural and
11 historic resources affected by the GIWW, and for the promotion
12 of the economic welfare of the state's interest in the GIWW;

13 (B) in developing proposals for a disposal plan or a
14 beneficial use project that will address dredged material
15 disposal involving a segment of the GIWW identified by the U.S.
16 Army Corps of Engineers as in need of maintenance dredging; and

17 (C) on the acquisition of disposal sites in an
18 environmentally sensitive and operationally suitable manner.

19 (5) Jurisdiction--

20 (A) for a city, the area within the incorporated city
21 limits and the extraterritorial jurisdiction of a city; and

22 (B) for a county, any area within the boundaries of

1 that county, excluding incorporated areas and areas within the
2 extraterritorial jurisdiction of a city.

3 (b) Federal and nonfederal sponsorship. The U.S. Army
4 Corps of Engineers is responsible for maintaining the GIWW. The
5 commission, under Transportation Code, Chapter 51, is the
6 nonfederal sponsor of the GIWW.

7 (c) Initiation of proposed disposal plans or beneficial use
8 projects.

9 (1) Disposal plan. The department may participate in the
10 development of a disposal plan for dredged material.

11 (2) Laguna Madre disposal plans. Legislative approval is
12 necessary for any substantive changes to the disposal plan
13 developed for the Laguna Madre reach of the GIWW dated October
14 11, 2002.

15 (3) Beneficial use project. The department may
16 participate in the development of a beneficial use project for
17 dredged material.

18 (A) Proposals. The department will accept from the
19 U.S. Army Corps of Engineers proposals for beneficial use
20 projects in the broad use categories of:

21 (i) habitat development;

22 (ii) beach nourishment;

- 1 (iii) aquaculture;
- 2 (iv) parks and recreation;
- 3 (v) agriculture, forestry, and horticulture;
- 4 (vi) strip mine reclamation and solid waste
5 management;
- 6 (vii) shoreline stabilization and erosion control;
- 7 (viii) construction and industrial use;
- 8 (ix) material transfer, such as transfer for fill,
9 dikes, levees, parking lots, roads; and
- 10 (x) multiple purposes, which is a combination of two
11 or more of the categories listed in this subparagraph on a
12 single dredging project.
- 13 (B) Submittal of proposals. The U.S. Army Corps of
14 Engineers will submit proposals in writing to the executive
15 director or the executive director's designee. The proposals
16 will include:
- 17 (i) a description of the proposed beneficial use
18 project and anticipated benefits;
- 19 (ii) a map delineating the location or locations of
20 the proposed beneficial use project;
- 21 (iii) a proposed project schedule including an
22 anticipated completion date;

1 (iv) a detailed estimate of the project cost,
2 including an estimate of the U.S. Army Corps of Engineers'
3 financial contributions to the project; and

4 (v) a plan addressing the operation and maintenance
5 of the facility created by or benefiting from the beneficial use
6 project.

7 (4) Early coordination. The department will initiate and
8 oversee early coordination with appropriate state and federal
9 agencies to develop a proposal for disposal plans or beneficial
10 use projects.

11 (5) Investigation.

12 (A) The department will use a task force to investigate
13 disposal plans and beneficial use projects and evaluate the
14 environmental and operational suitability of each. The task
15 force will include representatives from state and federal
16 agencies having jurisdiction in the protection of the state's
17 natural, historic, and economic resources, and the GIWAC or
18 federal interagency coordination team.

19 (B) The department or U.S. Army Corps of Engineers will
20 lead any field investigations. The task force agencies will be
21 requested to participate in field investigations and to provide
22 to the department written evaluations of the disposal plans and

1 beneficial use projects investigated.

2 (C) The GIWAC or federal interagency coordination team
3 will review the investigations and discuss with the department
4 any proposed disposal alternatives or beneficial use projects.

5 (d) Preparation of environmental review document. Upon the
6 identification of a disposal proposal or beneficial use proposal
7 related to the GIWW, the department will assist with the
8 preparation of the environmental review document by the U.S.
9 Army Corps of Engineers under 42 U.S.C. §§4321 et seq. and
10 applicable federal rules. The department will assist with any
11 public participation process conducted by the U.S. Army Corps of
12 Engineers.

13 (e) Procedures for state acquisition of real property. If
14 the commission proposes the acquisition of real property
15 necessary to enable it to meet its responsibilities as the
16 nonfederal sponsor of the GIWW, or if the commission proposes to
17 participate in the cost of a project to beneficially use dredge
18 material that requires the acquisition of an interest in real
19 property, the commission will complete the following procedures.

20 (1) Public hearing. The commission, through the
21 department, will hold a public hearing to receive evidence and
22 testimony concerning the desirability of the plan or project.

