Memorandum of Understanding with the Texas Parks and Wildlife Department

Title 43 (Transportation), Texas Administrative Code, Part 1 (Texas Department of Transportation), Chapter 2 (Environmental Review of Transportation Projects), Subchapter G (Memorandum of Understanding with the Texas Parks and Wildlife Department), §§2.201-2.207, effective July 20, 2021, 46 Texas Register 4375.

Rule §2.201 Purpose

(a) Transportation Code §201.607 requires the Texas Department of Transportation (TxDOT) to adopt a memorandum of understanding (MOU) with each state agency that has responsibilities for the protection of the natural environment or for the preservation of historical or archeological resources, and requires TxDOT and each of the agencies to adopt the memoranda and all revisions by rule. This subchapter contains the MOU between TxDOT and the Texas Parks and Wildlife Department (TPWD) that implements that section.

(b) This subchapter furthers TxDOT's environmental policy, as found in §2.2 of this chapter (relating to Environmental Policy), to integrate environmental considerations into department activities to achieve compliance with applicable laws, regulations and standards. TxDOT will focus on delivering safe, efficient transportation projects and making sound decisions based on a balanced consideration of transportation needs and of social, economic, and environmental impacts of proposed transportation improvements.

(c) According to Parks and Wildlife Code §12.0011, TPWD is the state agency with primary responsibility for protecting the state's fish and wildlife resources; providing recommendations that will protect fish and wildlife resources to local, state, and federal agencies that approve, permit, license, or construct developmental projects; providing information on fish and wildlife resources to any local, state, and federal agencies or private organizations that make decisions affecting those resources.

(d) Except as specified in subsection (f) of this section, this MOU supersedes the MOU adopted on September 1, 2013 and associated programmatic agreements. Nothing in this subchapter supersedes, modifies, or nullifies any other agreement entered into by TxDOT and TPWD.

(e) TxDOT and TPWD shall examine and revise this MOU not later than the fifth anniversary of its effective date, as required by Transportation Code, §201.607. Notwithstanding the

above, this MOU remains in effect until revised or terminated by written agreement of TxDOT and TPWD.

(f) The effective date of this MOU is the date on which this Subchapter G takes effect. Projects for which coordination with TPWD has been initiated prior to the effective date of this MOU will complete coordination under the procedures of the September 2013 MOU. Projects for which coordination with TPWD has not been initiated prior to the effective date of this MOU will be governed by this MOU. A project that requires reevaluation, and subsequently requires coordination as specified in §2.203 of this subchapter (relating to Applicability), will be governed by this MOU.

(g) The intent of the MOU is to foster communication, collaboration, and cooperation between TPWD and TxDOT on the review of transportation projects and protection of State natural resources.

Rule §2.202 Definitions

The following words and terms, when used in this subchapter, or in documents prepared by TxDOT or TPWD pursuant to this subchapter, have the following meanings.

(1) Best or Beneficial Management Practices (BMPs)--Measures provided by TPWD that will result in avoidance and minimization of potential impacts to natural resources.

(2) Categorical Exclusion (CE)--A category of actions that have been found to have no significant effect on the environment, individually or cumulatively, and are excluded from the requirement to prepare an Environmental Assessment or Environmental Impact Statement as defined in §2.81 of this chapter (relating to Categorical Exclusions).

(3) Environmental Assessment (EA)--Environmental documentation required for a transportation project that TxDOT has not classified as a categorical exclusion and that does not clearly require the preparation of an EIS, or if TxDOT believes that an EA would assist in determining the need for an EIS, as defined in §2.83 of this chapter (relating to Environmental Assessments).

(4) Environmental decision--The official record created after coordination, analysis, and reviews are completed concluding that an action and its environmental impacts have been adequately identified and assessed. A Finding of No Significant Impact (FONSI) is the environmental decision document for an EA and a Record of Decision (ROD) is the environmental decision document for an EIS.

(5) Environmental Impact Statement (EIS)--Environmental documentation required for a transportation project if there are likely to be significant environmental impacts, as defined in §2.84 of this chapter (relating to Environmental Impact Statements).

(6) Interagency Team (IAT)--As defined in §2.206 of this subchapter (relating to Interagency Team), TPWD and TxDOT staff identified to communicate on behalf of TPWD and TxDOT to carry out the MOU.

(7) Qualified biologist--A qualified biologist must have, at a minimum, a successful completion of a full 4-year course of study in an accredited college or university leading to a bachelor's or higher degree with a major in biological sciences, natural resource management, wildlife science or management, ecology, zoology, botany, conservation biology, or a closely related field and have experience relevant to the species, habitat, or ecosystems that are being studied or described.

(8) Reevaluation--The review and determination of the validity of the environmental decision under certain circumstances involving changes or delays subsequent to the environmental decision as defined in §2.85 of this chapter (relating to Reevaluations).

(9) Riparian habitat--The area of interface between land and a waterway (e.g., river or stream). River or creek dependent habitats which rely on periodic flooding or flushing, subirrigated substrates, and other influences of the ephemeral or perennial rivers or creeks to which they are adjacent, including floodplains, wet woodlands, gallery riverine forests, oxbows, swamps, and vegetated islands.

(10) Texas Natural Diversity Database (TXNDD)--A TPWD-owned and maintained database of natural resource records, including species of greatest conservation need (SGCN) and other tracked species, important remnant native vegetation, and other features of Texas natural history.

