

randa of understanding with each agency that has responsibility for the protection of the natural environment or for the preservation of historical or archeological resources, and to adopt all revisions to these memoranda by rule.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.607.

§2.24. Memorandum of Understanding with the Texas Historical Commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2013.

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General Counsel

Texas Department of Transportation

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SUBCHAPTER H. MEMORANDUM OF UNDERSTANDING WITH THE TEXAS HISTORICAL COMMISSION

43 TAC §§2.251 - 2.278

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.607(b), which requires the department to adopt memoranda of understanding with each agency that has responsibility for the protection of the natural environment or for the preservation of historical or archeological resources, and to adopt all revisions to these memoranda by rule.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.607.

§2.251. Purpose and Authority.

This subchapter contains the memorandum of understanding (MOU) entered into by the Texas Historical Commission (THC) and the Texas Department of Transportation (TxDOT) in accordance with Government Code, §442.005 and §442.007; Natural Resources Code, §191.0525(f); and Transportation Code, §201.607. The purpose of this MOU is to provide a formal mechanism for expediting THC review of TxDOT's transportation projects that potentially pose adverse effects on cultural resources. This MOU supersedes the previous MOU made effective on May 20, 2004.

§2.252. Applicability.

(a) Except as provided in subsection (b) of this section, this subchapter generally applies to:

- (1) a transportation project for which an environmental review is being or will be performed under this chapter; or
- (2) any other type of project coordinated at TxDOT's request.

(b) Federally funded, licensed, or permitted projects may follow the procedures of this subchapter only if doing so would not conflict with environmental rules promulgated by the lead federal agency.

§2.253. Programmatic Agreements.

(a) Provisions of this MOU may be implemented, in part, through a Programmatic Agreement (PA) among the Federal Highway Administration (FHWA), the Texas State Historic Preservation Officer (TSHPO), the Advisory Council on Historic Preservation (Council), and TxDOT.

(b) With respect to federally funded projects, instead of the procedures set forth in this MOU, THC and TxDOT shall use the applicable procedures outlined in their First Amended Programmatic Agreement Among the Federal Highway Administration, the Texas Department of Transportation, the Texas State Historic Preservation Officer, and the Advisory Council on Historic Preservation Regarding the Implementation of Transportation Undertakings (PA-TU) and its successors to provide for innovation and efficiency in the timely development of TxDOT's transportation projects considerate of their impacts on cultural resources.

(c) TxDOT and THC will seek to revise the existing PA, amended in 2005, to reflect the streamlined procedures contained in this MOU.

§2.254. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Antiquities permit--A permit issued by the Texas Historical Commission in order to regulate the taking, alteration, damage, exhumation, destruction, salvage, archeological survey, testing, excavation and study of state antiquities landmarks including prehistoric and historic archeological sites, and the preservation, protection, stabilization, conservation, rehabilitation, restoration, reconstruction, or demolition of historic structures and buildings designated as a State Antiquities Landmark (or listed in the National Register of Historic Places).

(2) Area of potential effects (APE)--The geographic space or spaces within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist.

(A) The area of potential effects for archeological properties will be confined to the limits of the proposed project right of way (including permanent and temporary easements), utility relocations designated by TxDOT, and project-specific locations designated by TxDOT. The area of potential effects also extends to the depth of impacts caused by the undertaking.

(B) The area of potential effects for non-archeological historic properties for all non-federal undertakings will be confined to the limits of the proposed project right of way (including permanent and temporary easements), utility relocations, and project-specific locations specifically designated by TxDOT.

(3) Cultural resources--A general term referring to buildings, structures, shipwrecks, objects, sites, and districts more than 50 years of age with the potential to have significance in local, state, or national history.

(4) Effect--Alteration to the characteristics of a historic property qualifying it for formal designation as a State Antiquities Landmark.

(5) Eligibility--A property's eligibility for designation as a State Antiquities Landmark, as set forth in 13 TAC Chapter 26 (relating to Practice and Procedure).

(6) Emergency permit--A permit that may be used by TxDOT under certain emergency circumstances for the purposes of performing investigations prior to formal application for an antiquities permit.

(7) Historic property--Any prehistoric or historic district, site, building, structure, or object that meets the requirements for designation as a State Antiquities Landmark as set forth in 13 TAC Chapter 26.

(8) Minor widening--Roadway projects resulting in pavement profile widened to less than double their original width, resulting from adding travel/center-turn lanes or paved shoulders.

(9) Project-specific location--The location of specific material sources (e.g., base material, borrow, and sand pits) and other sites used by a construction contractor for a specific project.

