

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

The Texas Transportation Commission (commission) finds it necessary to adopt the repeal of §§5.70-5.74 and adopt new §§5.101-5.111, all relating to the Transportation Development Credit Program to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted repeals and new sections, attached to this minute order as Exhibits A - C, 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 §§5.70-5.74 and new §§5.101-5.111 are adopted and are authorized for filing with the Office of the Secretary of State.

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

Submitted and reviewed by:

James M. Bass
Chief Financial Officer

Recommended by:

Ph. [Signature]
Executive Director

113281 SEP 27 12

Minute Number Date Passed

Adoption Preamble

The Texas Department of Transportation (department) adopts the repeal of §§5.70-5.74 and new §§5.101-5.111, concerning the Transportation Development Credit Program. The repeal of §§5.70-5.74 and new §§5.101-5.111 are adopted without changes to the proposed text as published in the July 13, 2012 issue of the *Texas Register* (37 TexReg 5242) and will not be republished.

EXPLANATION OF ADOPTED REPEALS AND NEW SECTIONS

The department is currently modifying the process for allocating, awarding, and administering transportation development credits. To achieve this goal the department has determined that changes to the existing rules are necessary. To streamline this process the department is repealing the existing sections relating to the Transportation Development Credit Program and simultaneously proposing new sections, which will be located in new Subchapter H.

Rider 45 to the appropriations to the department for fiscal years 2012-2013 (page VII-37, General Appropriations Act, 2011) stipulates that the department "shall make it a priority to utilize transportation development credits as the required match in a manner that would maximize the utilization of federal funds on eligible projects. The state funds then no longer needed to be used as the required federal match should then be available

1 to be targeted to priority projects in an effort to streamline
2 their delivery."

3

4 On June 30, 2011, the Texas Transportation Commission
5 (commission) created the Transportation Development Credit
6 Rulemaking Advisory Committee (committee) to be comprised of
7 seven members, including representatives from the three
8 metropolitan planning organizations (MPOs) with the largest
9 local balances of credits, the Public Transportation Advisory
10 Committee, an MPO located in a non-transportation management
11 area, a metropolitan transit provider and a city that partners
12 with the state on transportation projects. The committee met
13 four times with department staff to render advice, review draft
14 proposals, and make specific recommendations. In addition to
15 the committee, the department solicited comments on the draft
16 rules from the Public Transportation Advisory Committee and
17 other transit industry stakeholders.

18

19 Many of the new sections incorporate concepts included in the
20 current rules; however, the department has made numerous
21 substantive changes to address the requirements of Rider 45 and
22 the recommendations of the committee. The new rule
23 organizational structure subdivides the rules into smaller
24 sections and reorganizes them so that the new rules are easier
25 to read. The revision also permits easier location of and

1 access to specific provisions and makes them more
2 understandable.

3
4 New §5.101, Purpose, indicates that the purpose of the
5 subchapter is to set out the policies and procedures for
6 implementation of the program and references the federal law
7 that enables the use of transportation development credits.

8
9 New §5.102, Program Goals, sets out the overarching goals for
10 the program, based on the requirements of Rider 45 and the
11 recommendations of the committee. Each MPO and the commission
12 must consider these goals when awarding credits to eligible
13 projects under new §§5.106, 5.108, or 5.109, as appropriate.

14
15 New §5.103, Definitions, incorporates most of the definitions
16 from current §5.71 without substantive change. The defined term
17 "Executive director" has been removed because it is unnecessary.
18 The definition for "Metropolitan planning organization" and the
19 acronym "MPO" have been added since the new rules place certain
20 responsibilities on these entities.

21
22 New §5.104, Availability of Credits, requires the department to
23 provide information on the availability of transportation
24 development credits as part of the development and update of the
25 Unified Transportation Program (UTP). The UTP is a ten-year

1 statewide plan for transportation project development.

2 Including this information in the UTP will provide interested
3 parties with access to the number of credits that have been
4 previously awarded or may be available for award to eligible
5 projects in the future.