1 (A) The department will publish notice of a plan or
2 project and the date, time, and place of a hearing at least once
3 a week for three successive weeks before the hearing in a
4 newspaper of general circulation that is published in the county
5 seat of each county in which any part of a proposed dredge
6 material disposal site, channel alteration, or beneficial use
7 project would be located.

8 (B) The commission also will publish notice of the
9 hearing in at least one edition of the *Texas Register*.

10 (C) The department will also publish notice of the
11 hearing on the department's website.

12 (D) The U.S. Army Corps of Engineers' environmental
13 documents and findings will be on display at the public hearing.

14 (E) Comments, testimony, or evidence may be given in
15 person or in writing during the public hearing or may be
16 submitted in writing to the department during the prescribed
17 public comment period.

18 (2) Commission approval. After the public hearing the
19 commission may approve a plan or project under this paragraph,
20 and implement it including the acquisition of real property, if
21 it determines the following:

22 (A) The proposed plan or project can be accomplished

1 without an unjustifiable waste of publicly or privately owned
2 natural resources or a permanent and substantial adverse impact
3 on the environment, wildlife, or fisheries.

4 (B) For a project to beneficially use dredge material,
5 in addition to the requirements of subparagraph (A) of this
6 paragraph, the project:

7 (i) is proposed by the U.S. Army Corps of Engineers;

8 (ii) proposes one or more beneficial use activities
9 having a direct relationship of function or impact to the GIWW;

10 (iii) has substantial local support, as evidenced
11 through the public participation process and documentation,
12 including, at a minimum, a resolution or other official document
13 from the governing body of the city or county with jurisdiction
14 over the project area or if the project area is located in more
15 than one jurisdiction, from the governing body of the city or
16 county within which a majority of the project area is located,
17 in consultation with the other involved jurisdictions. For the
18 purposes of this clause, the jurisdiction of a city is the area
19 within the incorporated limits and the extraterritorial
20 jurisdiction of the city, and the jurisdiction of a county is
21 the area within the boundaries of the county, excluding
22 incorporated areas and areas within the extraterritorial

1 jurisdiction of a city;

2 (iv) is limited to a logical unit of work and capable
3 of being implemented and completed within a reasonable time as
4 determined by the department;

5 (v) is consistent with the Texas Coastal Management
6 Program; and

7 (vi) is consistent with the financial participation
8 requirements of this clause.

9 (I) The commission will establish an eligible cost
10 of the proposed beneficial use project by calculating the total
11 estimated cost of the project in excess of the established
12 federal standard for dredged material disposal. Except as
13 provided in subclause (II) of this clause, the department's
14 financial participation in the project will not exceed 50
15 percent of eligible cost.

16 (II) The commission may authorize participation at
17 levels exceeding 50 percent if the commission determines the
18 additional participation will result in extraordinary
19 environmental or economic benefits or the costs are reasonably
20 comparable to the costs of providing property to accommodate
21 traditional upland disposal.

22 (III) Department funding may not be used for

1 maintenance or operation of a beneficial use project.

2 (3) Commission agreement. If the commission approves
3 department participation in a beneficial use project, the
4 commission will enter into an agreement with the U.S. Department
5 of the Army to participate in the cost of the project.

6 (f) Public participation for state acquisition of real
7 property. Before conducting a public hearing required by
8 subsection (e) of this section, the department will conduct the
9 following additional public participation.

10 (1) Preliminary involvement.

11 (A) The department will notify a public or private
12 landowner of a parcel's environmental and operational
13 suitability for the proposed disposal plan or beneficial use
14 project, and offer to meet with the landowner to answer any
15 questions about the proposed disposal plan or beneficial use
16 project.

17 (B) The department also will notify the landowner of
18 any public meeting or public hearing on the proposed disposal
19 plan or beneficial use project.

20 (C) Meetings on the proposed disposal plan or
21 beneficial use project, as one form of public participation,
22 will be held with individuals owning property adjacent to the

1 project and with other affected property owners, such as
2 businesses and governmental entities that may be affected, if
3 those individuals or owners request such a meeting.

4 (D) Public meetings, as another form of public
5 participation, may be held in accordance with paragraph (2) of
6 this subsection.

7 (2) Public meetings. Notice of a public meeting will be
8 advertised through legal notices in a newspaper of general
9 circulation published in the county seat of each county in which
10 the proposed dredged material disposal plan or beneficial use
11 project is located. The notice will also be posted on the
12 department's website.

13

14 §2.133. Maintenance Projects and Programs.