(10) State Antiquities Landmark (SAL)--Both Archeological and Non-archeological historic properties that are designated or eligible for designation as landmarks as defined in Subchapter D of the Antiquities Code of Texas (Natural Resources Code, Chapter 191) and identified in accordance with 13 TAC Chapter 26.

(11) THC--Texas Historical Commission.

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

(13) Transportation project--A project to construct, maintain or improve a highway, rest area, toll facility, aviation facility, public transportation facility, rail facility, ferry, or ferry landing. A transportation enhancement is also a transportation project.

(14) TxDOT--Texas Department of Transportation.

§2.255. Coordination Responsibilities.

(a) Texas Department of Transportation. The coordination responsibilities of TxDOT under this MOU are defined as follows.

(1) Except as provided in §2.257 of this subchapter (relating to Projects Excluded from Review for Archeology Resources and Cemeteries), §2.270 of this subchapter (relating to Projects Excluded from Review for Non-Archeological Historic Properties), or other provisions of this subchapter that exclude projects from coordination requirements, TxDOT shall coordinate review of transportation projects for which TxDOT is the project sponsor under §2.7 of this chapter (relating to Project Sponsor) with THC for both archeological resources and cemeteries, and non-archeological historic properties, as described in this MOU.

(2) All coordination required by this MOU shall be conducted by or through TxDOT's Environmental Affairs Division, or its successor as established by TxDOT administration, unless the division (or its successor) and THC agree in writing to allow other appropriate organizational units of TxDOT or other entities approved by the respective agencies to conduct the coordination.

(3) Work in TxDOT right-of-way that is not associated with a project for which TxDOT is the project sponsor under §2.7 of this chapter is the responsibility of the project sponsor and not of TxDOT (see Natural Resources Code, §191.0525), except as provided under paragraph (5) of this subsection. The project sponsor is responsible for coordinating directly with THC for such work, using the terms of this MOU to the extent THC determines appropriate. Examples of projects that will be coordinated by the non-TxDOT project sponsor directly with THC include but are not limited to:

(A) on-system highway projects funded entirely with local funds;

(B) utility relocations or installations within TxDOT right-of-way sponsored by other entities; and

(C) driveway and access connections sponsored by other entities.

(4) TxDOT shall not be a signatory to any permit issued by THC to another entity for work on a project funded or sponsored by such other entity.

(5) In accordance with §2.12(g)(1) of this chapter (relating to Project Coordination), TxDOT may coordinate projects sponsored or funded by another entity under this MOU by agreement with the non-TxDOT project sponsor, and TxDOT will provide notice to THC when it coordinates such projects.

(b) Texas Historical Commission. The coordination responsibilities of THC under this MOU are to conduct any review required by this subchapter in an efficient manner, to provide timely feedback to TxDOT about projects coordinated under this subchapter, and to apply any funding provided by TxDOT solely to the review of TxDOT's projects in a manner that most efficiently streamlines THC's effective review and early coordination.

§2.256. Qualifications of Staff and Use of Consultants.

(a) All cultural resource investigations executed under the terms of this MOU shall be implemented by staff who meet the requirements for professional personnel set forth in 13 TAC Chapter 26 (relating to Practice and Procedure) or the Secretary of the Interior's Professional Qualification Standards (36 C.F.R. Part 61, Appendix A).

(b) TxDOT has the right to perform cultural resource investigations using staff or consultants who meet the professional standards cited in subsection (a) of this section.

(c) Cultural resource surveys, investigations, permit applications, and other work performed by consultants shall be coordinated with THC by or through TxDOT's Environmental Affairs Division, or its successor as established by TxDOT administration, unless it and THC agree in writing to allow other appropriate organizational units of TxDOT or other entities approved by the respective agencies to coordinate the work.

§2.257. Projects Excluded from Review for Archeological Resources and Cemeteries.

(a) Routine roadway maintenance projects and projects with minor levels of ground disturbance, by their nature and definition, do not have the potential to affect historic properties, and do not require review of their potential project impacts on archeological resources or cemeteries by THC under 13 TAC Chapter 26 (relating to Practice and Procedure) or under this MOU. Such projects include vegetation control, traffic control, routine painting and striping, and other activities with less than 100 cubic yards of ground disturbance below the original grade. The following activities also do not require review of their potential impacts on archeological resources or cemeteries under 13 TAC Chapter 26 or under this MOU:

(1) installation, repair, or replacement of fencing, signage, traffic signals, railroad warning devices, safety end treatments, cameras, and intelligent highway system equipment;

(2) projects involving purchase or acquisition of land without associated ground-disturbing activities;

(3) routine structural maintenance and repair of bridges, highways, railroad crossings, picnic areas, and rest areas;

