

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 2

ALL Districts

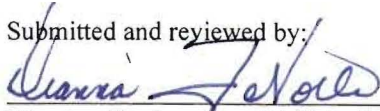
The Texas Transportation Commission (commission) finds it necessary to propose the repeal of §2.22 and new 43 TAC Chapter 2, Subchapter E, §§2.101-2.112 all relating to memorandum of understanding with Texas Parks and Wildlife Department to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed repeals and new sections, attached to this minute order as Exhibits A - 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 §2.22 and new §§2.101-2.112 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

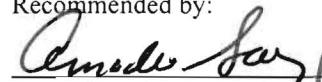
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



Director, Environmental Affairs Division

Recommended by:



Executive Director

111972 SEP 24 09

Minute
Number

Date
Passed

Proposed Preamble

The Texas Department of Transportation (department) proposes the repeal of §2.22 and simultaneously proposes new 43 TAC Chapter 2, Subchapter E, §2.101, Purpose, §2.102, Texas Natural Diversity Database, §2.103, Applicability of MOU, §2.104, Definitions, §2.105, Coordination with TPWD Concerning Transportation Project, §2.106, Standard Coordination Procedure, §2.107, Coordination During Early Project Development, §2.108, Review and Comment on Maintenance Programs, §2.109, Mitigation and Mitigation Payments to TPWD, §2.110, Agreement for Calculating Mitigation Payments for Unregulated Resources, §2.111, TxDOT and TPWD Commitment to Enter into Other Agreements, §2.112, Review of Performance; Updates of MOU, relating to Memorandum of Understanding with Texas Parks and Wildlife Department.

EXPLANATION OF PROPOSED REPEAL AND NEW SECTIONS

Transportation Code, §201.607 requires the department to adopt a Memorandum of Understanding (MOU) with each state agency that has responsibility for the protection of the natural environment, or for the preservation of historical or archeological resources. Transportation Code, §201.607 also requires the department to adopt the memoranda and all revisions by rule and to periodically examine and revise the memoranda. In accordance with Transportation Code, §201.607, the department

1 has examined the memoranda adopted in 1999 and proposes to
2 repeal 43 TAC §2.22 (relating to Memorandum of Understanding
3 with the Texas Parks and Wildlife Department) and propose new 43
4 TAC Chapter 2, Subchapter E, §§2.101-2.112 to ensure continued
5 effective coordination of the review of the environmental
6 effects of highway projects.

7
8 Current 43 TAC §2.22 describes the procedures, as set out in the
9 MOU executed by the department and Texas Parks and Wildlife
10 Department (TPWD) in 1999, that provide for TPWD review of
11 department projects that have the potential to affect natural
12 resources within the jurisdiction of TPWD. The section provides
13 a formal mechanism by which TPWD may review applicable
14 department transportation projects that promotes sharing of
15 information between the department and TPWD that assists the
16 department in making environmentally sound decisions. Instead
17 of amending current 43 TAC §2.22, the section is being repealed
18 and replaced by new 43 TAC §§2.101-2.112 because the changes to
19 the procedures and processes from the current to the new MOU are
20 substantial and because the MOU has been reorganized for clarity
21 and ease of understanding by those interested in or affected by
22 it.

23
24 New §2.101 describes the general purpose of the MOU. The
25 purpose is to provide an MOU between the two agencies for the

1 coordination and environmental review of transportation
2 projects. The MOU establishes the procedure for submission of
3 information by the department to TPWD, the TPWD review and
4 submission of comments to the department, and for the
5 department's response.

6
7 New §2.102 provides a description of the TPWD Texas Natural
8 Diversity Database (TXNDD), a database of documented occurrences
9 of listed and proposed threatened and endangered species, and
10 describes the department's access and use of TXNDD under a
11 memorandum of agreement.

12
13 New §2.103 defines the applicability of the MOU to
14 transportation projects as defined in §2.1 of 43 TAC Chapter 2
15 and to improvement projects on the state highway system
16 developed by entities other than the department. The proposed
17 MOU applies to department toll projects. Such projects had been
18 excluded from the prior MOU because at the time the MOU was
19 executed a separate state agency developed toll projects.

20
21 New §2.104 provides definitions applicable for this subchapter
22 and for documents prepared under this subchapter. Definitions
23 for terms in current 43 TAC §2.22 that are not included in
24 proposed §2.104 are: construction; early project development;
25 habitat; maintenance; maintenance programs, memorandum of

1 understanding (MOU); project development; public involvement;
2 and transportation projects. The definition for the term
3 "construction" is replaced by a new definition for "construction
4 project." The meaning of the term "early project development"
5 is clarified in proposed §2.107 and therefore a definition is
6 not necessary. The definition of "habitat" is incorporated
7 within the proposed definitions of "range" and "suitable
8 habitat" in new 43 TAC 2.106(a)(4). The term "maintenance
9 program" is already defined in 43 TAC §2.2 and the definition of
10 the term "maintenance" has been omitted with references to 43
11 TAC §2.2 made where appropriate. The term "memorandum of
12 understanding (MOU)" is defined in 43 TAC §2.101. The term
13 "public involvement" is not utilized in the proposed new rules
14 and therefore is not defined. The department's public
15 involvement process relating to environmental processes is
16 described in 43 TAC Chapter 2, Subchapter A. "Transportation
17 project" is described in 43 TAC §2.103. Existing definitions
18 that were revised for clarity are "environmental document,"
19 "mitigation," "NEPA," and "right of way." New definitions are
20 proposed for the following terms: "construction project,"
21 "coordination," "federal endangered species," "federal
22 threatened species," "floodplains or creek drainages," "mature
23 habitat," "qualified biologist," "riparian vegetation,"
24 "regulated resources," "significant remnant vegetation,"
25 "species of concern," "state threatened or endangered species,"

"unregulated resources," and "wetlands."

New §2.105 provides that the department will coordinate with TPWD on transportation projects according to 43 TAC §2.106 and 43 TAC §2.107. Generally, the department will interact with TPWD under the MOU through the Wildlife Habitat Assessment Program of TPWD.

New §2.106 delineates the standard procedure for project coordination. Section 2.106(a) provides that coordination is required for projects that are the subject of a draft environmental impact statement (EIS), a final EIS, a supplemental EIS, an environmental assessment, and certain categorical exclusions. Projects classified as categorical exclusions only require coordination if they meet or exceed criteria defined in §2.106(a)(3)(A)-(F). Section 2.106(a) also provides that coordination is only required for the reevaluation of either an EIS or an environmental assessment project if: the reevaluation relates to an issue TPWD commented on; or if the reevaluation addresses a change that if considered separately as a stand-alone project would trigger coordination under the criteria delineated in §2.106(a)(3)(A)-(F). Similarly, projects that were the subject of early coordination under new 43 TAC §2.107 do not require coordination under this section unless there has been a significant change to the project subsequent to

1 coordination. Significant change is defined as a change that is
2 equal to or greater than one or more of the criteria delineated
3 in §2.106(a)(3)(A)-(F). The coordination criteria for the
4 disturbance of mature woody vegetation delineated in subsection
5 §2.106(a)(3)(F) is now based on the acreage of disturbance
6 specific to each of 11 TPWD defined ecoregions.

