# Application to Assume FHWA Responsibilities

## Pursuant to 23 U.S.C. 327

Texas Department of Transportation

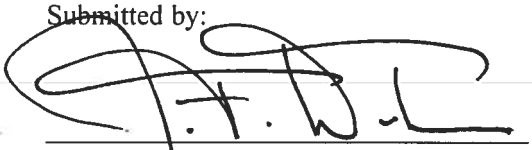
# State of Texas, Department of Transportation
# Application for Assumption of
# Federal Highway Administration
# Responsibilities Pursuant to the
# Surface Transportation Project
# Delivery Program, 23 U.S.C. 327

**May 2014**

This is the Texas Department of Transportation's (TxDOT's) application to assume the Federal Highway Administration's (FHWA) responsibilities under an Assignment Program authorized by the Surface Transportation Project Delivery Program, 23 United States Code (U.S.C.) 327.

On December 6, 2013, TxDOT and FHWA executed a memorandum of understanding (MOU) to assume responsibility for categorically excluded projects under 23 U.S.C. 326. That MOU became effective on February 12, 2014. Submittal of this application constitutes notice of the State's intent to terminate its current MOU for categorically excluded projects as provided in Stipulation IX.A.2 of the MOU for categorically excluded projects.

Submitted by:



Dated: 5/28/2014

LtGen J.F. Weber, USMC (Ret)
Executive Director
Texas Department of Transportation

For questions regarding this application, please contact: TxDOT's Director of Environmental Affairs, Carlos Swonke at (512) 416-2734.

## Executive Summary

The Texas Department of Transportation (TxDOT) appreciates the opportunity afforded by Congress to allow states to assume the responsibilities of the Federal Highway Administration (FHWA) for the National Environmental Policy Act (NEPA) and related laws through applying to participate in the Surface Transportation Project Delivery Assignment Program (NEPA Assignment Program) pursuant to 23 U.S.C. 327. TxDOT hereby submits the enclosed application. In submitting its application, TxDOT and the Texas Transportation Commission express their strong commitment to successful implementation of the responsibilities requested to be assigned to TxDOT under the NEPA Assignment Program. This application follows the requirements established in the Final Rule for the Assignment Program application issued in the Federal Register (Vol. 72, No. 28) on February 12, 2007.

As required by rule, TxDOT's draft application was publicly noticed on March 14, 2014 for a 30-day comment period. A notice of the draft application's availability was published in the Texas Register. TxDOT also sent notice of the application by letter with request for comment to Federal and State resource agencies and Native American tribes. Further details on the public noticing process are described later in this application. Seven comment letters were received. Summaries of all comments received and of changes made to the application in response to these comments are provided in this application. Appendix D contains copies of all comments received and the responses that TxDOT provided to each of the commenters. TxDOT is applying to assume all of FHWA's responsibilities under NEPA for state highway system (SHS) and local government projects off the SHS in Texas, with specific exclusions as described below. TxDOT is also applying to assume all of FHWA's responsibilities for environmental review, resource agency consultation, and other environmental regulatory compliance-related actions pertaining to the review or approval of projects. This request for assignment excludes specific ongoing projects that will be identified in the NEPA Assignment Program Memorandum of Understanding (MOU) and project types excluded by the Final Rule. Section 773.106(b)(1) of this application lists three specific ongoing projects that will be excluded from the Assignment Program; this list is subject to change until the NEPA Assignment Program MOU is signed.

NEPA directs federal agencies to consider the environmental effects of its actions, using a systematic, interdisciplinary approach. In the State of Texas, as the agency responsible for providing safe and reliable transportation solutions for Texas, TxDOT is also responsible for environmental compliance. The Texas Transportation Commission and TxDOT integrate environmental considerations into department activities to achieve compliance with applicable laws, regulations, and standards. TxDOT is focused on delivering safe, efficient transportation projects and making sound decisions based on a balanced consideration of transportation needs and of the social, economic, and environmental impacts of proposed transportation improvements. TxDOT's policy of balanced decision-making is similar to the philosophy underlying NEPA and FHWA's NEPA policy expressed in 23 Code of Federal Regulations (CFR) 771.105.

As required by NEPA, FHWA's NEPA regulations at 23 CFR 771, and in compliance with Texas Administrative Code Title 43, Part 1, Chapter 2, TxDOT examines and discloses the environmental effects of its proposed activities; identifies the ways that environmental impacts can be avoided or minimized; prevents significant, avoidable environmental impacts by modifying its projects and/or implementing mitigation when appropriate; and publicly discloses the impacts of its projects and its project decisions, emphasizing balanced decision-making. As part of this process, TxDOT undertakes timely and consistent outreach with the public, local jurisdictions, regional transportation planning agencies, resource and regulatory agencies, and Tribal Governments. TxDOT will continue to work cooperatively with its agency partners, communities, and the general public under the NEPA Assignment Program.

Based on the capabilities of TxDOT environmental staff, FHWA has previously entrusted to TxDOT certain aspects of its consultation responsibilities with its federal resource agency partners. Under the

provisions of a programmatic agreement, FHWA has authorized TxDOT to act on its behalf to perform many of the requirements of the National Historic Preservation Act. TxDOT has also been entrusted responsibilities for informal consultation under the Endangered Species Act (ESA) and the Magnuson-Stevens Fishery Conservation and Management Act (MSA). In addition to these project-related responsibilities, TxDOT is also actively involved in a number of programs for the conservation of listed species, consistent with the spirit of Section 7(a)(1) of the ESA.

TxDOT has worked with FHWA for over 40 years to meet NEPA requirements and to work cooperatively with its federal and state agency partners and with Tribal Governments; it has developed mature procedures and tools to support this work. Because of TxDOT's experience, expertise, and current level of involvement in consultations, its existing resources will be adequate to assume FHWA's responsibilities for resolving issues with external agencies. TxDOT's extensive staff capabilities and well-developed environmental compliance program, together with the steps that TxDOT has taken and will continue to take to strengthen its program under the NEPA Assignment Program, are summarized in this application.

Under the NEPA Assignment Program, TxDOT will comply with all applicable federal environmental laws and FHWA environmental regulations, policies and formal guidance. The program will not change or weaken federal environmental protection standards. Under NEPA, FHWA regulation, and state statute and rule, TxDOT currently makes decisions on its transportation projects that protect the environment and will apply these same rigorous environmental protection standards to projects under the NEPA Assignment Program. To ensure the success of the NEPA Assignment Program, TxDOT will regularly conduct formal self-assessments to gauge the effectiveness of its environmental procedures under the program and to identify the need for any program corrections. In addition, FHWA will audit TxDOT twice a year for the first two years of the NEPA Assignment Program and once a year thereafter to ensure that TxDOT is meeting NEPA and other federal environmental requirements consistent with FHWA's goals of environmental stewardship and streamlining.

The NEPA Assignment Program will streamline Texas' environmental review process and project delivery time. Once FHWA and TxDOT execute an MOU that assigns NEPA responsibilities, TxDOT will be solely responsible and liable for NEPA decisions on assigned highway and local roadway projects in the state without any involvement by FHWA. This application contains the following components, as required by 23 CFR 773:

§773.106 (b)(1): Classes of highway projects for which TxDOT requests NEPA responsibility;

§773.106 (b)(2): Federal environmental laws other than NEPA for which TxDOT request responsibility;

§773.106 (b)(3)(i): Existing organization and procedures;

§773.106 (b)(3)(ii): Changes to be made for assumption of responsibilities;

§773.106 (b)(3)(iii): Legal sufficiency;

§773.106 (b)(3)(iv): Prior concurrence;

§773.106 (b)(4)(i): Staff dedicated to additional functions;

§773.106 (b)(4)(ii): Changes to the organizational structure;

§773.106 (b)(4)(iii): Use of outside consultants for the Assignment Program;

§773.106 (b)(5): Financial resources under the Assignment Program;

§773.106 (b)(6): Certification for consent to exclusive federal court jurisdiction and waiver of immunity;

§773.106 (b)(7): Certification that the State of Texas's Public Records Act is comparable to the Federal

Freedom of Information Act;

§773.106 (b)(8)(ii): Comments received on the Assignment Program application.

This application also contains the following appendices:

A. Projects for which TxDOT does not request NEPA responsibility;

B. Federal Environmental Laws other than NEPA for which TxDOT requests responsibility;

C. Certifications for Consent to Exclusive Federal Court Jurisdiction and Waiver of Immunity and the State of Texas' Public Records Act is Comparable to the Federal Freedom of Information Act;

D. Copies of Comments Received on the Assignment Program Application and Responses Provided to the Commenters.

## §773.106 (b)(1): Classes of Highway Projects for Which TxDOT is Requesting NEPA Responsibility

TxDOT is requesting to assume FHWA's responsibilities under NEPA for the following classes of projects upon execution of the NEPA Assignment Program MOU with FHWA. In general, this includes all highway and roadway projects in Texas whose source of federal funding comes from FHWA or require FHWA approvals; these projects may include funding from other federal sources as well. For these projects, TxDOT requests to assume only FHWA's NEPA responsibilities; the request does not include assuming the NEPA responsibilities of other federal agencies.