(4) in-kind repair, replacement of lighting, signals, curbs and gutters, and sidewalks;

(5) crack seal, overlay, milling, grooving, resurfacing, and restriping;

(6) replacement, upgrade, and repair of safety barriers, ditches, storm drains, and culverts;

(7) intersection improvements, including repair or replacement of overpasses, that require less than 0.5 acres of additional right of way at each intersection;

(8) placement of riprap to prevent erosion of waterway banks and bridge piers provided no ground disturbance is required;

(9) all maintenance work between a highway and an adjacent frontage road;

(10) installation of noise barriers or alterations to existing publicly owned buildings less than 50 years old, to provide for noise reduction except in potential or listed National Register districts;

(11) driveway and street connections;

(12) all work within interchanges and within medians of divided highways;

(13) all work between the flowlines of the ditches and channels and above the original line and grade;

(14) ditch and channel maintenance, provided removal of fill is above the original line and grade;

(15) repairs needed as a result of an event, natural or man-made, which causes damage to a designated state highway, resulting in an imminent threat to life or property of the traveling public or which substantially disrupts or may disrupt the orderly flow of traffic and commerce;

(16) the installation and modification of sidewalks (including the addition of American with Disabilities Act (ADA) ramps) except:

(A) sidewalk installations where the depth of impact exceeds one foot;

(B) sidewalk and ADA ramp projects within the historic districts in the following cities or towns: Goliad, Rio Grande City, Roma, San Antonio, San Elizario, and San Ygnacio; and

(C) sidewalk or ADA ramp projects within the limits of the following cities or towns: Anahuac, Nacogdoches, San Patricio, and Socorro;

(17) design changes for projects that have completed all applicable review and consultation where the new project elements comprise only one or more of the activities listed in this section; or

(18) other kinds of undertakings jointly agreed to in writing by THC and TxDOT.

(b) Projects that are exempt from project-specific review for compliance with 13 TAC Chapter 26 and review under this MOU, as specified in subsection (a) of this section, are also exempt from compliance with other THC rules regarding project-specific investigations or coordination for potential impacts to cemeteries promulgated under Health and Safety Code, §711.012(c), unless one of the following two conditions is present:

(1) pavement would be extended to within 15 feet of the boundary of a known cemetery founded earlier than 1955; or

(2) another project element would directly affect known burials.

§2.258. Procedures for Project Coordination when the Project Requires Review for Archeological Resources and Cemeteries.

(a) For projects subject to review for archeological resources and cemeteries under this MOU, TxDOT will evaluate the APE for potential project effects to archeological historic properties and to determine whether the APE contains cemeteries. TxDOT must make reasonable efforts and act in good faith when complying with this requirement.

(b) TxDOT may approve projects to proceed to construction without review by THC when TxDOT staff finds that the project will not affect archeological historic properties and the project APE will not contain cemeteries.

(c) TxDOT will submit a quarterly report of projects evaluated and approved internally to THC.

(d) TxDOT will submit projects to THC for review when TxDOT staff finds the project may affect archeological historic properties or the project APE contains cemeteries. TxDOT may, at its discretion, submit projects for THC review in cases where TxDOT staff finds that the project will not affect archeological historic properties, and the project APE does not contain cemeteries.

(e) In its request for review, TxDOT will make one or more of the following findings, determinations, and recommendations:

(1) in cases where no archeological sites or cemeteries occur or are likely to occur in some or all of the APE, TxDOT will propose a finding of no effect in those portions of the APE and recommend that the project proceed to construction in those portions;

(2) in cases where an archeological site occurs within the APE but the portion of the site within the APE does not have characteristics that qualify it as an archeological historic property or is not likely to have such characteristics, TxDOT will propose a determination that the portion of the site in the APE is not an archeological historic property, find that the project will have no effect on archeological historic properties at the site location, and recommend that the project proceed to construction at the location of the site;

(3) in cases where the portion of a site within the APE has characteristics that qualify it as an archeological historic property, TxDOT will propose a determination that an archeological historic property occurs within the APE;

(4) in cases where the APE contains an archeological historic property or cemetery, TxDOT will either propose a finding that the project will have no adverse effect on the site or propose a finding that the project will have an adverse effect on the site; or

(5) if a project will have an adverse effect on an archeological historic property or cemetery within the APE, TxDOT will also recommend to THC an appropriate means by which to resolve the potential adverse effect.

(f) The resolution of adverse effects may take one of the following forms:

(1) the avoidance of the site during construction;

(2) an alternative mitigation strategy, such as the preservation of a comparable site or the re-analysis of an existing collection;

(3) data recovery excavation or exhumation; or

(4) another form of resolution approved by THC.