7
8 New §2.106(b) defines the procedure for coordination. TPWD is
9 provided 45 days from the date of the department transmittal
10 letter to review and provide comment on projects undergoing
11 initial coordination and on projects undergoing early project
12 development coordination under §2.107(a)(2). If additional
13 information is requested in either case, and the information is
14 available or reasonably can be obtained, TPWD will have 30 days
15 to review and comment from the date of the department
16 transmittal letter containing the additional information. The
17 department must consider all timely submitted comments in making
18 project decisions and notify TPWD in writing of the department's
19 decisions. TPWD comments submitted outside of the defined
20 timeframes must be considered by the department to the extent
21 practicable in making project decisions, and a written notice
22 provided to TPWD of the department's decisions. In accordance
23 with Parks and Wildlife Code, §12.0011 the department will
24 provide a written response to TPWD's comments no later than the
25 90th day after the date the environmental review for the project

1 is completed. The department will incorporate the results of
2 coordination within the project's final environmental
3 documentation.

4
5 New §2.107 describes coordination during early project
6 development. Section 2.107(a) provides that the department may
7 request coordination of a project during early development if
8 the department has conducted preliminary project planning, field
9 surveys, database searches, in-house coordination, initial
10 resource agency coordination, or scoping and if the project
11 would otherwise require coordination under 43 TAC §2.106. TPWD
12 may decline a request for early coordination.

13
14 Section 2.107(b) defines the coordination procedure. If TPWD
15 agrees to coordinate during early project development, TPWD is
16 provided 60 days from the date of the department transmittal
17 letter to review and provide comment. If additional information
18 is requested, and the information is available or reasonably can
19 be obtained, TPWD will have an additional 30 days to review and
20 comment from the date of the department transmittal letter
21 containing the additional information. In accordance with Parks
22 and Wildlife Code, §12.0011 the department will provide a
23 written response to TPWD's comments no later than the 90th day
24 after the date the environmental review for the project is
25 completed.

Section 2.107(c) requires the department to consider any comments submitted under §2.107 during final project development and to incorporate the results in the project's final environmental documentation.

New §2.108 will allow TPWD the opportunity to review and comment on the environmental review of a maintenance program under 43 TAC §2.18.

New §2.109 provides a new procedure for the department to provide monetary compensation to TPWD for unregulated resources, and establishes an initial compensation process that may be modified for long-term implementation by an interagency team and agreement described in new 43 TAC §2.110.

Section 2.109(a) states it is the department's order of preference to first avoid impacts to natural resources, then to minimize impacts, and finally to consider monetary compensation. The department will describe actions to mitigate effects during coordination with TPWD, the TPWD Wildlife Habitat Assessment Program will provide advice and assistance in designing mitigation plans or agreements, and the department will then describe the mitigation proposal in the project's environmental document. Mitigation will be included if mutually agreed to by

1 the department and TPWD.

2
3 Section 2.109(b) requires the department to consult with TPWD
4 when unforeseen impacts occur during construction of a project,
5 and to incorporate best management practices or other measures
6 suggested by TPWD, when practical and reasonable, to avoid or
7 minimize impacts.

8
9 Section 2.109(c) identifies the authority for the department to
10 provide state highway funds as monetary compensation to mitigate
11 adverse environmental effects resulting from either construction
12 or maintenance of a state highway. The authority to mitigate
13 impacts in Transportation Code, §222.001 relates only to effects
14 from projects on the state highway system. Accordingly, the
15 payments made under subsection 2.109(c) will not relate to other
16 projects, for example, rail projects. The subsection also
17 clarifies that impacts on regulated resources (as defined in the
18 MOU) are mitigated in accordance with federal law. The payments
19 made under §2.109(c) will not relate to impacts to regulated
20 resources. Section 2.109(c) sets an immediate process for the
21 department to provide estimated compensation for upcoming
22 projects on a quarterly timeframe, with amounts based on the
23 volume of project lettings and upon agreed rates specific to the
24 categories of the projects. At the end of each fiscal year the
25 department will calculate actual impacts to resources based on

1 acreage impacted that have occurred, and calculate compensation
2 based on agreed rates for seven categories of natural resources:
3 \$4,002 per acre for riparian habitat; \$2,668 per acre for upland
4 trees; \$1,334 per acre for brush; \$166 per acre for maintained
5 right of way; and \$666 per acre for other types of habitat.

6 Values for unique vegetation and habitat may be developed and
7 agreed upon according to procedures in new 43 TAC §2.110. The
8 department will reconcile the monetary difference between the
9 amount of compensation paid in the estimated quarterly payments
10 and the calculated amount for the actual annual impact from
11 completed projects.

12
13 New §2.110 requires development of an agreement for calculating
14 mitigation payments for unregulated resources by an interagency
15 team. Section 2.110(a) provides that following the execution of
16 the MOU an interagency team will meet and adopt an agreement on
17 procedures and methodologies for a final compensation plan for
18 adverse environmental impacts from all transportation projects,
19 whether or not they were referred to TPWD for coordination and
20 review.

21
22 Section 2.110(b) requires the interagency team to meet on a
23 quarterly basis to review the calculation of acreage impacted by
24 transportation projects.

1 Section 2.110(c) requires the interagency team to develop a
2 final compensation plan that supports the TPWD goals and
3 objectives for conservation of resources, determine if
4 additional or more refined habitats should be tracked, determine
5 an appropriate monetary compensation for each habitat and
6 ecoregion, and evaluate if a new category for unique vegetation
7 and habitat features is necessary.

8
9 Section 2.110(d) requires that if a new category for unique
10 vegetation and habitat features is proposed, TPWD and the
11 department must concur that it provides significant refuge or
12 habitat to wildlife or represents a localized but significant
13 stand of vegetation. The monetary compensation rate would be
14 determined by the executive offices of the department and TPWD.

15
16 Section 2.110(e) states that on the effective date of the
17 agreement that adopts the compensation plan under subsection (c)
18 of §2.110, mitigation based on construction letting will end and
19 the payments will be based on the final compensation plan. If
20 new habitat types are included, a transition from payments on
21 the prior habitat types may be provided.

22
23 New §2.111 allows the department and TPWD to enter into other
24 agreements. Section 2.111(a) states that the department and
25 TPWD will enter into an agreement concerning the methods and

1 guidelines for habitat description.

2
3 Section 2.111(b) states that the department and TPWD agree to
4 enter into an agreement concerning procedures for review and
5 adoption of best management practices for the mitigation of
6 environmental impacts of construction projects, maintenance
7 projects, and maintenance programs. All adopted best management
8 practices will be incorporated into the department standard
9 specifications.

10
11 Section 2.111(c) states that the department and TPWD agree to
12 enter into an agreement adopting a list of significant remnant
13 vegetation types and unique vegetation and habitat features.

14
15 Section 2.111(d) states that the department and TPWD agree to
16 enter into an agreement to adopt a procedure for the department
17 to request coordination with TPWD on projects during early
18 project coordination.

19
20 Section 2.111(e) requires the agreements described in §2.111 to
21 be finalized and executed by the department and TPWD not later
22 than December 31, 2010.