6

7 New §5.105, Regional Allocation, provides that the commission
8 will allocate 75 percent of the state's locally earned credits
9 to the MPO in whose planning area they were earned. The purpose
10 of this change is to allow more local control over the award of
11 transportation development credits.

12

13 New §5.106, Award by Metropolitan Planning Organizations, sets
14 out the basic framework that will govern the award of credits by
15 each MPO receiving an allocation under new §5.105. This section
16 does not prescribe the type of process that must be used for
17 evaluating applications and awarding credits; however, each MPO
18 will ultimately be responsible for developing guidelines
19 pertaining to the award and management of its credit allocation.
20 The MPO must consider how the award of credits will expand the
21 availability of funding for transportation projects, based on
22 the goals specified in new §5.102. This section also requires
23 the MPO to incorporate information regarding the award of
24 credits into its Transportation Improvement Program, as
25 appropriate, and submit an annual report to the department

1 documenting the management of its credit allocations. Finally,
2 this section specifies that a public transit agency located
3 within the planning area of an MPO must first seek the award of
4 credits from the MPO, unless the credits will apply to a program
5 that is administered by the department on a statewide basis.
6 The department and the committee agree that it is more
7 appropriate for metropolitan transit agencies to seek credits
8 for eligible projects from the regional allocation. The
9 exception applies to statewide programs funded through the
10 department, in which case it is more appropriate for the
11 commission to award any associated credits.

12

13 New §5.107, Award by Commission, provides that the commission
14 will award the transportation development credits that are not
15 locally earned and the state's locally earned credits that are
16 not otherwise allocated to MPOs under new §5.105. This section
17 authorizes the commission to award the credits using a
18 competitive process or in its sole discretion. In addition,
19 this section creates a specific allocation for public transit
20 projects, which is equal to the lesser of 15 million credits or
21 fifty percent of the total number of credits available for award
22 by the commission on the first day of the fiscal year. The
23 purpose of this particular allocation is to demonstrate the
24 department's continued commitment to using transportation
25 development credits in support of public transit projects.

1
2 New §5.108, Competitive Process, incorporates many of the
3 general concepts contained in current §5.72. This section
4 provides that the department may periodically publish a notice
5 soliciting proposals for award of transportation development
6 credits, and describes the content of the proposal. The
7 commission will award credits after considering the potential of
8 the project to expand the availability of funding for
9 transportation projects, based on the goals specified in new
10 §5.102.

11
12 New §5.109, Discretionary Award, continues the practice
13 authorizing the commission to make an award solely in its
14 discretion as described in current §5.73. In making an award,
15 the commission will consider the potential of the project to
16 expand the availability of funding for transportation projects,
17 based on the goals identified in new §5.102, and, if the project
18 is located within the planning boundaries of an MPO, the
19 expressed opinion, if any, of the MPO.

20
21 New §5.110, Administration, modifies the language in current
22 §5.74 and clarifies that the agreement must be executed before
23 credits may be used. This section also provides that if an
24 entity does not sign a project agreement within two years after
25 the date of the award of the credits, the credits may be awarded

1 to another eligible entity. The purpose of this new requirement
2 is to aid in the efficient and effective use of transportation
3 development credits.

4

5 New §5.111, Transfer of Credits, authorizes an MPO to transfer
6 credits to another MPO or the commission and requires that such
7 a transfer must be documented in the annual report described in
8 new §5.106. This provision will provide flexibility in the use
9 of transportation development credits throughout the state.

10

11 COMMENTS

12 Comments in support of the proposed repeals and new sections
13 were received from Hill Country Transit District.

14

15 STATUTORY AUTHORITY

16 The repeals and new sections are adopted under Transportation
17 Code, §201.101, which provides the commission with the authority
18 to establish rules for the conduct of the work of the
19 department.

20

21 CROSS REFERENCE TO STATUTE

22 23 U.S.C. §120.

1 SUBCHAPTER H. TRANSPORTATION DEVELOPMENT CREDIT PROGRAM

2 §5.101. Purpose. Under 23 U.S.C. §120, a state may use certain
3 toll revenue expenditures, known as transportation development
4 credits, as credit toward the non-federal share of certain
5 projects. This subchapter specifies the policies and procedures
6 for the implementation of the Transportation Development Credit
7 Program.