(g) In cases where data recovery is the selected means for resolving adverse effects, TxDOT will coordinate with THC at several stages during the data recovery process according to the following procedures, unless TxDOT and THC agree in writing to different procedures:

(1) TxDOT will submit an initial data recovery plan as part of a permit application for data recovery to THC for review;

(2) TxDOT will submit a brief report, documenting whether the fieldwork met the terms of the initial data recovery plan and justifying any deviation, to THC for review. When appropriate, TxDOT will recommend that the project be approved to proceed to construction and destruction of any remaining portion of the site within the APE;

(3) TxDOT will submit a revised data recovery plan, based on a preliminary review of field data and recovered materials, to THC for review. When appropriate, TxDOT will recommend that the revised plan be adopted for the completion of data recovery analysis and reporting;

(4) TxDOT will submit a draft data recovery report to THC for review. When appropriate, TxDOT will recommend that the report be accepted in partial satisfaction of the terms of the permit and in satisfaction of TxDOT's obligations for resolving the adverse effects of the project on the site; or

(5) TxDOT will ensure that data recovery investigations do not begin before the State of Texas' legal right to ownership of the artifacts to be recovered has been secured.

(h) THC will respond within 20 calendar days of receipt of the TxDOT request for review. The response will include:

(1) a statement of concurrence or nonconcurrence with TxDOT's findings and recommendations;

(2) a determination of site eligibility for all evaluated sites; and

(3) any other comments relevant to the archeological resources or cemeteries which could be affected by the project.

(i) If THC does not respond within 20 calendar days, TxDOT may assume that THC concurs with TxDOT's findings, determinations, and recommendations and may proceed with the project in accordance with the procedures required in this MOU.

§2.259. Background Studies for Archeological Resources and Cemeteries.

(a) For projects subject to review for archeological resources and cemeteries under this MOU, based on the results of background research, TxDOT will identify projects or portions of projects' APEs that require archeological field investigation.

(b) Eligibility determinations that TxDOT performs under this MOU will not require field investigations if sufficient background information exists to demonstrate that the portion of the site to be affected does not have potential research value.

(c) Determinations that TxDOT makes under this MOU regarding the presence of cemeteries in project APEs may be made through the use of maps, project-area photographs, or other background research.

§2.260. Permits for Archeological Resources and Cemeteries.

(a) THC shall issue antiquities permits for reconnaissance survey, intensive survey, monitoring, eligibility testing, exhumations, and emergencies to archeological staff at TxDOT under the following terms:

(1) the archeological staff of TxDOT's Environmental Affairs Division, or its successor as established by TxDOT administration, oversees the work;

(2) the work shall be completed in accordance with the provisions of the MOU; and

(3) THC shall not require TxDOT to submit an antiquities permit application.

(b) In lieu of a permit application, TxDOT archeological staff shall notify THC in writing (by email or letter) of:

(1) the principal investigator;

(2) the investigation type and scope of work;

(3) the county in which the project will occur;

(4) the project name or identifier (site trinomial, if applicable); and

(5) the period of time for which the permit is desired.

(c) TxDOT staff may initiate work following notification of THC.

(d) THC shall issue a permit number within five business days of receiving the notification.

(e) TxDOT may revise the type of investigation based on observations made during the conduct of work as long as TxDOT provides to THC notification of the change prior to submission of the report.

(f) When conditions of natural disasters, man-made disasters, or post-review discovery necessitate immediate action, TxDOT may initiate work under an emergency permit without having first requested and received the permit number subject to the following conditions:

(1) TxDOT staff shall only conduct work under an emergency permit when archeological deposits are discovered during development or other construction projects or under conditions of natural or man-made disasters that necessitate immediate action to deal with the situation and findings;

(2) TxDOT will provide notification to THC to obtain the permit number within five working days of initiating the work; and

(3) all categories of investigations can be authorized under an emergency permit, but an emergency permit will only be issued under emergency conditions where the investigations must be initiated or performed prior to notification under subsection (b) of this section.

(g) THC shall consider the work conducted under the permit completed upon receipt of:

(1) one unbound report;

(2) two tagged pdf format reports on an archival quality CD or DVD, one containing all maps and locational information and one with maps and locational information redacted;

(3) a shape file of the project area subject to investigation; and

(4) a completed abstract form.

(h) The number of defaulted permits accrued by particular TxDOT staff while working for TxDOT shall not affect the issuance of additional permits to other TxDOT staff by THC for TxDOT projects.