23
24 New §2.112 requires the department and TPWD to enter into an
25 agreement concerning the review of how the agencies have

1 implemented the MOU. If agreed on criteria are not met then the
2 department and TPWD agree to address the deficiency.

3
4 FISCAL NOTE

5 James Bass, Chief Financial Officer, has determined that for
6 each of the first five years the repeal and new sections as
7 proposed are in effect, there will be fiscal implications for
8 state government as a result of enforcing or administering the
9 repeal and new sections. Currently there is no monetary
10 compensation paid by the department to TPWD for impacts to
11 unregulated natural resources from transportation projects.
12 Under the initial compensation process delineated in 43 TAC
13 §2.109, based on recent historic volumes of construction letting
14 for each of the affected categories, it is estimated that the
15 annual monetary compensation to TPWD will be approximately
16 \$3,000,000 annually for fiscal years 2010-2014. The amount of
17 compensation may change following the development and
18 implementation of a final compensation plan according to 43 TAC
19 §2.110. The amount of change, either an increase or a decrease,
20 will be dependent upon the mutual agreements contained in the
21 final plan and cannot be estimated at this time. There will be
22 no fiscal implications for local government as a result of
23 enforcing or administering the repeal and new sections.

24
25 Dianna Noble, Director, Environmental Affairs Division, has

certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeal and new sections.

PUBLIC BENEFIT AND COST

Ms. Noble has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the repeal and new sections will be the availability of new funds to TPWD for use in furthering the protection or development of natural resources and wildlife habitat. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

This rulemaking action has been determined to be subject to the Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, as amended (Texas Natural Resources Code, §33.201 et. seq.), and the rules of the Coastal Coordination Council (31 TAC Chapters 501-506). As required by 31 TAC §505.22(a), this rulemaking action must be consistent with all applicable CMP policies.

This action has been reviewed for consistency, and it has been

1 determined that this rulemaking is consistent with the
2 applicable CMP goals and policies. The primary CMP policy
3 applicable to this rulemaking action is the policy that
4 transportation projects be located at sites that, to the
5 greatest extent practicable, avoid and otherwise minimize the
6 potential for adverse effects to coastal natural resource areas
7 from construction and maintenance of roads, bridges, causeways,
8 and other development associated with the project. This
9 rulemaking action provides a means for identifying the
10 environmental impacts of department transportation projects on
11 natural resources, including threatened and endangered species
12 and habitat, for coordination of these projects with the
13 relevant state resource agency, and for inclusion of these
14 investigations and coordination in the environmental
15 documentation for each project. All of these purposes will
16 provide a mechanism for avoiding, minimizing, or compensating,
17 where practicable, for the adverse effects of department
18 projects on coastal natural resource areas that serve as
19 habitat, on coastal preserves, and on threatened and endangered
20 species. For these same reasons, the rulemaking action is
21 consistent with the CMP goal of protecting, preserving,
22 restoring, and enhancing the diversity, quality, quantity,
23 functions, and values of coastal natural resource areas.
24 Interested persons are requested to submit comments on the
25 consistency of the proposed rules with the CMP.

1
2 PUBLIC HEARING

3 Pursuant to the Administrative Procedure Act, Government Code,
4 Chapter 2001, the Texas Department of Transportation will
5 conduct a public hearing to receive comments concerning the
6 proposed rules. The public hearing will be held at 9:00 a.m. on
7 October 28, 2009, in the first floor hearing room of the Dewitt
8 C. Greer State Highway Building, 125 East 11th Street, Austin,
9 Texas and will be conducted in accordance with the procedures
10 specified in 43 TAC §1.5. Those desiring to make comments or
11 presentations may register starting at 8:30 a.m. Any interested
12 persons may appear and offer comments, either orally or in
13 writing; however, questioning of those making presentations will
14 be reserved exclusively to the presiding officer as may be
15 necessary to ensure a complete record. While any person with
16 pertinent comments will be granted an opportunity to present
17 them during the course of the hearing, the presiding officer
18 reserves the right to restrict testimony in terms of time and
19 repetitive content. Organizations, associations, or groups are
20 encouraged to present their commonly held views and identical or
21 similar comments through a representative member when possible.
22 Comments on the proposed text should include appropriate
23 citations to sections, subsections, paragraphs, etc. for proper
24 reference. Any suggestions or requests for alternative language
25 or other revisions to the proposed text should be submitted in

1 written form. Presentations must remain pertinent to the issues
2 being discussed. A person may not assign a portion of his or
3 her time to another speaker. Persons with disabilities who plan
4 to attend this meeting and who may need auxiliary aids or
5 services such as interpreters for persons who are deaf or
6 hearing impaired, readers, large print or Braille, are requested
7 to contact Government and Public Affairs Division, 125 East 11th
8 Street, Austin, Texas 78701-2483, (512) 305-9137 at least two
9 working days prior to the hearing so that appropriate services
10 can be provided.

11
12 SUBMITTAL OF COMMENTS

13 Written comments on the proposed repeal of §2.22 and new
14 §§2.101-2.112 may be submitted to Dianna Noble, Director,
15 Environmental Affairs Division, Texas Department of
16 Transportation, 125 East 11th Street, Austin, Texas 78701-2483.
17 The deadline for receipt of comments is 5:00 p.m. on November 9,
18 2009.

19
20 STATUTORY AUTHORITY

21 The repeal and new sections are proposed under Transportation
22 Code, §201.101, which provides the Texas Transportation
23 Commission with the authority to establish rules for the conduct
24 of the work of the department, and more specifically,
25 Transportation Code, §201.607, which requires the department

1 every fifth year to revise the MOU with each state agency that
2 is responsible for the protection of the natural environment or
3 for the preservation of historical and archeological resources.

4

5 CROSS REFERENCE TO STATUTE

6 Transportation Code, §§201.604, 201.607, and 222.001.

SUBCHAPTER E. Memorandum of Understanding with Texas Parks and
Wildlife Department.

§2.101. Purpose.

(a) This subchapter provides the memorandum of understanding (MOU) between the Texas Department of Transportation (TxDOT) and the Texas Parks and Wildlife Department (TPWD) relating to the environmental review of transportation projects developed by TxDOT, as required by Transportation Code, §201.607, and the mitigation of the effects of certain transportation projects.

(b) The MOU establishes the procedure for the submission of information concerning a proposed transportation project by TxDOT to TPWD, the review of the project by TPWD, the submission of comments by TPWD to TxDOT, and TxDOT's response to those comments.

(c) The MOU takes effect January 7, 2010 and on that date, the previous memorandum of understanding between TxDOT and TPWD expires.

(d) Nothing in this subchapter or the MOU supersedes, modifies, or nullifies any agreement entered into by TxDOT and TPWD, other than the MOU.

(e) TxDOT and TPWD shall review and by rule shall update the MOU not later than the fifth anniversary of its effective

1 date, as required by Transportation Code, §201.607.