8

9 §5.102. Program Goals. The goals of the Transportation
10 Development Credit Program are:

11 (1) to maximize the use of available federal funds,
12 particularly in situations in which federal funds otherwise
13 would be unused because of the inability to provide the non-
14 federal share;

15 (2) to increase the availability of state and local funds
16 that otherwise would be used as the non-federal share, so that:

17 (A) a limited number of priority projects may be funded
18 without federal funds, in an effort to streamline project
19 delivery;

20 (B) a limited number of priority projects that are not
21 eligible for federal funding may be supported from state or
22 local funds; and

23 (C) available federal transit funds may be used that

1 otherwise would be unused because of the inability to provide
2 the non-federal share or to allow funds that would be used as
3 the non-federal share to be used for other transit projects;

4 (3) to support public transit; and

5 (4) to further any other stated goals of the commission
6 or the metropolitan planning organization responsible for
7 awarding credits.

8

9 §5.103. Definitions. The following words and terms, when used
10 in this subchapter, shall have the following meanings, unless
11 the context clearly indicates otherwise.

12 (1) Commission--The Texas Transportation Commission.

13 (2) Department--The Texas Department of Transportation.

14 (3) Eligible entity--Any entity that is eligible for
15 funding under Title 23, U.S.C. or Chapter 53 of Title 49,
16 U.S.C., is in good standing with the department, and has no
17 deficiencies or findings of noncompliance.

18 (4) Eligible project--A highway, rail, transit, bicycle
19 or pedestrian project, as authorized by Title 23, U.S.C., other
20 than an emergency relief program authorized by 23 U.S.C. §125,
21 or Chapter 53 of Title 49, U.S.C.

22 (5) Locally earned credits--Transportation development
23 credits earned from:

- 1 (A) a project of a regional tollway authority;
- 2 (B) a project of a county acting under Transportation
3 Code, Chapter 284;
- 4 (C) a project of a regional mobility authority;
- 5 (D) an international bridge not owned by the state; and
- 6 (E) a department project located within the geographic
7 area of a regional tollway authority, a county acting under
8 Transportation Code Chapter 284, or a regional mobility
9 authority that has developed one or more toll projects.
- 10 (6) Metropolitan planning organization--An organization
11 designated in certain urbanized areas to carry out the
12 transportation planning process as required by 23 U.S.C §134.
- 13 (7) MPO--A metropolitan planning organization.
- 14 (8) Transportation development credits--A financing tool
15 approved by the Federal Highway Administration that allows
16 states to use federal obligation authority without the
17 requirement of non-federal matching dollars. Credits are earned
18 when the state, a toll authority, or a private entity funds a
19 capital transportation investment with toll revenues earned on
20 existing toll facilities, excluding revenues needed for debt
21 service, returns to investors or the operation and maintenance
22 of toll facilities.

23

1 §5.104. Availability of Credits. The department will provide
2 information on the availability of transportation development
3 credits as part of the development and periodic update of the
4 Unified Transportation Program.

5
6 §5.105. Regional Allocation. The commission will allocate for
7 award under §5.106 of this subchapter (relating to Award by
8 Metropolitan Planning Organizations) 75 percent of the state's
9 locally earned credits to the MPO in whose planning area they
10 were earned.

11

12 §5.106. Award by Metropolitan Planning Organizations.

13 (a) Each MPO will award to projects within its planning
14 area the locally earned transportation development credits
15 allocated to it under §5.105 of this subchapter (relating to
16 Regional Allocation).

17 (b) The MPO must develop and use a documented process for
18 the receipt and evaluation of applications and the award of
19 credits. This process must also provide opportunities for
20 public review and comment at key decision points.

21 (c) The MPO must consider how the award of credits will
22 expand the availability of funding for transportation projects,
23 based on the goals specified in §5.102 of this subchapter

1 (relating to Program Goals).

2 (d) The MPO will notify each applicant of the results of
3 the selection process.

4 (e) The MPO will incorporate information regarding the
5 award of credits into the Transportation Improvement Program, as
6 appropriate.