(i) The inspection of a project APE or proposed APE for purposes of evaluating the kind of archeological investigation that may be required (scoping) shall not constitute an activity that requires a permit

from THC when that activity does not result in a report to be coordinated under the terms of the MOU.

(j) All types of archeological investigations conducted by TxDOT but not covered by this section shall require submission of an antiquities permit application and adhere to the terms of the permit and 13 TAC Chapter 26 (relating to Practice and Procedure).

§2.261. Surveys for Archeological Resources and Cemeteries.

(a) Surveys may be limited to an evaluation of existing impacts or stratigraphic integrity when these activities are sufficient to determine that any sites present are unlikely to be eligible.

(b) Eligibility determinations that TxDOT performs under this MOU do not require subsurface investigation if it can be demonstrated that the portion of the site to be affected is not likely to have sufficient integrity to be eligible.

(c) For portions of the APE where deposits may retain sufficient integrity for sites to be eligible, TxDOT survey methods will conform with THC's Archeological Survey Standards or with other appropriate methods, except as provided in paragraphs (1) and (2) of this subsection:

(1) TxDOT reserves the right to depart from published survey standards in cases where it deems appropriate; and

(2) THC reserves the right to review non-standard procedures for their adequacy.

(d) Survey methods will be considered adequate for the identification of burials and cemetery boundaries when the portions of the APE within 25 feet of a known cemetery have been investigated and the survey included scraping to a depth adequate to determine whether grave shafts or burials occur in the APE.

(e) A survey to identify burials does not comprise an activity with the potential to cause an adverse effect to a historic property.

§2.262. Archeological Eligibility Testing Phase.

(a) The following methods will be employed for test excavations:

(1) mechanical trenches will be excavated and profiles documented in order to characterize the area's potential for archeological deposits with sufficient integrity to be eligible to occur at the site;

(2) the extent of the site within the APE will be sampled through some combination of shovel-testing, column sampling, augering, surface collection, and geophysical prospection in order to characterize the distribution of archeological materials across the site;

(3) additional units will be excavated and screened to evaluate site areas that appear to have the best potential for yielding important data with good integrity, based on the results of previous work; and

(4) the materials analyzed will comprise those materials most likely to contribute important information about prehistory or history.

(b) TxDOT reserves the right to depart from these methods in cases where it deems appropriate and shall justify deviations in the report.

(c) Data from test excavation projects shall be made available to qualified researchers.

§2.263. Archeological Excavation and Data Recovery.

(a) When appropriate and established in the final research design approved by THC, TxDOT will develop public educational outreach projects for significant data recovery investigations.

(b) Data from data recovery projects shall be made available to qualified researchers.

§2.264. Exhumation.

(a) Exhumation is a form of investigation to resolve the adverse effects of a project on a cemetery.

(b) Exhumation efforts may be staged as a separate phase of work from burial identification. Following procedures set forth in Health and Safety Code, Chapter 711, exhumation may begin once any required notifications of next of kin or other procedures required by Health and Safety Code, Chapter 711 have been conducted.

(c) The following tasks represent a sufficient, reasonable, and good faith effort to identify remains and any next of kin associated with burials in unknown or abandoned cemeteries:

(1) making inquiries through the local County Historical Commission;

(2) posting notices with local news outlets; and

(3) posting notices with local churches.

(d) An exhumation project is itself not a type of investigation that requires an outreach effort or curation of materials at a state-certified facility.

§2.265. Archeological Sites found after Award of Contract.

(a) When previously unknown archeological remains are encountered after award of a construction contract, TxDOT will immediately suspend construction or any other activities that would affect the site.

(b) TxDOT will inform THC of the discovery of previously unknown archeological remains and invite THC to accompany TxDOT staff (or consultants) to the location within ten business days of the discovery.

(c) TxDOT, in consultation with THC, will evaluate the need, if any, for further investigations.

(d) If TxDOT determines that the discovery is an unrecorded archeological site, then TxDOT or its consultants shall complete an electronic TexSite archeological site survey form.

(e) If TxDOT determines that the site does not warrant further investigations because it is not a historic property, construction will resume. TxDOT will document its findings.

(f) If TxDOT determines that the site warrants further investigation because the site may be a historic property, TxDOT will take one of the following three actions, as appropriate:

(1) a permit amendment will be sent to THC for the additional work, if an existing permit for the project is still open;

(2) a notification for a new permit will be sent to THC; or

(3) TxDOT will perform necessary investigations under an emergency permit.

(g) Upon completion of the investigation in accordance with any applicable permit terms, construction may proceed as planned.

§2.266. Standard Treatments for Particular Resource Types.