15 (a) Maintenance programs. This section applies to the
16 following maintenance programs and the maintenance projects
17 undertaken under them:

18 (1) Bridge maintenance--Activities to repair or perform
19 preventive maintenance on bridges, culverts, retaining walls,
20 and barrier walls.

21 (2) Customer service--Activities related to providing the
22 traveling public with services, including maintaining rest

1 areas, picnic areas, and litter barrels.

2 (3) Debris and spills--Activities related to removing
3 debris from the right of way, including litter, roadway debris,
4 spills, and sweeping.

5 (4) Drainage--Activities related to maintaining drainage
6 systems and slopes on the right of way and within drainage
7 easements, including roadside ditches, slopes, channels, creeks,
8 streams, and rivers.

9 (5) Ferry maintenance--The maintenance and operation of
10 ferries under Transportation Code, §342.001.

11 (6) Maintenance enhancement--Maintenance activities that
12 improve the access to a highway or improve the performance of
13 the highway system such as the installation of turn lanes,
14 turnouts, turn-arounds, driveways, or shoulders.

15 (7) Pavement maintenance--Activities to repair or perform
16 preventive maintenance on pavements, including work performed on
17 the pavement surface, base, sub-base, sub-grade, or embankment.

18 (8) Roadside appurtenances--Activities related to
19 fixtures along the roadways, including signs, delineators,
20 mailboxes, guard rails, attenuators, illumination, and signals.

21 (9) Traffic pavement markings--Activities related to
22 markings on the pavement to control vehicular movement,

1 including installing and removing striping, specialty markings,
2 and pavement markings.

3 (10) Vegetation management--Activities performed to
4 establish and maintain the condition of the roadway and roadside
5 on the state highway right of way, including mowing operations,
6 pest management, revegetation techniques, erosion control,
7 wildflower preservation and propagation, tree and brush trimming
8 and removal, and the preservation of threatened and endangered
9 plant species.

10 (b) Environmental review.

11 (1) Programs. At least every ten years the department
12 will conduct an environmental review following the requirements
13 of this chapter for each of the maintenance programs listed in
14 subsection (a) of this section.

15 (2) Projects. Except as provided in the next succeeding
16 sentence, no individual environmental review under this chapter
17 will be required for maintenance projects undertaken under
18 programs listed in subsection (a) of this section. An
19 individual environmental review under this chapter will be
20 required for a maintenance project that is conducted or
21 supported by FHWA, unless FHWA has approved an environmental
22 review of the program under which the project is conducted.

1

2 §2.134. Coastal Management Program.

3 (a) Scope. The approval of transportation projects and
4 programs located in whole or in part within the coastal
5 boundary, as defined in 31 TAC §503.1 (relating to Coastal
6 Management Program Boundary), are actions subject to the Texas
7 Coastal Management Program (CMP), 31 TAC Part 16. A project or
8 program will be approved unless it is found to be inconsistent
9 with the goals and policies of the CMP, as described in 31 TAC
10 Chapter 501 (relating to the Coastal Management Program). For
11 the purposes of this section, "transportation projects and
12 programs" includes the projects and programs for which an
13 environmental document is prepared under this subchapter and
14 Gulf Intracoastal Waterway projects for which the commission
15 authorizes right-of-way acquisition and beneficial use projects.

16 (b) Thresholds. In accordance with 31 TAC §505.26
17 (relating to Approval of Thresholds for Referral), the
18 department's threshold for referral of actions to the General
19 Land Office is the approval of transportation projects and
20 programs requiring an environmental impact statement. The
21 threshold for actions concerning the Gulf Intracoastal Waterway
22 is the approval by the commission for acquisitions of rights of

1 way for dredged material disposal and for beneficial use
2 projects, unless:

3 (1) the federal agency's consistency determination for
4 the federal activity or the federal development project included
5 the dredged material disposal plan or the beneficial use
6 project, and the consistency is affirmed in accordance with 31
7 TAC Chapter 506 (relating to Council Procedures for Federal
8 Consistency with Coastal Management Program Goals and
9 Priorities);

10 (2) the Coastal Coordination Council or General Land
11 Office previously issued a consistency agreement under 31 TAC
12 Chapter 506 for the federal activity or the federal development
13 project that included the disposal plan or the beneficial use
14 project; or

15 (3) the disposal or placement of dredged material in
16 existing dredge disposal sites or within existing beneficial use
17 projects meets the provisions of 31 TAC Chapter 506.

- 1 SUBCHAPTER C. ADDITIONAL REQUIREMENTS FOR CERTAIN TYPES
2 OF TRANSPORTATION PROJECTS
3 §2.44. Gulf Intracoastal Waterway Projects.
4 §2.48. Coastal Management Program.

Repeals