1. All Class I, or environmental impact statement (EIS) projects, both on the SHS and local government projects off the SHS that are funded by FHWA or require FHWA approvals. The following projects will not be assigned under this MOU. This list is subject to change until the Assignment Program MOU is signed (see Appendix A for more information on the projects listed below):
   - Trinity Parkway, Dallas
   - Harbor Bridge, Corpus Christi
   - South Padre Island, Second Crossing, Pharr

Included in the Class I (EIS) projects to be assumed under the Assignment Program are the following for which a draft EIS has already been issued or is expected to be issued to the public prior to execution of the Assignment Program MOU (This list may need to be adjusted in the Assignment Program MOU depending on the date that the MOU is signed.):

- US 281, San Antonio
- US 290, Austin
- Lindale Reliever Route, Tyler
- SH 249, Houston
- SH 99 Grand Parkway Segment B, Houston

2. All Class II, or Categorically Excluded, projects, both on the SHS and local government projects off the SHS that are funded by FHWA or require FHWA approvals. Upon execution of the Assignment Program MOU, the 23 U.S.C. §326 CE MOU will be terminated and Class II projects included under that MOU will be assumed under the Assignment Program as of that date.
   - None
3. All Class III, or environmental assessment (EA) projects, both on the SHS and local government projects off the SHS that are funded by FHWA or require FHWA approvals. The following projects will not be assigned under this MOU. This list is subject to change until the Assignment Program MOU is signed (see Appendix A for more information on the projects listed below):
   - None

Projects meeting the following criteria will be excluded from the assignment:

1. Transit projects funded, in whole or in part, by the Federal Transit Administration under Chapter 53 of Title 49 of the United States Code;
2. Railroad projects funded in whole or in part by the Federal Railroad Administration under Subtitle V of Title 49 of the United States Code.
3. Priority projects designated under Executive Order 13274;

4. Federal Lands Highway projects, unless designed and constructed by TxDOT;
5. Projects that cross state or international boundaries.

TxDOT's assumption of these responsibilities program-wide will provide for the highest degree of consistency and efficiency in document review and agency coordination. It will also provide the greatest opportunity for streamlining benefits.

## §773.106 (b)(2): Federal Environmental Laws Other than NEPA for Which TxDOT is Requesting Responsibility

TxDOT requests to assume all of FHWA's responsibilities for environmental review, interagency consultation, and other regulatory compliance-related actions pertaining to the review or approval of projects for which TxDOT is requesting assumption of responsibilities under NEPA. TxDOT requests to assume these responsibilities under all applicable federal environmental laws and Executive Orders, including, but not limited to the federal laws, regulations, and Executive Orders listed in Appendix A of 23 CFR 773 (also listed in Appendix B of the application). TxDOT requests immediate assumption of these responsibilities upon execution of the Program MOU with FHWA. These responsibilities are not planned to be phased in. TxDOT's approach and practice in working with federal resource agencies and their regulations are described in further detail within this application.

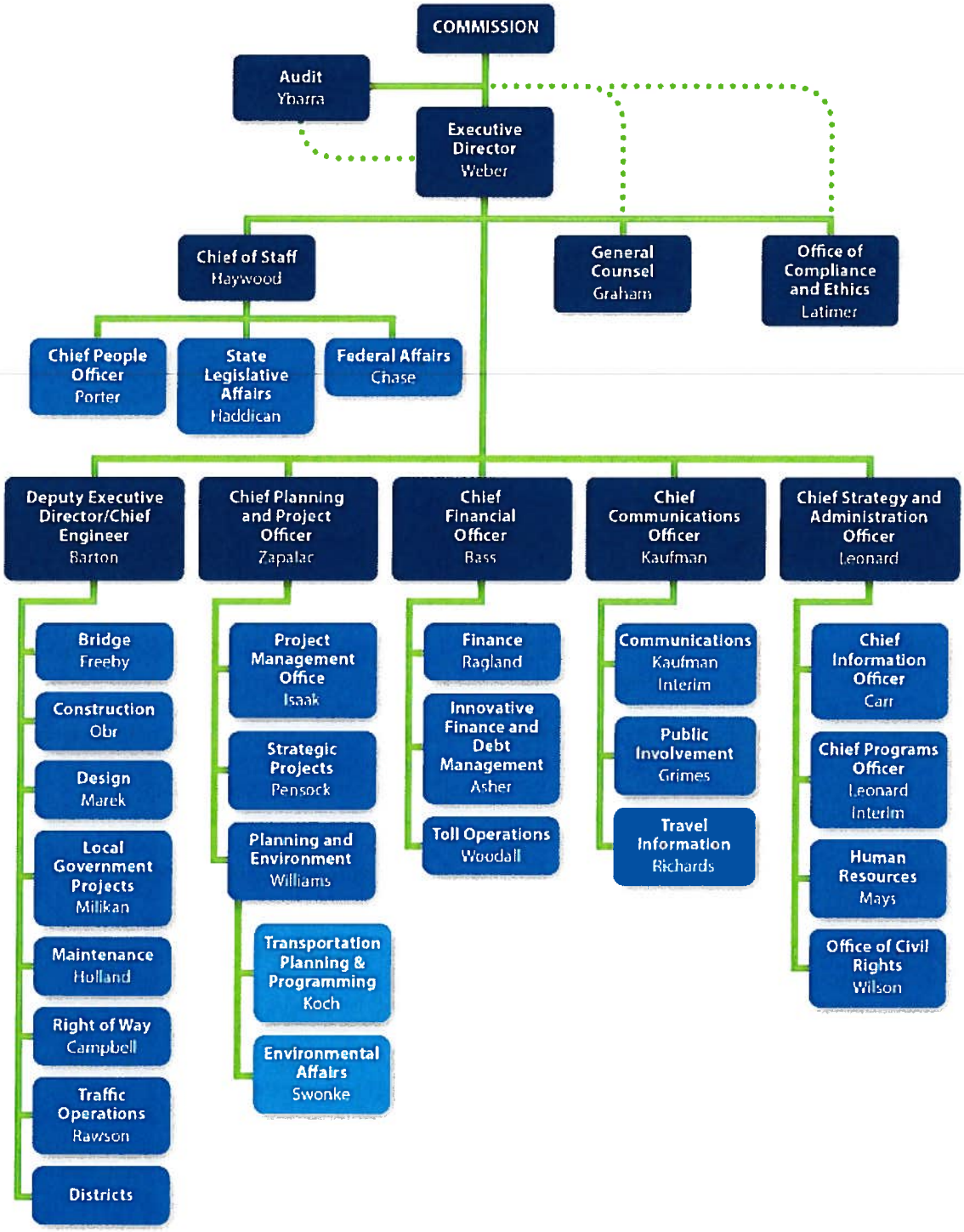
## §773.106 (b)(3)(i): Existing Organization and Procedures

### Organization

TxDOT is the legally authorized transportation department for the State of Texas, with responsibility for roadways, general aviation, the Gulf Intracoastal Waterway and certain public transportation projects. TxDOT is overseen by the Texas Transportation Commission, a five-member board with one of the board members serving as the chair. The commissioners are appointed by the Governor with the advice and consent of the Texas Senate and serve staggered six-year terms. The TxDOT executive director leads TxDOT under the direction of the commission.

TxDOT is comprised of 25 districts and a headquarters divided into divisions and offices (see organization chart in Figure 1). The TxDOT districts report to the Deputy Executive Director/Chief Engineer. Most TxDOT divisions and offices report to five executive-level organizational units. The Office of General Counsel reports directly to the executive director. The Audit Office reports directly to the commission.

**Figure 1. TxDOT Organization Chart**



The districts design and oversee development of all district transportation projects and are responsible for maintenance and operation of the state highway network within their district boundaries. A district environmental staff member is responsible for environmental compliance activities for all projects in the district. In general, the district environmental staff conduct initial environmental surveys, prepare or oversee preparation of environmental documents, perform local interagency coordination, and implement public involvement as well as other activities related to NEPA compliance. In addition to their general environmental experience, many district environmental personnel have education and training in specialty areas such as biology, geology, socio-economics, and water quality. Some district environmental staff are subject matter experts (SMEs) in air quality, archeology, hazardous materials, noise, biology, and wetland sciences.

The TxDOT Environmental Affairs Division (ENV), a headquarters division, is responsible for developing and implementing the environmental program for the department as a whole. In this capacity ENV develops, administers, and distributes environmental policies, procedures, manuals, and guidance. ENV also provides training and technical support to the districts. As shown on Figure 1, ENV and Transportation Planning and Programming (TPP) (Planning and Environment) are grouped together and report to the Chief Planning and Project Officer.

TxDOT's Office of General Counsel (OGC) also plays an important role in the environmental compliance process. OGC provides legal expertise related to administrative law including NEPA compliance for EISs and the broader environmental review process; assists the State Attorney General's office in litigation; and conducts legal review of memoranda of understanding, programmatic agreements and other agreements.