(a) Isolated wells or cisterns unassociated with other remains will be treated as follows:

(1) isolated wells or cisterns that post-date 1900 A.D. do not warrant notification of THC or additional investigation. Removal or sealing of these features does not constitute an adverse effect; and

(2) isolated wells or cisterns that pre-date 1900 A.D. require documentation of their location, construction, and condition. Upon completion of the documentation, these features may be back-filled and capped. These activities do not constitute an adverse effect.

(b) Burnt rock midden features that have not been obviously destroyed by modern disturbances will be treated as follows:

(1) the feature will be trenched to expose a cross-section;

(2) the exposed profiles will be documented, focusing on the identification of any internal structure;

(3) column samples will be taken from the exposed profile in order to collect samples for flotation and dating from each deposit recognized in the profile;

(4) deviations from this standard approach may be undertaken if TxDOT coordinates an alternate approach with THC; and

(5) any additional work on the feature will be determined in consultation between TxDOT and THC, based on the results of the trenching.

§2.267. Artifact Recovery and Curation.

(a) Artifact recovery.

(1) Artifacts or analysis samples (such as soil samples) that are recovered from survey, testing, or data recovery investigations by TxDOT or their contracted agents that address the research questions must be cleaned, labeled, and processed in preparation for long-term curation unless the artifacts or samples are approved by THC for discard under 13 TAC Chapters 26 and 29 (relating to Practice and Procedure; and Management and Care of Artifacts and Collections, respectively).

(2) To ensure proper care and curation, recovery methods must conform to the applicable requirements of 13 TAC Chapters 26 and 29.

(b) Artifact curation.

(1) TxDOT or its permitted contractor may temporarily house artifacts and samples during laboratory analysis and research, but upon completion of the analysis, artifacts and accompanying documentation must be transferred to a permanent curatorial facility in accordance with the terms of the antiquities permit.

(2) Artifacts and samples will be placed at an appropriate artifact curatorial repository which fulfills the applicable requirements of 13 TAC Chapter 29 as approved by THC. When appropriate, TxDOT will consult with THC to identify for disposal collections or portions of collections that do not have identifiable value for future research or public interpretation. Final approval regarding the disposition of collections will be made by THC.

(3) TxDOT is responsible for the curatorial preparation of all artifacts to be submitted for curation so that they are acceptable to the receiving curatorial repository and fulfill the applicable requirements of 13 TAC Chapters 26 and 29, as approved by THC.

§2.268. Documentation for Archeological Resources and Cemeteries.

(a) Projects subject to review for archeological resources and cemeteries under this MOU will be documented by TxDOT in the manner described in this section. Documentation for each such project will include, at a minimum:

(1) a description of the project, defining the APE or the investigated portion of the APE in three dimensions;

(2) a project location map, plotting the project location on 7.5' Series USGS quadrangle maps;

(3) information regarding the setting that is relevant for the assessment of the integrity of any archeological sites within the APE;

(4) information on previously recorded archeological sites in the project location;

(5) description and justification of the level of effort undertaken for the investigation; and

(6) results and recommendations.

(b) All TxDOT survey and testing reports will also include:

(1) description and justification of field methods, including the sampling strategy;

(2) description and quantification of any archeological materials identified;

(3) accurate plotting of any sites found on 7.5' Series USGS quadrangle maps;

(4) submission of electronic TexSite archeological site survey forms to the Texas Archeological Research Laboratory; and

(5) recommendations regarding whether any site merits further investigation.

§2.269. Quarterly Reports for Archeological Resources and Cemeteries.

Quarterly reports will be submitted by TxDOT to THC within 60 business days after the end of the calendar quarter, listing all projects for which TxDOT has documented that no historic properties or cemeteries are present in the project's area of potential effect, and those projects that will have no adverse effects on archeological historic properties or cemeteries.

§2.270. Projects Excluded from Review for Non-Archeological Historic Properties.

(a) For the purposes of this section, the term historic properties will refer only to non-archeological historic properties.

(b) Based on previous coordination outcomes, TxDOT and THC agree that the following types of routine roadway projects pose limited potential to affect historic properties:

(1) maintenance, repair, installation, or replacement, of transportation-related features, including fencing, signage, traffic signals, railroad warning devices, safety end treatments, cameras and intelligent highway system equipment, bridges, railroad crossings, picnic areas, rest areas, roadside parks, lighting, curbs and gutters, safety barriers, ditches, storm drains, culverts, overpasses, channels, rip rap, and noise barriers;

(2) maintenance, repair, or replacement of roadway surfacing, including crack seal, overlay, milling, grooving, resurfacing, and restriping;

(3) maintenance, repair, reconfiguration, or correction of roadway geometrics, including intersection improvements and driveway and street connections;