2
3 §2.102. Texas Natural Diversity Database. TPWD maintains the
4 Texas Natural Diversity Database. The database contains
5 information on listed and proposed threatened and endangered
6 species, both state and federal, species of concern, significant
7 remnant native vegetation, and other features of concern to
8 TPWD. The data are in a nationally recognized biological
9 Geographic Information System (GIS) database format. TPWD makes
10 the database accessible to TxDOT under the memorandum of
11 agreement entitled Sharing and Maintaining Natural Diversity
12 Database Information, effective April 11, 2007 that concerns the
13 use by TxDOT of the database. The memorandum of agreement
14 authorizes certain limited use and distribution of this
15 information, and specifies security requirements.

16
17 §2.103. Applicability of MOU. The MOU applies only to a
18 transportation project, as described by §2.1(b)(2) of this
19 chapter (relating to General; Emergency Action Procedures),
20 developed by TxDOT and to a highway improvement project on the
21 state highway system developed by another entity.

22
23 §2.104. Definitions. The following words and terms, when used

1 in this subchapter, or in documents prepared by TxDOT or TPWD
2 pursuant to this subchapter, have the following meanings, unless
3 the context clearly indicates otherwise.

4 (1) Construction project--The construction of a new
5 transportation facility or the expansion, rehabilitation, or
6 reconstruction of an existing transportation facility.

7 (2) Coordination--Actions between TxDOT and TPWD that
8 relate to and facilitate TPWD's review of and comments on the
9 potential environmental effect of a highway project and that are
10 carried out in accordance with the requirements of either
11 National Environmental Policy Act or this chapter, or both.

12 (3) Environmental document--Environmental document
13 includes categorical exclusion documentation, environmental
14 assessments, environmental impact statements, supplemental
15 environmental assessments, and supplemental environmental impact
16 statements. An environmental document incorporates
17 environmental reports and shows coordination and consultation
18 efforts and cost and engineering elements.

19 (4) Federal endangered species--Endangered species, as
20 defined by the Endangered Species Act (16 U.S.C. §§1531 et
21 seq.), including the rules implementing that Act.

22 (5) Federal threatened species--Threatened species, as
23 defined by the Endangered Species Act (16 U.S.C. §§1531 et

1 seq.), including the rules implementing that Act.

2 (6) Floodplains or creek drainages--Water related
3 features that exhibit riparian vegetation or would have riparian
4 vegetation if not previously disturbed; the extent of riparian
5 habitat.

6 (7) Mature habitat--Any native vegetation community that
7 exhibits a composition and structure closely resembling a native
8 condition, and in which a significant percentage of the plants
9 are reproductively mature.

10 (8) Mitigation--The actions taken to address the adverse
11 impacts to the natural environment that result directly from a
12 transportation project. The term includes actions taken to
13 avoid, minimize, or to compensate for impacts.

14 (9) NEPA--The National Environmental Policy Act of 1969,
15 as amended (42 U.S.C. §4371 et seq.), and the rules adopted to
16 implement the Act by the Council on Environmental Quality or by
17 a federal agency with jurisdiction over a proposed
18 transportation project.

19 (10) Qualified biologist--A person holding a bachelor's
20 degree from an accredited university in a natural resource
21 field, or who possesses demonstrated experience and training in
22 the assessment of biological resources.

23 (11) Right of way--The land provided for a transportation

1 facility, for example, the roadway itself (including shoulders),
2 and areas between the roadway and adjacent properties (including
3 drainage easements). The term is also known as "project limits"
4 when a transportation project is under development or
5 construction.

6 (12) Riparian vegetation--Vegetation that would not be
7 present in an area except for the presence of a water feature.

8 (13) Regulated resources--Natural resources that when
9 impacted by a transportation project may require mandatory
10 mitigation as directed by federal law, including but not limited
11 to mitigation directed by the United States Army Corps of
12 Engineers under the Clean Water Act, Section 404 (26 U.S.C.
13 §1344), concerning impacts to waters of the United States, or as
14 directed by the United States Fish and Wildlife Service
15 concerning impacts to federal threatened or endangered species.

16 (14) Significant remnant vegetation--A type of native
17 vegetation that is considered by TPWD or other recognized
18 authorities to be rare or to have significantly declined in
19 recent times and listed in an agreement under §2.111(c) of this
20 subchapter (relating to TxDOT and TPWD Commitment to Enter into
21 Other Agreements).

22 (15) Species of concern--A species of plants or animals
23 that is on the current and applicable county list prepared by

TPWD and that TPWD identified in the Texas wildlife action plan as rare, declining, or priority. The term does not include a federal threatened or endangered species.

(16) State threatened or endangered species--A species of wildlife listed under Parks and Wildlife Code, §68.003 as threatened with statewide extinction or a plant species on the list of endangered, threatened, or protected native plants filed with the Office of the Secretary of State under Parks and Wildlife Code, §88.003 or amended under Parks and Wildlife Code, §88.004.

(17) Unregulated resources--Natural resources that are not regulated resources.

(18) Wetlands--Areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. The term includes swamps, marshes, bogs, and similar areas.

§2.105. Coordination with TPWD Concerning Transportation Project. TxDOT will coordinate with TPWD concerning a proposed transportation project in accordance with §2.106 of this subchapter (relating to Standard Coordination Procedure) or

§2.107 of this subchapter (relating to Coordination during Early Project Development), as applicable. Unless otherwise expressly provided in this subchapter, if TxDOT is required by this subchapter to coordinate with or submit an environmental or other document to TPWD, TxDOT will coordinate with or submit the document, as appropriate, to the Wildlife Habitat Assessment Program of TPWD.

§2.106. Standard Coordination Procedure.

(a) Projects subject to review.

(1) TxDOT will coordinate with TPWD under this section concerning a proposed transportation project if:

(A) the project is the subject of a draft environmental impact statement, final environmental impact statement, environmental assessment, or supplemental environmental impact statement or supplemental environmental assessment; and

(B) TxDOT undertakes a reevaluation of an environmental impact statement or an environmental assessment related to the project and:

(i) the project has been reviewed by TPWD and the scope of the reevaluation relates to an issue TPWD commented on; or

(ii) the change proposed in the reevaluation,

1 considered as a stand-alone transportation project, is equal to
2 or greater than at least one of the factors listed in
3 subparagraphs (A) through (F) of paragraph (3) of this
4 subsection.

5 (2) TxDOT will coordinate with TPWD under this section
6 concerning a transportation project that was the subject of
7 coordination under §2.107 of this subchapter (relating to
8 Coordination during Early Project Development) only if a
9 significant change to the project occurred after coordination
10 during early project development. A significant change is equal
11 to or greater than at least one of the factors listed in
12 subparagraphs (A) through (F) of paragraph (3) of this
13 subsection. TxDOT's Environmental Affairs Division will review
14 a project before final approval of the environmental document to
15 determine if significant changes to the project occurred after
16 the project underwent coordination during early project
17 development.