(11) TPWD--Texas Parks and Wildlife Department.

(12) TPWD Transportation Staff--The qualified biologist at TPWD that is assigned to work solely on transportation projects and related matters.

(13) TxDOT--Texas Department of Transportation.

Rule §2.203 Applicability

(a) TxDOT will coordinate with TPWD on federal and state transportation projects that require an EA or EIS.

(b) TxDOT may coordinate other projects that do not require an EA or EIS with TPWD at TxDOT's discretion.

(c) If TxDOT prepares a reevaluation for a transportation project that was previously coordinated with TPWD under the 2013 MOU, TxDOT will coordinate the reevaluation with TPWD when any of the following apply:

(1) New impacts not included in previous coordination or increase in impacts from previous coordination to terrestrial and aquatic state-listed species or their habitat as determined by a qualified biologist or rare plant communities with a record in the TXNDD or any state rank or rank range that includes a 1, 2, or 3.

(2) New or increased impacts to riparian habitat or water resources.

(3) Change to commitments made during previous coordination, including BMPs.

(4) Reevaluations of CE level projects with new or increased impacts may be re-coordinated at TxDOT's discretion.

(d) This subchapter does not apply to individual maintenance projects for which a programmatic environmental review is conducted under §2.133 of this chapter (relating to Maintenance Projects and Programs).

Rule §2.204 Coordination and Communication

(a) For projects requiring an EA or EIS, TxDOT will contact TPWD when TxDOT has completed its analysis of potential impacts to fish, wildlife, and other natural resources. To facilitate collaborative review, TxDOT will provide access to TxDOT's Environmental Compliance Oversight System (ECOS).

(b) TxDOT will post on the Environmental Compliance Toolkit webpage the set of BMPs as recommended by TPWD. This set of BMPs is non-project specific. The application of specific BMPs to individual projects will be determined by TxDOT at its discretion.

(c) TxDOT will indicate in the draft EA or draft EIS the TPWD-recommended BMPs that will be applied to the project. TxDOT may also include information shared by TPWD during collaborative review.

(d) To ensure TxDOT will benefit from any recommendations or information provided by TPWD early in the environmental review process, TxDOT will follow the procedure indicated below.

(1) At or around the same time that a draft EA or draft EIS is made available for public review, but no less than 45 days before the issuance of an environmental decision, TxDOT will email the notice of availability of the document required by §2.108 of this chapter (relating to Notice of Availability) to TPWD at the following email address: WHAB_TxDOT@tpwd.texas.gov or the email account designated by TPWD.

(2) The email communication described in subsection (1) will serve as the "request for comments" in Parks and Wildlife Code §12.0011(b-1).

(3) To facilitate review of a draft EA or EIS, TxDOT will provide access to TxDOT's ECOS.

(e) If TPWD has any information or recommendations to conserve fish and wildlife species and other natural resources it wishes to provide to TxDOT in response to a request for comments, TPWD will provide them in writing to TxDOT within 45 days of the date on which TxDOT submitted the request for comments by email.

(f) If TPWD provides any recommendations or information regarding fish and wildlife to TxDOT after the 45-day deadline specified in subsection (e) of this section, then TxDOT will consider such recommendations or information to the extent practicable.

(g) TxDOT will respond as outlined in Parks and Wildlife Code §12.0011(c).

(h) Electronic communication will be used to the maximum extent practical.

Rule §2.205 Commitments

(a) TxDOT will provide funding, through an interagency contract, for one TPWD employee to review transportation projects under this agreement. TxDOT will actively and consistently engage this employee in project development, conservation actions, and other natural resource coordination needs as determined appropriate by TxDOT. The interagency contract to fund the review of transportation projects will be renewed biennially at TxDOT's discretion.

(b) Through that same interagency contract or other authority as appropriate, TxDOT and TPWD will identify and collaborate on mutually agreeable conservation actions. Conservation actions to be undertaken will be described in detail in an interagency contract document or associated workplan agreed upon by the IAT.

Rule §2.206 Interagency Team

(a) Each agency shall mutually appoint members to IAT which will meet at least on a bi-annual basis.

(b) An Interagency Team shall discuss and make recommendations for opportunities for the agencies to partner on conservation actions including but not limited to research, offsets, specification development, and restoration opportunities.

Rule §2.207 Texas Natural Diversity Database (TXNDD)

(a) This MOU authorizes certain limited use and distribution of TXNDD information and specifies security requirements.

(b) TPWD will continue to provide TXNDD information to TxDOT on a schedule agreed upon by both parties.

(c) Except as provided in subsections (d), (e) and (f) of this section, TxDOT will not release the TXNDD or any portion of it to outside parties unless TxDOT receives a request under the Texas Public Information Act for the TXNDD or information contained therein, in which case TxDOT will notify TPWD of the request.

(d) Texas Public Information Act requests for copies of approved environmental review documents and environmental reports that contain information from the TXNDD do not require TPWD notification. Such documents and reports are not subject to the restrictions in subsection (c) of this section and may be disclosed to the public by TxDOT.

(e) TxDOT will conduct training on access and use of the TXNDD as it relates to transportation projects for TxDOT environmental staff and environmental contract employees. TPWD will assist in training development and implementation if requested.

(f) TxDOT will provide completed TXNDD reporting forms or any other format preferred by TPWD for observations of SGCN occurrences, which include federally and state protected species, within TxDOT project areas and collected by TxDOT staff and contract individuals.