(4) maintenance, repair, installation or modification of pedestrian and cycling-related features, including American with Disabilities Act ramps, trails, sidewalks, and bicycle and pedestrian lanes;

(5) maintenance, repair, relocation, addition, or minor widening of roadway, highway, or freeway features, including turn

bays, center turn lanes, shoulders, U-turn bays, right turn lanes, travel lanes, interchanges, medians, and ramps;

(6) maintenance, repair, replacement, or relocation of features at crossings of irrigation canals, including bridges, new vehicle crossings, bank reshaping, pipeline and standpipe components, canal conversion to below-grade siphons, and utilities;

(7) repairs needed as a result of an event, natural or man-made, which causes damage to a designated state highway, resulting in an imminent threat to life or property of the traveling public, or which substantially disrupts or may disrupt the orderly flow of traffic and commerce;

(8) design changes for projects that have completed all applicable review and consultation where the new project elements comprise only one or more of the activities listed in this subsection; and

(9) other kinds of undertakings jointly agreed to in writing by THC and TxDOT as not requiring review.

(c) For projects described by subsection (b) of this section, TxDOT qualified professional staff shall determine whether additional evaluation is required due to direct effects to historic properties. If no such evaluation is deemed necessary, such projects are determined to pose no effect on historic properties and do not require review by THC under 13 TAC Chapter 26 (relating to Practice and Procedure) or under this MOU.

(d) For review-exempt projects, documentation shall be limited to that maintained in TxDOT's official project files. THC may audit TxDOT files for specific projects upon request.

§2.271. Procedures for Project Coordination when the Project Requires Review for Non-Archeological Historic Properties.

(a) Historic properties. For the purposes of this section, the term historic properties will refer only to non-archeological historic properties.

(b) Internal review projects. For projects subject to review for historic properties under this MOU, TxDOT qualified professional staff shall determine the presence or absence of historic properties in the area of potential effects. Such efforts should focus on the types of historic properties within public rights-of-way and other sensitive areas, including but not limited to historic bridges, historic road corridors, historic roadside parks and rest areas, historic Depression Era masonry culverts, historic districts, historic courthouse squares and other historic commercial zones. Project activities that TxDOT determines will have no effect or no adverse effect on historic properties may be internally reviewed by TxDOT and are approved for construction. Documentation for such projects will be maintained in official TxDOT project files and regularly reported to THC in accordance with subsection (d)(1) of this section.

(c) Coordinated projects. Projects subject to review for historic properties under this MOU that are determined by TxDOT qualified professional staff to pose an adverse effect on historic properties shall require individual THC review according to the following procedures:

(1) THC will respond within 20 calendar days of receipt of TxDOT's request for review by indicating whether an affected historic property will require a historic structures permit for an SAL, or whether THC intends to initiate an SAL nomination for the affected property. If THC does not respond within 20 calendar days, TxDOT may assume THC's concurrence with its determinations, and TxDOT may proceed with the project to construction;

(2) in accordance with Government Code, §442.008 and 13 TAC §17.2 (relating to Review of Work on County Courthouses),

TxDOT will notify THC of any work affecting a county courthouse or its surrounding site, up to and including the curb. THC will respond within 20 calendar days of receipt of TxDOT's notification by indicating whether a historic structures permit for an SAL or additional consultation pursuant to a preservation covenant or easement will be required; and

(3) state-funded projects coordinated under this MOU that may subsequently require a federal permit or change to federal funding, and that involve a direct taking of a historic property, must be individually coordinated with THC in order to satisfy federal regulations under 23 C.F.R. Part 774 and 36 C.F.R. Part 800. Procedures outlined in the 2005 PA-TU or subsequent agreements will govern such coordination.

(d) Documentation. For projects that are internally reviewed or individually coordinated under subsections (b) and (c) of this section, TxDOT will comply with the following project documentation requirements:

(1) for projects that are internally reviewed under subsection (b) of this section, TxDOT will submit to THC a quarterly report of internally approved projects within 60 business days after the end of the calendar quarter. THC may audit TxDOT files for specific projects submitted in the quarterly report. Quarterly report documentation will include:

(A) project description and scope;

(B) project location map with delineation of the APE and location of historic properties;

(C) methodology used to identify historic properties;

(D) photographic and descriptive information for each identified property;

(E) description of public involvement activities;

(F) justification for findings of historic properties, including setting, integrity, and contextual information; and

(G) justification of effects on historic properties, including evaluations, reports, and other information relevant to the findings by TxDOT; and

(2) for projects that are individually coordinated under subsection (c) of this section, documentation submitted to THC will include the items listed in paragraph (1)(A) - (G) of this subsection, and a description of efforts to avoid or minimize harm, mitigation, and commitments.