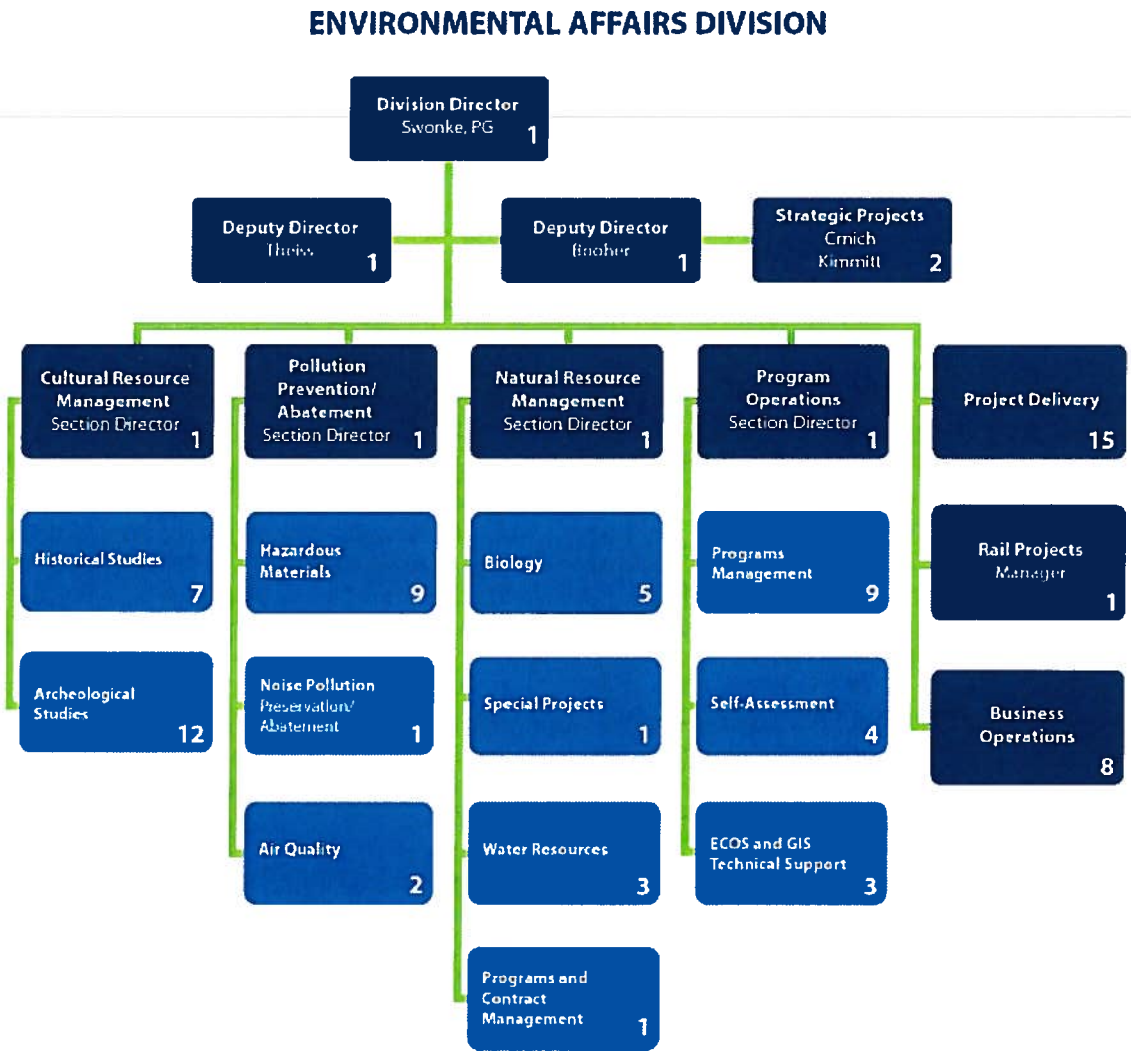
## Current Environmental Affairs Division Organization

ENV provides expertise to the department by integrating environmental considerations into TxDOT activities to achieve environmental compliance. ENV develops environmental policies and procedures, including those for preparing and processing environmental documents; manages TxDOT's environmental documentation tracking program referred to as the Environmental Compliance Oversight System (ECOS); and works on a variety of environmental streamlining initiatives. The division provides policy, procedure, training, guidance, and technical assistance to other organizational units of the department. Subjects of technical support include air quality, archeology, biology, hazardous materials, history, indirect and cumulative impacts, NEPA, noise, socio-economics, Section 4(f) determinations, and water quality. ENV also manages environmental programs and monitors changing laws and regulations.

ENV works with the districts to ensure environmental compliance and appropriate consideration of environmental issues on all TxDOT projects. ENV has a major role in consultation and coordination with state and federal resource agencies and with Indian tribes, for projects as well as for the TxDOT environmental program as a whole. For projects, ENV reviews all EAs and EISs as well as all Section 4(f) evaluations, and for federal aid highway projects, recommends their approval to FHWA. Districts are responsible for reviewing and approving CEs. ENV also develops environmental compliance quality assurance standards and defines quality control requirements for environmental document approval. Currently, ENV has a staff of approximately 90 full time employees (FTEs), including environmental managers, specialists, planners and a variety of SMEs, including biologists, geologists, water quality experts, archeologists, historians architectural historians, and a historical architect; all cultural resource management staff meet the Secretary of Interior's standards as qualified professionals. This number includes 11 information technology (IT), Geographic Information System (GIS), and administrative professionals. In addition to the ENV staff of 90, 7 full time professional contractor staff currently assist in the following areas: historical studies, programs management, project delivery, and business support. In addition to its responsibilities for review and approval of TxDOT environmental documents, ENV reviews and recommends approval of EAs and EISs for local government projects, projects proposed by private entities, and other alternative delivery projects.

As shown in the division organizational chart (Figure 2), ENV includes six sections: Cultural Resource Management, Pollution Prevention and Abatement, Natural Resource Management, Program Operations, Strategic Projects, Project Delivery, and Business Operations. Within their respective disciplines, SMEs provide technical expertise, as requested, throughout the project development process. When requested by a district environmental project manager (PM) or an ENV PM, SMEs prepare documentation for resource agency consultation, such as biological assessments under Section 7 of the Endangered Species Act and determinations of eligibility and effect under Section 106 of the National Historic Preservation Act, conduct technical studies, and review technical studies and reports prepared in support of projects.

**Figure 2. Environmental Affairs Division Organization Chart**




The Strategic Projects section assists districts with the development, review, and approval of environmental documents for projects that are highly complex, high profile, or otherwise deemed strategic by TxDOT. This section includes staff who team with district environmental staff for all EIS

projects and for strategic projects requiring a complex EA. The Strategic Projects section is supported by staff from the Project Delivery section. The Strategic Projects section provides support and NEPA expertise to facilitate the efficient development, review and approval of these documents and to effectively meet the requirements of NEPA and other FHWA and federal and state requirements. The section is charged with confirming that EISs are NEPA-compliant and that project files contain a complete administrative record. The section also coordinates with legal counsel for review of certain NEPA documents. Two EISs were completed in FY 2013 (one a NEPA EIS, and one a state EIS). Three NEPA EISs are planned for completion in FY 2014.

The Rail Projects section provides environmental review of rail projects, which will not be included in the NEPA Assignment program.

The Project Delivery section is responsible for review of EAs as well as overall support for districts. In addition, they provide staff support to the Strategic Projects section for EIS projects. Project Delivery section project managers are assigned to projects to ensure that NEPA documents are complete and accurate and appropriately support the decision-making process, and that public involvement and interagency coordination required for the NEPA decision are complete. This section ensures that documents are administratively complete and NEPA compliant. The Project Delivery section coordinates with legal counsel for legal review, when warranted. This section also distributes environmental documents and technical reports to the technical experts, as appropriate, for review and comment; compiles comments from the various technical sections; transmits compiled comments to document authors for revision; and ensures that comments are addressed in the final NEPA document.

The Program Operations section develops general TxDOT environmental policy, procedures, training, and guidance based on federal and state statutes and regulations. Each of the technical sections is responsible for developing policy, procedures, training, and guidance relating to technical issues in coordination with the Program Operations Section. Once policies, procedures, and guidance are developed, the Program Operations section distributes this information throughout TxDOT and assists in training and implementation. This section also reviews and comments, as appropriate, on proposed state and federal legislation and regulation, and monitors trends and changes in federal and state policy and guidance. The section contains a Self-Assessment Branch that performs quality assurance reviews for categorically excluded projects. Quality assurance reviews will be extended to environmental documents under the Assignment Program (see QA/QC section below).

In addition to in-house staff, ENV contracts with a variety of consultants on environmental issues, from cultural resources to hazardous materials. Consultants are used for project-specific environmental surveys, technical studies, reviews, and environmental document preparation. Some consultants are located on-site to augment ENV staff, performing support functions.