18 (3) TxDOT will coordinate with TPWD under this section
19 concerning a proposed transportation project that is classified
20 as a categorical exclusion only if the project:

21 (A) is in the range of a state threatened or endangered
22 species or a species of concern, and within the limits of the
23 project there is suitable habitat;

(B) temporarily or permanently disturbs any significant remnant vegetation;

(C) contains floodplains or creek drainages or wetlands that require a nationwide permit with pre-construction notification or an individual permit, issued by the United States Army Corps of Engineers, or a water-related feature that has associated riparian vegetation or would have riparian vegetation if the vegetation was not previously disturbed;

(D) includes in the TxDOT right of way more than 200 linear feet of one or more of the following that is not already channelized or otherwise maintained:

(i) channel realignment; or

(ii) stream bed or stream bank excavation, scraping, clearing, or other permanent disturbance.

(E) contains isolated wetlands outside existing TxDOT right of way that will be directly impacted by the project; or

(F) temporarily or permanently disturbs mature woody vegetation that is at least 50 percent native species in an area equal to or greater than the area of disturbance in Figure 43 TAC §2.106(a)(3)(F) associated with the ecoregion, as designated by TPWD, in which the project is located.

Figure 43 TAC §2.106(a)(3)(F)

Ecoregion	Area of Disturbance
Piney Woods	3 acres
Oak Woods and Prairies	2 acres
Blackland Prairie	1 acre
Gulf Coast Prairies & Marshes	2 acres
Coastal Sand Plain	1 acre
South Texas Brush	1 acre
Edwards Plateau	1 acre
Llano Uplift	1 acre
Rolling Plains	1 acre
High Plains	1 acre
Trans Pecos	1 acre

1

2

(4) For the purpose of paragraph (3)(A) of this

3

subsection, "range" is the general area where a species would be

4

expected to occur as shown in a selection of field guides or

5

other references and "suitable habitat" is an area with minimum

6

conditions required by a species.

7

(5) For the purpose of paragraph (3)(F) of this

8

subsection, "mature woody vegetation" means plant communities

9

described in "The Vegetation Types of Texas" with aspect

10

dominants that are woody in character and for which the majority

1 of the dominant plants are capable of producing seed. The term
2 includes trees and shrubs.

3 (b) Procedure.

4 (1) TxDOT will submit the environmental documentation for
5 an applicable project to TPWD for review and comment. TPWD
6 shall have a period of 45 days from the date of the TxDOT
7 transmittal letter for its review. If TPWD requests additional
8 information, TxDOT will provide the requested information if the
9 information is available or reasonably can be obtained. If
10 requested information is provided, TPWD shall have 30 days from
11 the date of TxDOT's second transmittal letter that will
12 accompany the additional information forwarded to TPWD to review
13 the documentation.

14 (2) If a project that underwent coordination during early
15 project development under §2.107 of this subchapter is also
16 subject to coordination under this section, TPWD shall have a
17 period of 45 days from the date of the TxDOT transmittal letter
18 submitted under this section to amend or expand upon earlier
19 comments and recommendations made under §2.107 of this
20 subchapter.

21 (3) TxDOT will consider the comments that are timely
22 submitted by TPWD in making decisions on the project, and will
23 give to TPWD a written explanation of TxDOT's decisions. If

TPWD submits comments after the dates established by paragraph (1) or (2) of this subsection, TxDOT will consider the comments in making decisions on the project to the extent practicable, and provide a written explanation of TxDOT's response to those comments.

(4) TxDOT will incorporate the results of the coordination documentation into the project's final environmental documentation.

(5) TxDOT will submit to TPWD its written explanation to TPWD's comments under paragraph (3) of this subsection not later than the 90th day after the date the environmental review for a transportation project is completed.

§2.107. Coordination during Early Project Development.

(a) Request.

(1) TxDOT may request early project coordination with TPWD if:

(A) the project meets the requirements for required coordination under §2.106(a) of this subchapter (relating to Standard Coordination Procedure); and

(B) TxDOT has conducted one or more of the following activities for the project: preliminary project planning, field surveys, database searches, in-house coordination, initial

1 resource agency coordination, or scoping.

2 (2) A request under this subsection must be made in
3 accordance with the agreement entered into under §2.110(d) of
4 this subchapter (relating to Agreement for Calculating
5 Mitigation Payments for Unregulated Resources) and must be
6 submitted to TPWD.

7 (3) TPWD may decline a request.

8 (b) Coordination procedure. If a request under subsection
9 (a) of this section is accepted by TPWD, TPWD shall have a
10 period of 60 days from the date of the TxDOT transmittal letter
11 to review each early project development project referral. If
12 TPWD requests additional information, TxDOT will provide the
13 requested information if the information is available or
14 reasonably can be obtained. If requested information is
15 provided, TPWD shall have 30 days from the date of TxDOT's
16 second transmittal letter that will accompany the additional
17 information forwarded to TPWD. TxDOT will submit to TPWD a
18 written response to TPWD's comments not later than the 90th day
19 after the date the environmental review for a transportation
20 project is completed.

21 (c) Use of results. TxDOT will consider any comments
22 submitted by TPWD under this section during final project
23 development. TxDOT will incorporate the results of early

1 project coordination into the project's final environmental
2 documentation.

3
4 §2.108. Review and Comment on Maintenance Programs. TxDOT will
5 allow TPWD the opportunity to review and comment on the
6 environmental review for a maintenance program under §2.18 of
7 this chapter (relating to Maintenance Projects and Programs).

8
9 §2.109. Mitigation and Mitigation Payments to TPWD.

10 (a) Mitigation.

11 (1) TxDOT seeks to mitigate impacts to resources through
12 avoidance, minimization, and compensation, in that order of
13 preference. TxDOT will consider procedures and methods for
14 avoidance and minimization measures throughout transportation
15 project development.

16 (2) In the referral of a project to TPWD under §2.106 of
17 this subchapter (relating to Standard Coordination Procedure) or
18 §2.107 of this subchapter (relating to Coordination during Early
19 Project Development), TxDOT will describe the proposed steps to
20 be taken to mitigate potential adverse impacts on resources.
21 TxDOT will consider TPWD recommendations for changed or
22 additional steps.

23 (3) The Wildlife Habitat Assessment Program of TPWD will

1 provide advice and assistance to TxDOT staff, including
2 districts and the Environmental Affairs Division, in designing
3 mitigation plans or agreements.

4 (4) TxDOT will describe the mitigation proposal for the
5 project in the project's environmental document. Mitigation
6 will be included if mutually agreed to by TPWD and TxDOT.

7 (b) Mitigation during construction.

8 (1) TxDOT will consult with TPWD when unforeseen impacts
9 on state threatened or endangered species, species of concern,
10 or their habitats are identified during construction of a
11 project. TxDOT will incorporate best management practices and
12 other mitigation measures suggested by TPWD when practical and
13 reasonable.

14 (2) The Wildlife Habitat Assessment Program of TPWD and
15 district staff of TxDOT will conduct on-site project
16 coordination when appropriate.

17 (c) Payments to TPWD for Impacts to Unregulated Resources.

18 (1) Authority. Impacts on unregulated resources
19 resulting from a transportation project that result directly
20 from construction or maintenance of a state highway by TxDOT
21 will be mitigated in accordance with this subsection.
22 Transportation Code, §222.001 authorizes TxDOT to use funds
23 deposited to the state highway fund to mitigate adverse

environmental effects that result directly from the construction or maintenance of a state highway. Impacts on regulated resources are mitigated in accordance with federal law and not covered by this subsection.