§2.272. Denial of Access.

In cases where access to private land for conducting investigations is denied prior to the approval of the environmental review document, TxDOT will make a commitment to complete appropriate investigations once access is obtained, but prior to any construction related impacts.

§2.273. MOU to Govern TxDOT Procedures.

TxDOT satisfies applicable THC requirements if it utilizes the procedures of this MOU in lieu of other THC procedures. In cases where TxDOT is utilizing this MOU in lieu of other THC procedures, TxDOT must follow the requirements of this MOU.

§2.274. Project-Specific Agreements.

Any project-specific agreement reached between TxDOT and THC regarding the evaluation or treatment of project effects shall be honored by both parties and shall supersede the requirements of this MOU. TxDOT and THC may deviate from the terms of the agreement only when both parties concur that the agreement requires revision.

§2.275. Continuous Improvement Agreement.

TxDOT and THC agree to collaborate on improvements to their programs and development of innovative solutions for expedited review procedures. Such mechanisms may include using project outcomes to refine approaches to resource identification, evaluation, treatment methods, programmatic mitigation measures and interagency agreements that facilitate early coordination, and streamlining and expedited review of TxDOT's transportation projects.

§2.276. THC Review of TxDOT Project Files.

THC may review TxDOT project files for specific undertakings carried out under this MOU. THC may recommend process improvements based on issues identified during the review.

§2.277. Dispute Resolution.

THC and TxDOT staff will be responsible for attempting to resolve any conflict between THC and TxDOT that results from the implementation of this subchapter before elevating to agency management.

§2.278. Review of MOU.

This memorandum of understanding shall be reviewed and updated as provided by law or by agreement between the parties. THC and TxDOT agree to convene every four years to review, update, or extend this agreement.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 1, 2013.

TRD-201300410

Jeff Graham

General Counsel

Texas Department of Transportation

Earliest possible date of adoption: March 17, 2013

For further information, please call: (512) 463-8683



CHAPTER 7. RAIL FACILITIES SUBCHAPTER D. RAIL SAFETY

43 TAC §7.31

The Texas Department of Transportation (department) proposes amendments to §7.31, concerning safety requirements.

EXPLANATION OF PROPOSED AMENDMENTS

During the department's rule review process, the Rail Division identified several changes that are necessary to update §7.31, Safety Requirements.

Amendments to §7.31 combine the laws listed in existing subsections (b) and (c), that provide safety requirements applicable to railroads operating in Texas, into a single list and revise references to certain laws. Texas Civil Statutes, Article 6492a has been revised as Transportation Code, Chapter 193 and the amendments to §7.31(b)(4) reflect that change. The references to 49 C.F.R. Part 40 and 49 C.F.R. Parts 107 and 171-180 are moved from existing subsection (c)(1) and (2) to new subsection (b)(5) and (6), respectively. The references to the specific provisions of the Code of Federal Regulations contained in existing subsection (c)(3) - (24) are changed to a more general reference and transferred to subsection (b)(7). Existing subsection (c) is deleted as a result of the combination of the two subsections.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each year of the first five years in which the proposed amendments are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Jeff Graham, General Counsel, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Graham has also determined that for each year of the first five years in which the amendments are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be clarity in the department's rules. There are no anticipated economic costs for persons required to comply with the section as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §7.31 may be submitted to Robin Carter, Office of General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "7.31." The deadline for receipt of comments is 5:00 p.m. on March 18, 2013. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

STATUTORY AUTHORITY

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

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 111 and 193.

§7.31. Safety Requirements.

(a) Applicability. A person, association, private corporation, public corporation, or any other entity that owns or operates a railroad shall comply with the requirements of this subchapter.

(b) Governing statutes. Railroads operating within the state of Texas shall comply with the safety requirements contained in or adopted under [the following statutes]:

(1) 49 United States Code, Subtitle III, Chapter 51;

(2) 49 United States Code, Subtitle V, Part A;

(3) Transportation Code, Chapter 111; [and]

(4) Transportation Code, Chapter 193; [Texas Civil Statutes, Article 6492a.]

(5) 49 C.F.R. Part 40;

(6) 49 C.F.R. Parts 107 and 171 - 180; and

(7) 49 C.F.R. Subtitle B, Chapter II, Federal Railroad Administration, Department of Transportation, Parts 200 - 299.

{(e) Federal regulations adopted by reference. The following federal railroad safety requirements, as they exist on the effective date of this rule, are adopted by the department as the minimum railroad safety requirements, and all railroads operating within the state of Texas shall comply with them:}