ENV staff work with many divisions and offices on an ongoing basis on various issues of mutual interest. The following are notable:

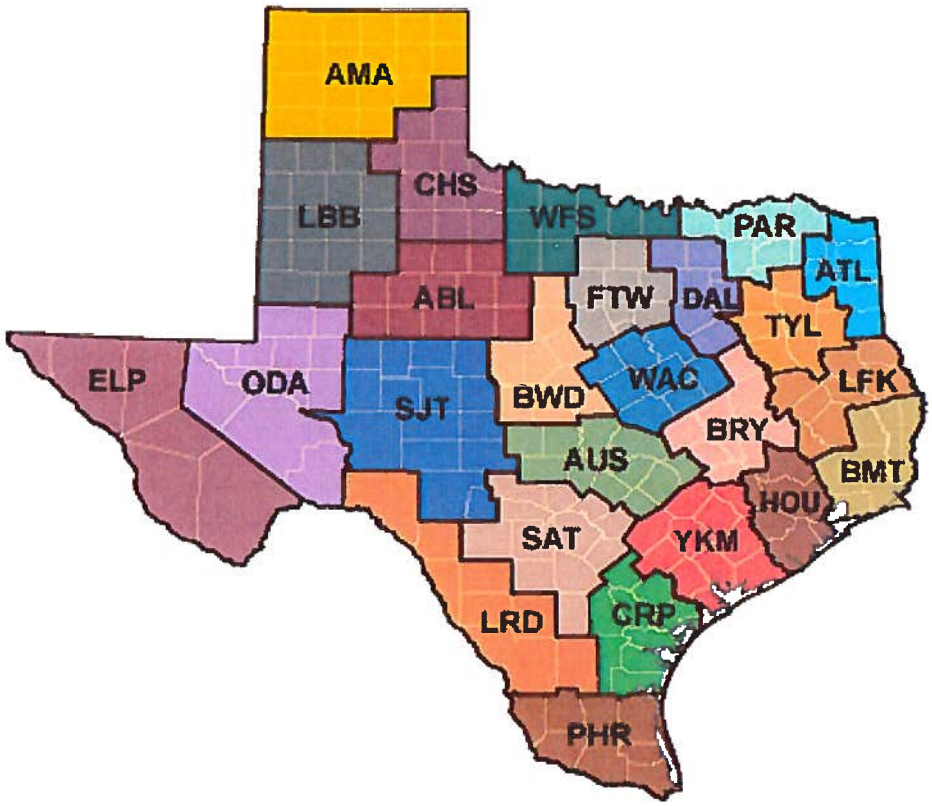
- ENV works with the Local Government Project Office to communicate environmental policies, procedures, and guidance to local governments, and to coordinate training for local governments.
- ENV works with the Office of Public Involvement to develop rules, policies, procedures, training, and other matters related to public participation requirements during the environmental process.
- ENV participates in the Project Management Office's project to integrate scheduling and resource commitments in ECOS into a project management system so that environmental considerations are automatically incorporated into overall project scheduling and development.

- ENV participates in the Project Management Office's annual workforce analysis to determine in-house environmental document production capacity, which supports an estimate of consultant needs over the next four years.
- ENV works with the Right-of-Way Division on projects involving early right of way acquisition, and when projects require continuing coordination regarding specific resource issues during the acquisition process.
- ENV works with the Bridge Division to deliver historic bridge projects via maintenance of the Historic Bridge Inventory database, joint development of the Historic Bridge Manual, and joint authorship of the Historic Bridge Task Force reports. In addition, the divisions are embarking on joint creation of a framework for historic bridge management planning for on-system bridges.
- ENV coordinates TxDOT's Environmental Management System (EMS) under the direction of the Standing Committee for Environmental Management. The standing committee includes district engineers and representatives from the Construction, Design, Maintenance, and Human Resources Divisions. Although the EMS focuses largely on stormwater issues during design and construction, it also includes Stage Gate Checklists that function as QC checkpoints when a project transitions between project development phases (planning, design, and construction).
- ENV works with the Transportation Planning and Programming Division on planning and environmental linkages so that work accomplished through the planning process can be used to streamline environmental project development. The Transportation Planning and Programming Division also maintains a critical link with Metropolitan Planning Organizations (MPOs) to help ensure NEPA documents are consistent with MPO long range plans prior to NEPA approvals being issued by ENV or districts.
- ENV provides technical support to the Transportation Planning and Programming Division, TxDOT Administration, and other TxDOT units for transportation conformity, transportation control measures, speed limit changes, corridor planning, and Congestion Mitigation Air Quality Program (CMAQ) programming.
- ENV works with TxDOT's OGC to develop state rules and provide OGC with background information relevant to litigation and other legal issues. OGC or TxDOT's outside environmental counsel provides legal review of draft environmental documents for any project with a toll element, as well as for all EISs. TxDOT attorneys also provide legal support on project environmental issues as requested by districts or ENV. Collaboration with respect to legal sufficiency is noted later in this application. OGC also coordinates Freedom of Information Act and Texas Public Information Act requests within TxDOT. At ENV, the Program Operations section handles responses to these requests.
- ENV works with TxDOT's State Legislative Affairs Office and Federal Affairs Office to monitor, and when necessary review and comment on, legislation that may affect TxDOT's environmental program.

## District Organization

TxDOT is a decentralized organization, with 25 district offices throughout the state. District boundaries are shown in Figure 3. Districts develop or oversee development and construction of projects, and maintain and operate the state highway network within their district boundaries. Each district is led by a District Engineer or District Administrator with an environmental lead responsible for reviewing and preparing initial environmental surveys and studies, completing environmental documents, performing local interagency coordination, and implementing public involvement, as well as other activities related to NEPA compliance.

**Figure 3. TxDOT District Boundaries Map**




All districts have an environmental lead (often referred to as the environmental coordinator) on staff that is responsible for NEPA compliance; many districts also have environmental specialists. Environmental specialists come from a variety of professions including archeology, biology, geology, and socioeconomics. Both environmental leads and environmental specialists often have a variety of responsibilities including performing and reviewing technical studies such as noise analyses, cultural resource studies, habitat assessments, and wetland delineations. Generally, district environmental staff are located in the Transportation Planning and Development section, which implements the district environmental program. For each project, district environmental staff work with district planning staff and design engineers throughout the project design and development process. As the engineers design the project, this coordination supports appropriate consideration of environmental resources, avoidance and minimization of environmental impacts, and environmental compliance. Districts also use consultant contracts, either as part of design contracts on individual projects, scientific services contracts, or by accessing ENV's environmental consultant contracts, to prepare environmental documents or to provide specific technical resource studies (such as archeological surveys/testing and wetland delineation).

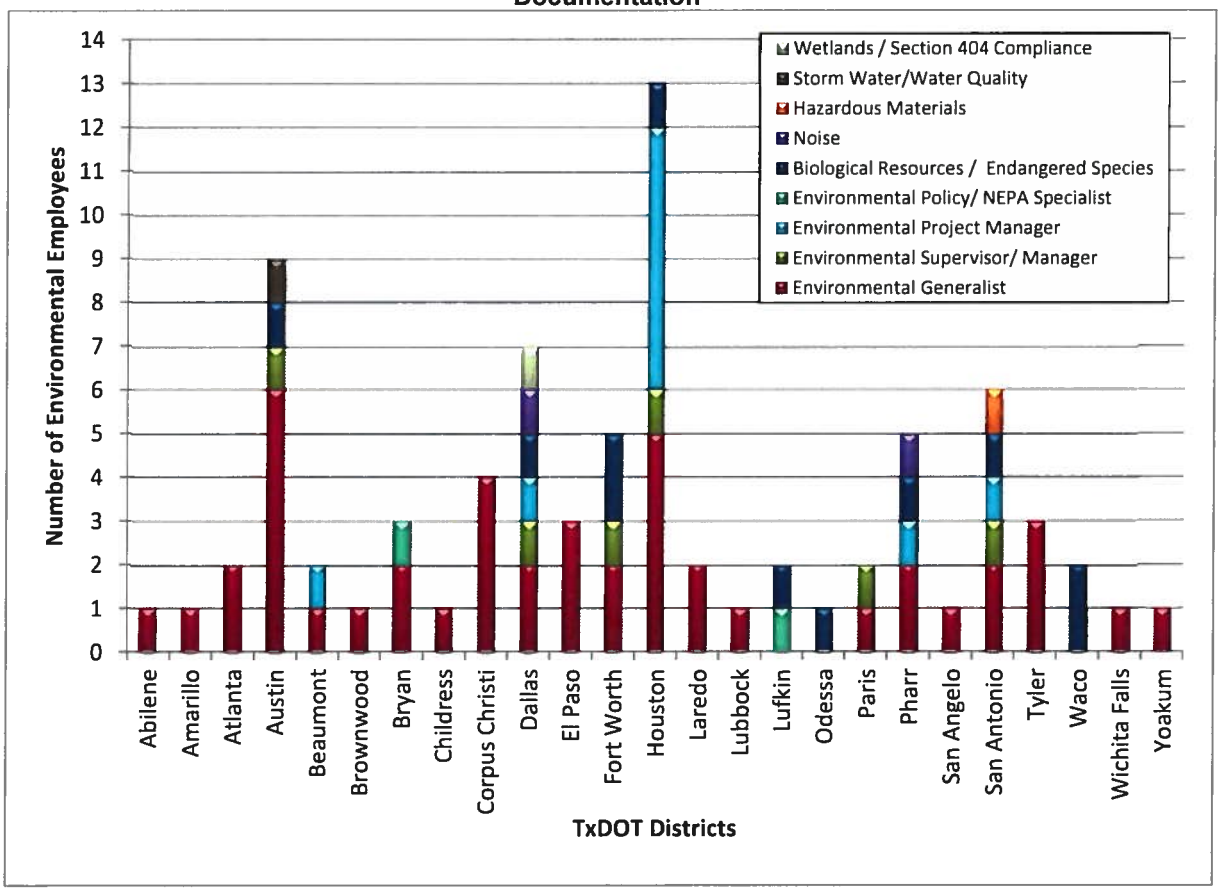
Districts also collaborate with MPOs, local councils of government (COGs), local governments, and other political subdivisions to identify, develop, and design transportation projects. Local government projects follow TxDOT's local government project procedures, as described more fully below. The primary point of contact for local government projects is the local TxDOT district office. Each TxDOT district has a planning and programming section that studies and plans for the needs of the district's highway system. Local governments work with TxDOT district staff to identify and prioritize funding for projects. The district staff coordinate with the Transportation Planning and Programming Division (TPP) regarding fiscal constraint, design concept and scope, and with the Finance Division in Austin regarding funding agreements and confirmation of NEPA approvals.