7 (f) Not later than December 1st of each year, the MPO will
8 submit a report to the department documenting the management of
9 its credit allocations for the previous fiscal year.

10 (g) A public transit agency located within the planning
11 area of an MPO must first seek the award of credits under this
12 section for an eligible project, unless the credits will serve
13 as the non-federal share for a public transit program that is
14 administered by the department on a statewide basis.

15

16 §5.107. Award by Commission.

17 (a) Process. The commission will award the transportation
18 development credits that are not locally earned credits and the
19 state's locally earned credits that are not allocated to MPOs
20 under §5.105 of this subchapter (relating to Regional
21 Allocation). The commission will make the awards:

22 (1) using the competitive process described in §5.108 of
23 this subchapter (relating to Competitive Process); or

1 (2) in its sole discretion subject to §5.109 of this
2 subchapter (relating to Discretionary Award).

3 (b) Allocation for public transit projects. For each
4 fiscal year the commission will allocate for award by the
5 commission an amount of transportation development credits that
6 may be used during that fiscal year only to support public
7 transit projects. The minimum number of credits allocated under
8 this subsection is equal to the lesser of 15 million credits or
9 fifty percent of the total number of credits available for award
10 by the commission on the 1st day of that fiscal year. The
11 allocation under this subsection is not intended to set the
12 maximum number of credits that may ultimately be awarded for
13 public transit projects under this subchapter during that fiscal
14 year.

15

16 §5.108. Competitive Process.

17 (a) Program call. The department may periodically publish
18 a notice in the *Texas Register* soliciting proposals for award of
19 transportation development credits under this section.

20 (b) Proposal. An eligible entity may submit a proposal for
21 an eligible project in response to the notice published under
22 subsection (a) of this section. The proposal must include:

23 (1) a detailed description of the project and the need

1 for the project;

2 (2) a detailed explanation of how the award of credits
3 will expand the availability of funding for transportation
4 projects, considering the goals specified in §5.102 of this
5 subchapter (relating to Program Goals); and

6 (3) if the project is located within the planning area of
7 an MPO, evidence that the eligible entity obtained the
8 concurrence of the MPO before the entity submitted the proposal
9 under this section.

10 (c) Additional information. The executive director of the
11 department or the executive director's designee may require
12 supplemental information to clarify the issues described in
13 subsection (b)(1) of this section.

14 (d) Award. The commission will award credits under this
15 section after considering the potential of the project to expand
16 the availability of funding for transportation projects, based
17 on the goals specified in §5.102 of this subchapter.

18
19 §5.109. Discretionary Award. In making an award solely in its
20 discretion, the commission will consider:

21 (1) the potential of a project to expand the availability
22 of funding for transportation projects, based on the goals
23 specified in §5.102 of this subchapter (relating to Program

1 Goals); and

2 (2) if the project is located within the planning
3 boundaries of an MPO, the expressed opinion, if any, of the MPO.

4

5 §5.110. Administration.

6 (a) Before an entity that is awarded transportation
7 development credits under this subchapter may use those credits,
8 the entity must enter into a project agreement with the
9 department if the credits are awarded by the commission or with
10 the MPO that awarded the credits.

11 (b) If an entity does not sign a project agreement within
12 two years after the date of the award of the credits, the
13 credits may be awarded to another eligible entity under this
14 subchapter.

15 (c) An entity that enters into a project agreement under
16 this section shall comply with all specified terms and
17 conditions of the agreement.

18

19 §5.111. Transfer of Credits.

20 (a) An MPO may transfer transportation development credits
21 allocated to it under §5.105 of this subchapter (relating to
22 Regional Allocation) to another MPO or to the commission.

23 (b) The transferring MPO shall document each transfer under

- 1 this section in its annual report required under §5.106 of this
- 2 subchapter (relating to Award by Metropolitan Planning
- 3 Organizations).

1 SUBCHAPTER F. TRANSPORTATION DEVELOPMENT CREDIT PROGRAM

2 §5.70. Purpose.

3 §5.71. Definitions.

4 §5.72. Competitive Process.

5 §5.73. Discretionary Award.

6 §5.74. Administration.

Repeals