(2) Payment dates. TxDOT will pay to TPWD on March 1, June 1, September 1, and December 1 of each year an amount to compensate for environmental effects on unregulated resources. Payments are due within 60 days of the payment date.

(3) Payment based on construction contracts awarded. The amount of a payment will be calculated using the amount of specified categories of contracts entered into by TxDOT during the three months immediately preceding the payment date. TxDOT and TPWD will agree on a factor to be applied to the category that, when applied to the contract amount for the preceding three months, will result in the best estimate of the dollar impact on unregulated resources per dollar of contracts awarded. TxDOT will assign each project to the category that most accurately describes the project. The categories are:

(A) Category 1: preventative maintenance and rehabilitation;

(B) Category 4: statewide connectivity corridor projects;

(C) Category 6: structures, highway bridges, and

railroad grade separation;

(D) Category 8: safety;

(E) Category 11: district discretionary; or

(F) Category 12: strategic priorities.

(4) Payment based on acreage impacted; reconciliation.

(A) Not later than October 1 of each year, TxDOT will complete a list of construction projects awarded during the preceding fiscal year. Each project will be identified by its control section job (CSJ) number, district, and the number of acres affected within the project's right of way, for each of the following habitat categories: riparian, upland trees, brush, maintained right of way, other, and unique vegetation or habitat. Figure 43 TAC §2.109(c)(4)(A) indicates the value per acre for each habitat type.

Figure 43 TAC §2.109(c)(4)(A)

Habitat Category	Riparian	Upland Trees	Brush	Maintained ROW	Other	Unique Vegetation/Habitat
Value/acre	\$4,002	\$2,668	\$1,334	\$166	\$666	To be determined under §2.110(d)

(B) Not later than November 1 of each year, TxDOT will calculate the total payments made under paragraph (3) of this subsection during the preceding state fiscal year to TPWD. Using the procedure set forth in this paragraph, or a revised

1 procedure as developed under §2.110 of this subchapter (relating
2 to Agreement for Calculating Mitigation Payments for Unregulated
3 Resources), TxDOT will calculate the total payments based on
4 acreage impacted. If the sum of the quarterly payments based on
5 construction contract awards exceeds the sum of the total
6 payments calculated based on acreage impacted, TPWD will return
7 to TxDOT the excess payments. If the sum of quarterly payments
8 based on construction contract awards was less than the
9 calculated acreage impacted, TxDOT will make payment for the
10 remaining acreage impacted.

11
12 §2.110. Agreement for Calculating Mitigation Payments for
13 Unregulated Resources.

14 (a) Immediately after the execution of the MOU, a team of
15 TxDOT and TPWD staff will meet to adopt an agreement on
16 procedures and methodologies to calculate the environmental
17 effects directly caused by transportation projects that result
18 directly from construction or maintenance of a state highway by
19 TxDOT on unregulated resources and to provide recommendations to
20 accurately and equitably compensate for environmental effects.
21 The procedures and methodologies will provide compensation for
22 every TxDOT construction project. TxDOT will track impacts for
23 all construction projects by TxDOT district and submit a

1 quarterly list to TPWD that includes both projects that are
2 referred and not referred to TPWD for review.

3 (b) Under the agreement an interagency team will meet on a
4 quarterly basis to review the calculation of acreage impacted by
5 projects as required under §2.109 of this subchapter (Mitigation
6 and Mitigation Payments to TPWD).

7 (c) The interagency team will review the process by which
8 impact is measured and will prepare a final compensation plan.

9 The team will:

10 (1) determine if the process supports the TPWD goals and
11 objectives for conservation of regulated and unregulated
12 resources;

13 (2) determine if additional or more refined types of
14 habitats should be tracked;

15 (3) determine an appropriate rate of compensation for
16 each habitat within each of the ecoregions designated by TPWD;
17 and

18 (4) evaluate whether it is necessary to add a category
19 for unique vegetation and habitat features to address unique
20 areas or features differing from the general descriptions
21 provided for the region in TPWD's "Vegetation Types of Texas."

22 (d) To add a category described by subsection (c)(4) of
23 this section, both TPWD and TxDOT must agree that the unique

1 vegetation and habitat features either provide significant
2 refuge or habitat to wildlife or represent a localized but
3 significant stand of vegetation. The amount of compensation
4 under the new category will be determined by the executive
5 offices of TxDOT and TPWD on a case-by-case basis.

6 (e) On the effective date of the agreement that adopts the
7 compensation plan prepared under subsection (c) of this section,
8 the quarterly payments under §2.109 of this subchapter (relating
9 to Mitigation and Mitigation Payments to TPWD) based on
10 construction contract awards will end and the payments will be
11 based on that compensation plan. If new habitat types are
12 provided under the plan, the plan may provide for a transition
13 from payments based on the impacts to the habitat types
14 identified in §2.109 of this subchapter to payments based on the
15 new habitat types.

16
17 §2.111. TxDOT and TPWD Commitment to Enter into Other
18 Agreements.

19 (a) TxDOT and TPWD agree to enter into an agreement
20 concerning the methods of and guidelines for habitat
21 description.

22 (b) TxDOT and TPWD agree to enter into an agreement
23 concerning procedures for review and adoption of best management

1 practices. Under the agreement a working group of TPWD and
2 TxDOT staff will meet regularly to identify, assess, and adopt
3 best management practices for the mitigation of the
4 environmental impacts of construction projects and the
5 maintenance projects and programs described by §2.18 of this
6 chapter (relating to Maintenance Projects and Programs) on
7 resources and habitat. The best management practices will be
8 documented in standard specifications and will be applied as
9 appropriate.

10 (c) TxDOT and TPWD agree to enter into an agreement
11 adopting a list of significant remnant vegetation types in Texas
12 and any unique vegetation and habitat features.

13 (d) TxDOT and TPWD agree to enter into an agreement
14 adopting a procedure under which TxDOT may request coordination
15 with TPWD concerning a project processed during early project
16 development under §2.107 of this subchapter (Coordination during
17 Early Project Development).

18 (e) TxDOT and TPWD agree that the agreements described in
19 this section will be finalized and executed by TxDOT and TPWD by
20 no later than December 31, 2010.

21
22 §2.112. Review of Performance; Updates of MOU.

23 (a) TxDOT and TPWD agree to enter into an agreement

1 adopting a list of measurable performance criteria and goals for
2 benchmark reviews for implementing the MOU.

3 (b) Semiannually, TxDOT and TPWD will jointly review the
4 transportation projects that TxDOT has referred to TPWD for
5 coordination under the MOU. The review will evaluate whether
6 coordination work meets the performance criteria established in
7 the agreement entered into under this section. If a performance
8 criterion is not met, TxDOT and TPWD will take steps to address
9 the deficiency.

SUBCHAPTER B. MEMORANDA OF UNDERSTANDING WITH
NATURAL RESOURCE AGENCIES

§2.22. Memorandum of Understanding with the Texas Parks and
Wildlife Department.

(a) Purpose.