## Existing Environmental Staff

TxDOT currently has a staff of approximately 169 FTEs across the state assigned to environmental functions, 79 working in the 25 districts and 90 working at ENV. In addition, there are currently 7 consultant FTEs under contract working at the division. Statewide, TxDOT environmental staff is augmented by the flexible use of environmental consultants. With this staff, TxDOT planned 1691 environmental documents and determinations in fiscal year (FY) 2013. In FY 2014, 1380 environmental documents and determinations are planned. In addition, in a typical year, TxDOT completes approximately 15 *de minimis*, 12 programmatic, and less than 1 individual Section 4(f) evaluations.

Figure 4 and Table 1 present the diversity of expertise that is spread throughout the state within the 25 districts and ENV. Figure 2 identifies the number of ENV staff, by technical, management, or supervisory specialty. As can be seen, districts and ENV contain management, environmental specialists, technical experts, project managers, environmental generalists, IT specialists, GIS specialists, and administrative support. The combined capability of ENV and district environmental personnel provides the expertise required to meet the responsibilities to be assumed under this application.

**Figure 4. District Staff, by Location, Responsible for Environmental Compliance and Documentation[1]**




[1] Staff primary area of responsibility is identified.

**Table 1. TxDOT Range of Technical Expertise**

| | TxDOT Range of Technical Expertise | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Biological Resources / Endangered Species | Archeological Resources | Historic Preservation | Section 4(f) | Noise | Air Quality | Hazardous Materials | Storm Water/Water Quality | Wetlands / Section 404 Compliance | Floodplains/Hydraulics | Environmental Justice / Social & Economic Impacts | Indirect & Cumulative Impacts |
| Environmental Staff | | | | | | | | | | | | |
| Abilene | | | | | | | | | ✓ | | | |
| Amarillo | ✓ | | | | | | | | | | | |
| Atlanta | ✓ | | | ✓ | ✓ | | ✓ | ✓ | ✓ | ✓ | ✓ | |
| Austin | ✓ | | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | | ✓ | ✓ |
| Beaumont | | | | ✓ | ✓ | ✓ | | ✓ | ✓ | | | |
| Brownwood | ✓ | | | ✓ | | | | ✓ | ✓ | | | |
| Bryan | ✓ | ✓ | ✓ | ✓ | | | ✓ | ✓ | ✓ | | | |
| Childress | ✓ | | | | | | | ✓ | | | | |
| Corpus Christi | ✓ | | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Dallas | ✓ | | | ✓ | ✓ | | | ✓ | ✓ | ✓ | ✓ | ✓ |
| El Paso | | | | | | | | | | | | |
| Fort Worth | ✓ | | | | ✓ | ✓ | | ✓ | ✓ | ✓ | ✓ | ✓ |
| Houston | ✓ | | | | ✓ | | ✓ | | ✓ | | | |
| Laredo | ✓ | | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Lubbock | | | | | | | | | | | | |
| Lufkin | ✓ | | | ✓ | | | | ✓ | ✓ | | | |
| Odessa | ✓ | | | | | | | ✓ | ✓ | | | |
| Paris | ✓ | | | | ✓ | | ✓ | | ✓ | ✓ | | |
| Pharr | ✓ | | | ✓ | ✓ | | | ✓ | ✓ | | ✓ | |
| San Angelo | ✓ | ✓ | ✓ | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | |
| San Antonio | ✓ | | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | | | ✓ |
| Tyler | ✓ | | | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | |
| Waco | ✓ | | | ✓ | ✓ | | ✓ | ✓ | ✓ | | ✓ | |
| Wichita Falls | ✓ | | | ✓ | | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Yoakum | ✓ | | | | | | | | ✓ | | | |
| ENV | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |

Most environmental personnel work for supervisors and managers with many years of experience and broad backgrounds in environmental analyses and/or strong technical knowledge in one or more of the environmental specialty areas. Districts with relatively inexperienced environmental staff work with an experienced ENV liaison. Where expertise is not available locally, ENV provides technical assistance and expertise to the districts. TxDOT may also choose to contract for technical expert services. When in the best interest of the state, the districts and ENV may contract for preparation of complete environmental documents as well as additional environmental technical services. ENV does not currently retain legal staff; however, TxDOT has two staff attorneys assigned by OGC to provide legal counsel to ENV.

## Approach to Environmental Document Preparation

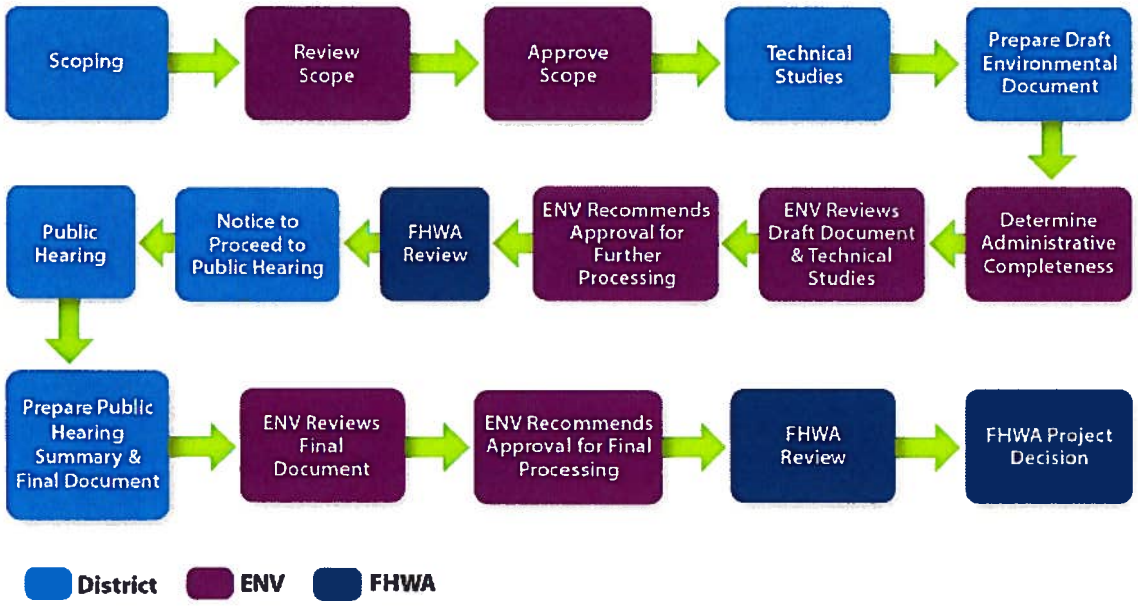
TxDOT integrates environmental considerations into its activities to achieve compliance with applicable laws, regulations, and standards. TxDOT values the delivery of safe, efficient transportation projects and makes sound decisions based on the balanced consideration of transportation needs and of social, economic, and environmental impacts of proposed transportation improvements. TxDOT complies with NEPA and all other federal environmental requirements on its projects requiring federal funding or approval. State-only funded projects comply with TxDOT-specific state environmental requirements, found at 43 Texas Administrative Code (TAC) 2. Where there are differences between federal and state requirements, TxDOT follows federal requirements for projects requiring federal approval.

TAC rules define a project sponsor as the entity that accepts responsibility for preparing the environmental review document for the project and performing related tasks. Project sponsors can be a TxDOT district or division. Certain local governments also can be approved to be project sponsors. TxDOT's rules define a department delegate as the organizational unit of TxDOT that has the authority to review and approve an environmental document on TxDOT's behalf. Typically, project sponsors and department delegates perform their functions independently and sequentially, which frequently results in iterative cycles of submittal and review prior to approval.