(1) It is the policy of the Texas Department of
Transportation (TxDOT) to:

(A) investigate fully the environmental impacts of
TxDOT transportation projects, coordinate these projects with
applicable state and federal agencies, and reflect these
investigations and coordinations in the environmental
documentation for each project;

(B) base project decisions on a balanced consideration
of the need for a safe, efficient, economical, and
environmentally sound transportation system;

(C) receive input from the public through the public
involvement process; and

(D) utilize a systematic interdisciplinary approach as
an essential part of the development process for transportation
projects.

(2) In order to pursue this policy, TxDOT and the Texas
Parks and Wildlife Department (TPWD) have agreed to develop this
Memorandum of Understanding (MOU) that will supersede the MOU

1 which became effective on October 15, 1992.

2 (3) Transportation Code, §201.607, directs TxDOT to adopt
3 memoranda of understanding with appropriate environmental
4 resource agencies, including TPWD.

5 (4) The rules for coordination of state-assisted
6 transportation projects found in §§2.40-2.51, of this title
7 (relating to Environmental Review and Public Involvement for
8 Transportation Projects), underline the need for and importance
9 of comprehensive environmental coordination for all
10 transportation projects.

11 (5) It is the purpose of this MOU to provide a formal
12 mechanism by which the TPWD may review TxDOT transportation
13 projects, including those that have the potential to affect
14 natural resources within facilities owned or managed by TPWD.
15 This review will promote the mutually beneficial sharing of
16 information between TxDOT and TPWD, which will assist TxDOT in
17 making environmentally sound decisions.

18 (b) Definitions. The following words and terms, when used
19 in this section shall have the following meanings, unless the
20 context clearly indicates otherwise.

21 (1) Construction--Activities which involve the building
22 of transportation facilities on a new location, or the
23 expansion, rehabilitation, or reconstruction of an existing

1 facility.

2 (2) Early project development--The phase of project
3 development that includes, but is not limited to, project
4 planning, field surveys, database searches, in-house
5 coordination, initial resource agency coordination, and scoping,
6 if necessary prior to selection of alternatives.

7 (3) Environmental document--A decision-making document
8 which incorporates the results of environmental studies,
9 coordination and consultation efforts, and engineering elements.
10 Types of documents include categorical exclusions, environmental
11 assessments, and environmental impact statements.

12 (4) Habitat--Areas of intrinsic biological resource
13 value, the disturbance of which would not require: a U.S. Army
14 Corps of Engineers permit; a U.S. Coast Guard permit;
15 coordination under the Endangered Species Act, Fish and Wildlife
16 Coordination Act, or the Migratory Bird Treaty Act.

17 (5) Maintenance--Activities which involve the repair or
18 preservation of an existing facility to prevent that facility's
19 degradation to an unsafe or irreparable state, or which involve
20 the treatment of an existing facility or its environs to meet
21 acceptable standards of operations or aesthetic quality. Such
22 activities generally do not require the acquisition of
23 additional right of way.

1 (6) Maintenance programs--A collection of maintenance
2 activities performed singularly or collectively on the state
3 highway system. The following categories have been established
4 as maintenance programs: bridge maintenance; customer service;
5 debris and spills; drainage; ferry maintenance; maintenance
6 enhancement; pavement maintenance; roadside appurtenances;
7 traffic pavement markings; and vegetation management.

8 (7) Memorandum of Understanding (MOU) --A formal document
9 which outlines the relationship between agencies or parties,
10 including the responsibilities and jurisdiction of each party.

11 (8) Mitigation--A means of addressing adverse impacts to
12 the natural environment including, in general order of
13 preference, avoidance, minimization, and compensation, the
14 commitment for which will be included in the environmental
15 document wherever the need is mutually agreed upon by TxDOT and
16 TPWD, including detailed plans where practicable.

17 (9) National Environmental Policy Act of 1969 (NEPA)--The
18 basic national charter for protection of the environment which
19 establishes policy, sets goals, and provides means for carrying
20 out the policies. NEPA is binding upon federal agencies,
21 including the Federal Highway Administration, and is usually
22 followed as an environmental guideline by state and local
23 agencies. In this document, NEPA includes the Act itself, its

subsequent amendments, and implementing regulations.

(10) Project development--The planning process of a transportation project which includes early project development, environmental studies including the development of the appropriate environmental documentation, public involvement, engineering design, and right of way acquisition.

(11) Public involvement--An important, ongoing phase of the project planning process which encourages and solicits public input and seeks to provide the public the opportunity to become fully informed regarding project development.

(12) Right of way--The land provided for a transportation facility, for example, the roadway itself (including shoulders), and areas between the roadway and adjacent properties (including drainage facilities).

(13) Transportation projects--All surface transportation projects designed, constructed, and maintained by TxDOT, excluding toll projects.

(c) Responsibilities.

(1) Texas Department of Transportation. The responsibilities of TxDOT pertain primarily to:

(A) planning and designing safe, efficient, effective, and environmentally sound transportation facilities, while avoiding, minimizing, or compensating for anticipated

1 environmental impacts to the fullest extent practicable;

2 (B) timely and efficient construction of transportation
3 facilities in a manner consistent with approved plans or
4 agreements that TxDOT has executed regarding the protection of
5 the natural environment to provide safe, efficient, and
6 environmentally sound transportation facilities for the
7 traveling public;

8 (C) the ongoing maintenance of these facilities to
9 provide safe, efficient, and environmentally sound
10 transportation facilities for the traveling public, and
11 dedication to the protection of natural resources within the
12 jurisdiction of TxDOT; and

13 (D) as directed by House Bill 1359, 74th Legislature,
14 1995 which amended House Bill 9, 72nd Legislature, 1991, the
15 construction, repair, and maintenance of roads in and adjacent
16 to state parks, state fish hatcheries, state wildlife management
17 areas, and support facilities for parks, fish hatcheries, and
18 wildlife management areas. (These items have been implemented
19 under a separate memorandum of agreement between TxDOT and TPWD
20 dated September 1, 1998.)

21 (2) Texas Parks and Wildlife Department.

22 (A) The responsibilities of TPWD relate primarily to
23 its functions as a natural resource agency, including its

resource protection functions, designated by Parks and Wildlife Code, Chapters 67, 68, 88, and §12.001 and §12.0011, and include:

(i) acting as the state agency with primary responsibility to protect the state's fish and wildlife resources;

(ii) providing recommendations that will promote fish and wildlife resources to local, state, and federal agencies that approve, permit, license, or construct developmental projects;

(iii) providing information on fish and wildlife resources to any local, state, or federal agencies or private organizations that make decisions affecting those resources; and

(iv) maintaining a listing of endangered and threatened species and providing these listings to local, state, and federal agencies that make decisions affecting those species.

(B) TPWD will identify and appoint appropriate staff to coordinate with TxDOT staff on transportation projects and to review project-specific information and documentation.

(d) Provisions. For the purpose of this MOU, the activities of TxDOT are divided into the following categories.

(1) Early project development. TxDOT may coordinate the

1 potential impacts with TPWD Wildlife Habitat Assessment Program
2 staff or the appropriate selected regional staff. TPWD will
3 provide a list of regional director contacts for district use.
4 TPWD staff may provide information concerning the occurrence of
5 unique or important wildlife travel or activity areas, sensitive
6 habitats, important vegetative communities or ecosystems,
7 suitability of habitat for threatened or endangered species, or
8 other natural resource information that could identify potential
9 undesirable impacts and associated planning constraints before
10 completion of a project design, and selection of a preferred
11 project alternative. The level of information provided by TPWD
12 will be consistent with protocol established to protect
13 confidentiality of site-specific data collected on private lands
14 pursuant to Parks and Wildlife Code, §12.0251 and §12.103.
15 TxDOT will provide project-specific information, as available,
16 to TPWD regional contacts. Following appropriate early
17 coordination that may involve TPWD regional staff, TxDOT may
18 solicit written concurrence from TPWD of a proposed project's
19 potential impacts and mitigation during early project
20 development. However, initially, written concurrence must be
21 coordinated through the Wildlife Habitat Assessment Program of
22 TPWD. Eventually, projects successfully coordinated with TPWD
23 regional staff during early project development may not require

1 additional coordination with TPWD as required under paragraph
2 (2) of this subsection, as determined by mutual agreement
3 between TPWD and TxDOT.

4 (2) Project development. Upon completion of TxDOT's
5 preliminary project review, a copy of the environmental
6 documentation shall be furnished to TPWD for all projects
7 meeting the criteria for coordination unless previously
8 documented as shown in paragraph (1) of this subsection.

9 Coordination will be conducted for projects that:

10 (A) involve more than 1.0 acre (0.4 hectares) of new
11 right of way within floodplains or creek drainages in rural or
12 undeveloped urban areas;

13 (B) require channel modifications to streams, rivers,
14 or water bodies;

15 (C) involve a channel realignment involving the
16 creation of new drainage ways or other excavation impacting more
17 than 1.0 acre (0.4 hectares) of mature woody vegetation;

18 (D) require any excavation (scraping, clearing, or
19 other surface disturbance) of the existing channel outside of
20 TxDOT's existing right of way or of the channel inside TxDOT's
21 existing right of way which is not routinely maintained and
22 exhibits native vegetation;

23 (E) might affect mature woody vegetation, dense mature

brush, including any significant remnant native vegetation
(e.g., undisturbed native prairie or bottomland hardwood, etc.);

(F) are within the range and in suitable habitat of any
state or federally listed threatened or endangered species;

(G) involve mitigation plans, or otherwise involve
proposals to redress project impacts on fish, wildlife, or plant
resources;

(H) have previous environmental documentation but where
three years have passed without major action(s) (i.e., final
design, acquisition of right of way, approval of plans,
specifications, or estimates) and the project has not been
reviewed by TPWD, but meets the above listed criteria; or

(I) have previous environmental documentation but where
three years have passed with major action(s) and the project may
or may not have been reviewed by TPWD, but meets the above
listed criteria.

(3) Elements of documentation. The level of
environmental documentation prepared and provided to TPWD will
be of sufficient detail to allow determination of the kinds of
vegetation communities that will be affected and areal extent of
vegetation impacted. The biological and natural resource
information contained in the environmental documentation will be
interpreted and verified by a qualified biologist prior to

1 coordination with TPWD. When available, environmental
2 documentation may be supported by aerial photography or on-
3 ground photography taken by a hand-held camera.

4 (4) Interagency team. An interagency team consisting of
5 staff from both TxDOT and TPWD will be established within 60
6 days from the signature date of this MOU.

7 (A) This team will:

8 (i) develop procedures and methodologies for
9 providing habitat characterizations and impact descriptions, and
10 develop supporting information for the environmental
11 documentation; and

12 (ii) establish criteria for the appropriateness,
13 planning, and implementation of compensatory mitigation when
14 TxDOT has identified a need, or when TxDOT and TPWD mutually
15 have identified the need, for compensation (Because mitigation
16 planning or implementation may be completed after the contract
17 for the project is awarded, no project shall be delayed pending
18 mitigation.).

19 (B) In addition, TxDOT has the final decision on the
20 implementation of a given mitigation plan. However, if TxDOT
21 determines that mitigation is not feasible, an explanation of
22 why it will not be undertaken shall be provided to TPWD.

23 (5) Review period. TPWD shall have a period of 45 days

1 from the date of the transmittal letter to review project
2 environmental documentation. Any comments submitted by TPWD
3 shall be considered by TxDOT in making project decisions. If
4 additional information is requested by TPWD it shall be provided
5 by TxDOT, if such information is available or reasonably can be
6 obtained. In such case, TPWD shall have an additional 30 days
7 from the date of TxDOT's second transmittal letter that will
8 accompany the additional information forwarded to TPWD to review
9 documentation.

10 (6) Final disposition of projects. TxDOT reserves the
11 right to determine the final disposition of proposed
12 transportation projects, based on a considered analysis of TPWD
13 comments and practical alternatives as they relate to TxDOT's
14 responsibilities as described in this document.

15 (7) Ongoing coordination. When necessary, construction
16 activities coordination between TxDOT and TPWD shall continue
17 through the construction phase to provide for the protection of
18 natural resources. Mitigation proposals agreed upon by TxDOT and
19 TPWD relating to construction activities will be included in the
20 project construction plans.

21 (8) Unforeseen protected species impacts. In the event
22 that unforeseen impacts to endangered or threatened species or
23 their habitat under TPWD jurisdiction are identified after

1 construction has commenced, TxDOT will coordinate with TPWD
2 regarding such resources.

3 (9) Maintenance program review. TPWD will be provided
4 the opportunity to review TxDOT maintenance programs prior to
5 implementation of each program or plan. TPWD will be provided an
6 opportunity to comment and make suggested revisions to the
7 programs, and TxDOT will give consideration to these suggested
8 revisions. If TxDOT does not fully implement the revisions
9 suggested by TPWD, TxDOT will provide a written explanation to
10 TPWD.

11 (10) TPWD document commentary. Comments received by TxDOT
12 from TPWD in the coordination process shall, when applicable,
13 include:

14 (A) guidance as to what species may be present within
15 the project area that may require special considerations in
16 terms of those species and their habitat;

17 (B) suggested mitigation measures; and

18 (C) recommendations for protection of natural resources
19 under TPWD jurisdiction, as defined in Parks and Wildlife Code,
20 §12.001 and §12.0011.

21 (e) Special provisions relating to information exchange.

22 (1) TxDOT and TPWD shall cooperate in the maintenance and
23 enhancement of a computer-based information system detailing the

1 distribution of species listed as threatened or endangered
2 (including state and federal listings), or those which are of
3 concern and are being considered for listing.

4 (2) TxDOT and TPWD shall cooperate to develop a protocol
5 addressing the transfer of the computer-based information on
6 locations of protected species and/or habitats of concern, the
7 use and distribution of this information, and the security of
8 the information. The level of information provided by TPWD will
9 be consistent with protocol established to protect
10 confidentiality of site specific data collected on private lands
11 pursuant to Parks and Wildlife Code, §12.0251 and §12.103.

12 (f) Review of MOU. This MOU shall be reviewed and updated,
13 at a minimum, every fifth year beginning January 1, 2002, and
14 TxDOT and TPWD by rule shall adopt the MOU and all revisions to
15 the MOU.