### Process for TxDOT-Sponsored Projects

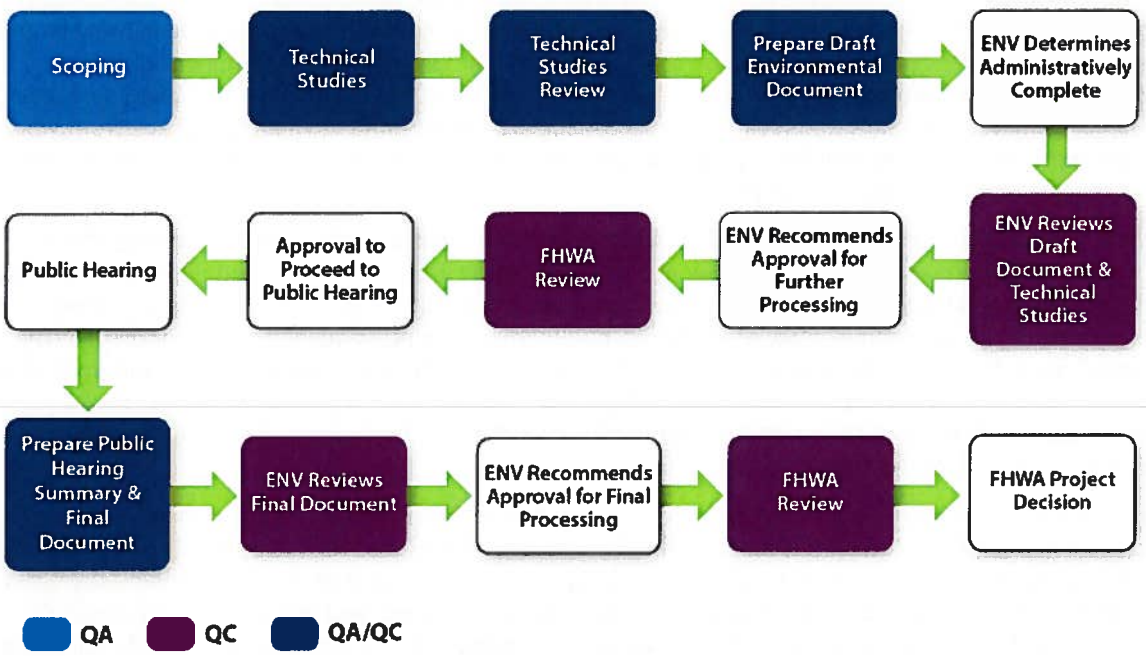
TxDOT is transitioning from a process oriented around environmental documents containing large volumes of data and resource-specific studies presented directly in the environmental document to a more streamlined process with shorter documents containing referenced materials. The practice of using environmental documents as the medium for reporting primary data and analyses resulted in unwieldy environmental documents. In addition, the practice was oriented around sequential submittal, review and revision of documents, which often led to a protracted review and approval process. It resulted in technical errors not being discovered until review of the environmental document, which would result in iterative document reviews and revisions and increase the total level of effort for the environmental process. The former process is depicted in Figure 5.

**Figure 5. Former Environmental Compliance Process**




TxDOT has begun implementing a new streamlined approach to document preparation that is oriented around shorter "reader-friendly" decision-making EAs and EISs and is designed to prevent sequential, iterative reviews. This new process involves greater collaboration among environmental document producers and reviewers, and a focus on shorter EAs and EISs that are centered on presenting the environmental and project information most important for public understanding and project decision-making. Technical studies are separately prepared and reviewed and then incorporated into the environmental document by reference, briefly summarized or included as appendices. These studies are evaluated before the environmental document is submitted for review, which prevents technical study errors from entering the environmental document and extending the duration of document review time. The new process is being implemented prior to assignment, and is depicted in Figure 6.

**Figure 6. Existing Environmental Compliance Process**




TxDOT's revised approach emphasizes collaboration between district and ENV staff at key points during the environmental process to ensure that studies and documents are appropriately scoped and that finished products are acceptable prior to final review and decision. This is discussed further below in the section describing the changes to be made as part of the assignment program. This approach is being implemented to reduce the level of effort of sequential production and review of studies and documents. Further, it serves to reduce rejection of documents as a result of preventable errors in technical work. Over the course of developing a project, district and ENV staff consider preliminary environmental data, identify environmental constraints, and work in coordination with design staff to perform environmental impact analyses.

Early in project development, a district environmental project manager and an ENV project manager are assigned to form a core team to coordinate and complete the environmental process. The core team, which may be expanded at their discretion to include SMEs, gathers preliminary environmental information and performs constraints analyses, which may play a part in the district design concept conference, during collection of preliminary engineering data, or identification of alternatives. During this early stage of project development, design engineers, the core team, and other district staff bring forward key issues for consideration in development of the project. The information gathered during this stage is used to develop an environmental project scope (hereafter, "project scope" or "scope").

Texas statute requires completion of a project scope early in the environmental review process. This scoping is distinct from the NEPA scoping process required under FHWA's NEPA regulations at 23 CFR 771.123(b). Development of the Texas statutorily-required project scope is a process for determining the scope of issues to be addressed, identifying key environmental issues related to a proposed action, and delineating roles and responsibilities in the environmental review process. The scope serves as a management tool to guide environmental activities during project development, including public involvement and resource agency coordination activities. The scoping process also helps scale the environmental effort to the context and intensity of a project's anticipated impacts. The required project scope is completed by the core team and may include consulting with SMEs. The project scope is kept up

to date throughout project development via amendment when or if there are changes to the project or when or if there is new environmental information requiring changes in scoped activities.

For EIS projects, scoping, as required by Council on Environmental Quality (CEQ) and FHWA NEPA regulations (40 CFR 1501.7; 23 CFR 771.123(b)), is also conducted. NEPA scoping is an early and open process for determining the scope of issues to be addressed and for identifying the important issues related to a proposed project. The EIS scoping process stresses early consultation with federal and state resource agencies, other state and local agencies, tribal governments, and any federal agency from whom project approval or funding will be required. Scoping is a mechanism to bring together and resolve the concerns of agencies, tribes, and the public.

Technical studies are prepared, as needed, to address specific issues identified during scoping or at any other point in the process. Public involvement and coordination are documented along with completion of technical studies. At the discretion of the core team, technical studies may be reviewed by a subject matter expert to ensure their accuracy. If studies, public involvement, or agency coordination identify potential impacts, the district may work with project designers to discuss ways to avoid or minimize those impacts. Once project alternatives have been defined and any necessary technical studies and documentation are reviewed for accuracy, the district uses the interdisciplinary process to develop or oversee preparation of the NEPA document.

The core team is responsible for completing quality control of the environmental document. The first stage of this review is to determine whether the document is administratively complete as required under Texas statute. A determination of administrative completeness includes determining whether all studies and other activities required by the project scope have been completed, and whether all sections of the environmental document are present. If the document is determined to not be administratively complete, it is returned to the project sponsor who will then provide the missing information or revise the incomplete sections.

The complete environmental document is reviewed by the core team using the collaborative approach established to produce environmental documents. For EAs, this core team may add a peer reviewer, at the team's discretion, to provide a fresh set of eyes for document review, and the team may also request SMEs to review elements of the environmental document as the team determines appropriate. EISs require a mandatory NEPA peer review. The core team plus any additional staff reviewing the environmental document comprise the review team. The review team performs a "review for readiness." The review for readiness is designed to ensure that the environmental document is NEPA compliant, internally consistent, consistent with the supporting technical studies, and meets the requirements of federal and state environmental statute, regulation, and policy. In the event that supporting studies and documentation were not evaluated prior to submittal of the document, they will be reviewed for their adequacy and content at this phase.

TxDOT's EIS review procedures require that TxDOT ENV and an attorney from TxDOT OGC or outside counsel provide a legal review of all draft and final EISs prior to submittal of these documents to FHWA for formal NEPA decision.

## Process for Local Government-Sponsored Projects

State statute specifies that certain local governments may be approved as project sponsors. Projects with designated local government project sponsors may be managed slightly differently than those sponsored by TxDOT. State rules identify early submittal of technical reports as an optional technique for processing environmental reviews, and explicitly state that early submittal is not required. TxDOT proposes to make early submittal an important feature of the quality assurance process for TxDOT-sponsored projects; however, local government project sponsors may elect to submit all technical information concurrently with the environmental document. Local government project sponsors are required to participate in the collaborative scoping process, and TxDOT will strongly encourage continued collaboration throughout the environmental process in order to prevent iterative reviews that

could unnecessarily delay the project schedule. Once received at TxDOT, local government project environmental documents and studies are reviewed in the same manner as projects sponsored by TxDOT, and meet the same quality standards as TxDOT projects. Under TxDOT rules, local government project sponsors are responsible for maintaining project files until a project is approved. Local government sponsors currently maintain paper project files. Upon project approval, the local government project sponsor is required to transfer the project file to TxDOT. TxDOT will use its authority under the NEPA Assignment Program to examine project files whenever necessary.

Under state statute and rules, TxDOT is the project sponsor for local government projects for which the local government is not designated as the sponsor. For these projects, although the local government performs all environmental work, TxDOT is responsible for developing the formal project scope and maintaining the project file. Typically, the local government initiates the collaborative environmental scoping process.

These local government projects follow standard TxDOT environmental document production, review and approval processes. TxDOT will not approve any local government NEPA document until it meets federal environmental requirements.

The Texas State Legislature has established legislative deadlines for completion of certain elements of the environmental process. Additional deadlines have been set by rule. Those deadlines are shown in Table 2. Missed deadlines are reported to the Texas Legislature. There are no additional consequences when established deadlines are exceeded.

**Table 2. Environmental Review Deadlines**

| **Legislative Deadlines** | | | |
|---|---|---|---|
| **Document / Process** | **Time Begins** | **Deadline** | **Action Required** |
| Classification Letter | When sponsor submits notice (project scope serves as notice) | 30 days | Issue classification letter (agreement on project scope constitutes classification letter) |
| Administrative Completeness | When environmental review document is submitted for review | 20 days[2] | Determine whether document is administratively complete |
| CE | Date supporting documentation is received | 90 days | Render decision |
| Draft EA | Date draft is determined administratively complete | 90 days | Provide all department comments |
| EA | The later of:<br>1. The date the revised EA is submitted; or<br>2. The date the public participation process concludes | 60 days | Render decision |
| Reevaluation | Date supporting documentation is received | 120 days | Render decision |
| FEIS | Date draft FEIS is determined administratively complete | 120 days | Render decision |
| Dispute Resolution | Date either party requests dispute resolution | 60 days | Conclusion of dispute resolution |
| **Rule-Based Deadlines** | | | |
| Optional Review of Env. Reports | Date report is submitted | 60 days | Notify project sponsor in writing of deficiencies, flaws, or omissions |

[2] This deadline is different from the other legislative deadlines in how it is calculated. If a document is not administratively complete, time ends, and starts again on resubmittal. For all other deadlines, time is cumulative, minus any suspensions.

## Approach to Categorical Exclusion Documentation Preparation

On December 6, 2013,TxDOT and FHWA executed an MOU which assigns responsibilities for determining if projects meet the criteria for categorical exclusion for specific activities listed under 23 CFR 771.117 (c) and (d) to TxDOT. That MOU became effective on February 12, 2014. As of that date, TxDOT became responsible for CE determinations for (c) and (d) list activity projects. The CE Assignment MOU can be found at http://ftp.dot.state.tx.us/pub/txdot-info/env/txdot-fhwa-ce-mou-121113.pdf

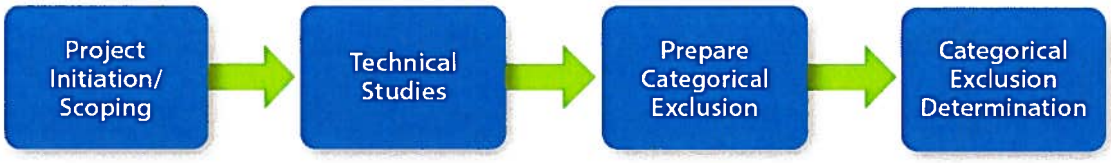
Pursuant to 23 CFR 771.117 (a) and (b), the district documents its decision regarding the need for studies to confirm that the project meets the criteria for a CE.

If no studies are needed for projects falling within one or more of the activities listed in 23 CFR 771.117(c), the project is determined by the district environmental project manager to be a CE with no further review. If studies are needed, those studies are identified in the project scope and then undertaken. After completion of all tasks identified in the scope, the district determines whether the results of studies support or invalidate the proposed classification. If the classification is valid, the CE is approved by a qualified individual with signature authority delegated by the District Engineer. This approval is electronically documented in the project file. If the classification is invalid, the district reclassifies the project and proceeds with environmental approval as required under the new classification. A report is submitted to FHWA by ENV regarding the federal approval by TxDOT of these actions by c-list number and type, so that FHWA may process project authorizations timely for TxDOT letting.

If no studies are needed for projects listed in 23 CFR 771.117(d) the district environmental project manager produces a determination of categorical exclusion. If studies are needed for projects listed in 23 CFR 771.117(d), they are entered into a project scope and then undertaken. After completion of all tasks, the district environmental project manager produces a determination of categorical exclusion and forwards it for review to a qualified environmental staff member not involved in producing the determination. The environmental staff member then reviews the determination and project file to verify that the project meets the criteria for categorical exclusion. Following this review, the determination is forwarded to the District Engineer for approval and signature. The approval is electronically documented in the project file. A report is submitted to FHWA by ENV regarding the federal approval by TxDOT of these actions by d-list number and type, so that FHWA may process project authorizations timely for TxDOT letting.

The process is the same for local government CE projects. The CE process is shown in Figure 7.

**Figure 7. Categorical Exclusion Process**




## Public Involvement Procedures

TxDOT implements a public involvement program, based on 23 U.S.C. §139, 23 CFR Part 771.111, and 43 TAC Part 1, Chapter 2, Subchapter E, the combination of which encourages opportunities and provides guidance for interagency coordination and public participation.

TxDOT policy further details public involvement procedures as required in 23 CFR Part 771.111 and 23 U.S.C. §139. Based on project classification, project description, public interest, the potential for

controversy on environmental grounds, or potential impacts, the TAC prescribes when a project sponsor must meet with affected property owners, hold a public meeting, afford an opportunity for a public hearing, or hold a public hearing. TxDOT conducts open houses, individual stakeholder and property owner meetings, neighborhood meetings, elected official briefings, and public meetings, as necessary, during the environmental process. A public hearing or the opportunity for a public hearing is offered for some CE projects and for all EA projects. Scoping, public meetings, and public hearings are held for all EIS level projects.

During scoping, TxDOT determines the type of public involvement needed for the project, based on the based on the context and intensity of the project and its potential impacts. For an EIS, that plan is formalized as a component of the Coordination Plan as required by 23 U.S.C. §139 (g). The public outreach plan describes how the project team will establish and maintain communication with the public, ensure the public remains informed about the proposed project, and ensure the public has an opportunity to provide input, as may be appropriate given the nature of the project. Details regarding stakeholders identification (stakeholder database), strategies that will be used to convey information to the public (social media, newsletters, flyers, websites, newspapers, radio, TV, message boards and the like), and anticipated face-to-face involvement (meetings, virtual open houses, and etc.) may be described in the public outreach plan.

TxDOT currently follows the requirements of 23 U.S.C. §139 for efficient environmental review and applies it to all projects for which EISs are prepared. These requirements emphasize collaboration between federal, state, local and tribal entities and the public when preparing EISs. It defines the lead agency and provides direction on identifying participating and cooperating agencies. 23 U.S.C §139 requires lead agencies to provide, as early as practicable in the environmental review process, an opportunity for the public and participating agencies to provide input in the development of the purpose and need and the range of alternatives to be considered. It states the lead agency will also collaborate with the cooperating and participating agencies during the study process on study methodologies to be used, and level of detail required for the analysis of project alternatives. Following the requirements of 23 USC §139 (g), the Coordination Plan identifies the lead agencies for the project (federal, state and local) along with the cooperating and participating agencies and describes expectations for each of the roles. The plan also describes the coordination that will take place and includes guidance for inter-agency coordination and ways to encourage opportunities for agency and public participation during scoping, development of purpose and need and alternatives, and public review of the environmental document.

Environmental staff and project designers, as needed, review public and agency comments received during meetings and hearings and evaluate the comments. Modifications to the alternatives or design concepts may then occur based on the comments received. Any project changes as well as responses to public comments are included in a public involvement summary and analysis report that is developed for each formal public meeting or hearing. Public meeting and public hearing summary reports, once approved by the project delegate or FHWA, are then made available to the public.

## Quality Control Procedures

TxDOT distinguishes between quality assurance (QA) and quality control (QC) processes. QA is devoted to preventing problems, whereas QC is devoted to identifying and correcting problems. Both QA and QC steps are built into the project environmental document preparation and approval process. Some QC points are built into state statutory requirements. TxDOT also has program-level QA procedures, as discussed in the section on Internal Monitoring and Process Reviews, below.

TxDOT's process is structured to include very high levels of QA throughout the project-specific environmental process. The team concept itself is a QA feature in that it ensures that the persons producing and approving documents communicate mutual expectations about what is needed for a project. Consistent interaction between the core team members and any involved SMEs is intended to

resolve most, if not all, problems before the document is completed and ready for review. As a result, when a document begins review for readiness, it should be a final draft ready for approval.

Environmental documents go through QA/QC at several stages during their development and review. Environmental scoping and scope amendment (described above) are QA activities intended to prevent late identification of problems that could cause delays or lead to unsupported environmental decisions. Various guidance documents, described below, also serve as QA materials that help guide the development of adequate and supported environmental documents and technical studies.

The process for approving environmental documents has several QC points. As determined by the core team, key environmental technical studies and consultation documentation are subject to QC review by qualified SMEs located in districts or at ENV. Administrative completeness review (noted above) is an environmental document QC point where fundamental problems may be detected and corrected, or documents may proceed to detailed review. Administrative completeness review prevents unnecessary expenditures of time and resources on projects that are not ready for approval. Note that the administrative completeness review does not prevent a project sponsor from submitting to TxDOT an incomplete document for informal peer review, a practice that is not uncommon across the state. This practice, when implemented, is an informal QA activity.

The next QC step is NEPA review for readiness where the environmental document is reviewed for content by the core team and SMEs, as appropriate. This QC step ensures that environmental documents are satisfactory for public disclosure. This process is managed by the core team, who works with SMEs identified by the core team to provide QC review of the draft environmental document and, later in the process, the final environmental document. Technical review is completed by SMEs for projects that have specific resource concerns or potential impacts. The core team identifies issues that must be addressed, and the district revises the document accordingly. This process continues until the core team determines that the document is ready for FHWA review and approval. A standard QC matrix is used to document review comments and their resolution. This matrix acts as a formal record of the comment and response progression and is intended to ensure clarity and efficiency in the QC process.

For EISs, in addition to the technical review described above, a legal review is completed by TxDOT's legal counsel, the Attorney General's office, or TxDOT's outside environmental counsel. The primary goal of this review is to assess the document from the perspective of legal standards, litigation risk and legal defensibility. Legal review occurs before submitting the DEIS to FHWA for review, and again prior to submitting the FEIS to FHWA for project decision.

## Environmental Commitments

Consideration of environmental commitments begins at the earliest phases of project development, although completion of commitments may not occur until the operation and maintenance phase of a project. Depending upon the nature of the commitment, environmental commitments may be implemented during final design; or prior to, during, or after construction is completed. TxDOT requires that environmental commitments be communicated from environmental approval through detailed design, pre-bid conference, project letting, maintenance, and operation. The EPIC records each environmental mitigation, compensation, and enhancement commitment; specifies how each commitment will be met; and identifies responsibility for the commitment. Environmental commitments that affect construction are communicated to contractors on an EPIC sheet as well as in the General Notes, layouts and Stormwater Pollution Prevention Plan (SW3P) in the final plan set, and are discussed during pre-construction meetings. EPIC information is usually conveyed to the public in the NEPA decision document (CE determination, Finding of No Significant Impact (FONSI), or Record of Decision (ROD).

## Tools and Guidance

For over four decades, TxDOT has worked with FHWA to implement NEPA on SHS and local government projects that require FHWA approval. As the state highway agency, TxDOT routinely

prepares NEPA documents for FHWA's independent evaluation and approval. Local agencies and their consultants also prepare NEPA documents for local government projects and for locally-sponsored projects on the SHS under the guidance and oversight of TxDOT. These documents are reviewed by TxDOT prior to their submittal to FHWA. In addition, TxDOT certifies that certain types of CEs meet regulatory requirements. Through programmatic agreements, TxDOT has also been entrusted with the authority to act on behalf of FHWA for specific programs, such as informal Section 7 consultation, and most federal historic preservation consultations.

To implement NEPA effectively, TxDOT has developed a broad assortment of policy and guidance materials that guide environmental document development and provide specific requirements for individual technical subject areas. These tools and guidance ensure that environmental documents and technical reports meet quality standards and are consistent with federal and state requirements. Together with other federal agencies, TxDOT has also participated in the development of, and is a signatory to, a number of programmatic agreements and MOUs that streamline the environmental review and project delivery process. A few of these tools, exemplifying the breadth and depth of TxDOT's environmental compliance program, are highlighted below.

TxDOT's **policy and guidance** resources address the environmental requirements associated with planning and delivering highway projects. The policies and guidance are a compilation of environmental procedures and processes related to environmental, cultural, historic, and social resources. Developed by TxDOT ENV in collaboration with TxDOT districts and FHWA, this on-line reference material is intended for use by project sponsors and environmental practitioners who conduct environmental work on behalf of TxDOT, as well as TxDOT environmental staff. The policies and guidance work in conjunction with online toolkits comprised of standards, procedures, and guidance documents (including handbooks and field guides) that may be reviewed, evaluated, and updated on a regular basis. The policies and guidance and supporting toolkits are "living" documents that are regularly evaluated and are updated as the need arises in response to changing environmental requirements, standards and policies.

TxDOT has prepared a variety of guidance documents and checklists that provide transportation practitioners with a practical approach for conducting analyses and ensuring that environmental issues are appropriately addressed. Guidance documents, policies, procedures and other related items are available on the **Environmental Affairs** page of TxDOT's website at: http://www.txdot.gov/inside-txdot/division/environmental.html. The site contains standard operating procedures, methodologies, documentation standards, review standards, handbooks, and guidance covering technical aspects of each resource category including air quality, environmental justice, indirect and cumulative impacts, limited English proficiency, Sections 4(f) and 6(f), tolling, hazardous materials, archeology, biological resources, community impacts, historical studies, traffic noise, and more.

TxDOT implements its **public involvement program**, based on 23 CFR Part 771.111, 23 USC §139 (h), 43 TAC Part 1, Chapter 2, Subchapter E, and as described in its Public Involvement guidance chapter. The program encourages opportunities for public input and provides guidance for interagency coordination and public participation during various stages of project development.

## Additional Guidance

In addition to TxDOT's own guidance, TxDOT and its consultants use the wealth of FHWA NEPA guidance in developing environmental documents and studies. FHWA provides a rich on-line set of guidance (http://www.fhwa.dot.gov/environment/ and http://www.environment.fhwa.dot.gov/guidebook/index.asp) covering a comprehensive listing of environmental topics. Each topic is covered in depth with direction and methodologies for performance of studies and assessments ranging from community impact assessments to air analyses. FHWA's Environmental Review Toolkit (http://environment.fhwa.dot.gov/projdev/index.asp) includes comprehensive guidance on a wide variety of topics such as historic preservation, environmental justice, water, wetlands and wildlife and Section 4(f), to name a few.

## Environmental Compliance Oversight System

TxDOT's ECOS contains the official project environmental file of record for all projects. ECOS has been in use since 2011 and is under continuing development. It is an electronic system that serves as a management and analytical tool, and as a repository for all project-specific environmental technical studies, analyses, agency coordination, environmental documents, EPIC items, and decision documents. For any given project, ECOS contains a wide range of basic project information such as the project description location, environmental scope and NEPA class of action, funding sources, right-of-way needs, and the project's status on transportation plans.

ECOS fulfills the scoping requirements for identifying and scheduling tasks, and for amending scopes by adding or subtracting tasks. ECOS assists the user in identifying necessary tasks via risk assessments that determine what tasks, if any, are recommended for a subject matter expert based on preliminary information. The system tracks which tasks are complete and which are not, and indicates whether a regulatory requirement has been met. ECOS also contains forms that serve as workspaces for producing studies so that information is keyed directly into the file of record. The system includes tasks for NEPA reviews and fields in which to record decisions. There are fields in which to record the start and end dates of various activities, including the dates from which to calculate the duration of the environmental process from the beginning to the end as well as the durations of individual components including EPIC item tracking.

The system has robust forensic capabilities for analyzing performance of the TxDOT environmental program as a whole. Much of the relevant information is recorded using consistent terminology, so the database can be screened for patterns of performance that could indicate whether problems occur too often to be random. In addition to having records ready on demand, the system also keeps a record of who produced an ECOS record or uploaded a file, and when a record was changed and by whom. This system will be used for TxDOT's self-assessments as well as to assist in the FHWA audits under NEPA Assignment.

## Programmatic Agreements and Agency Consultation

A programmatic agreement (PA) is a document that spells out the terms of a formal, legally binding agreement between TxDOT and other state or federal agencies. A PA may establish a process for consultation, review and/or compliance with one or more federal laws. It may also function as an expression of collaborative intent between agencies. TxDOT has several PAs, as described below:

A Memorandum of Understanding (MOU) developed under 23 U.S.C. §326 between FHWA and TxDOT to assign to TxDOT all CE activities listed on 23 CFR 771.117 (c) and (d) was executed on December 6, 2013 and became effective on February 12, 2014. TxDOT intends to terminate the 23 U.S.C. §326 MOU for CE projects and suspend the programmatic agreement regarding CEs and to subsume all CE approvals under the NEPA Assignment Program on the effective date of the NEPA Assignment Program MOU.

Prior to the implementation of the CE Assignment MOU, TxDOT and FHWA implemented a *Programmatic Agreement for the Review and Approval of NEPA Categorically Excluded Transportation Projects*. The PA was originally implemented in 2004, and was amended in 2011. This PA programmatically entrusted to TxDOT some review functions that normally would have been performed by the FHWA Texas Division. The PA defined two classes of categorical exclusions: blanket categorical exclusions (BCEs) and programmatic categorical exclusions (PCEs).

In 1995, the FHWA, the Advisory Council on Historic Preservation (ACHP), the State Historic Preservation Office (SHPO), and TxDOT entered into a Section 106 PA to streamline compliance under the National Historic Preservation Act. This PA was amended in 2005 and is currently being considered for amendment in response to the 2013 revisions to the MOU between TxDOT and the THC. Under the provisions of the current Section 106 PA, FHWA authorizes TxDOT to perform many of the Section 106 steps, yet retains direct involvement for those aspects of Section 106 that are more complex, relate to

other FHWA statutory responsibilities such as Section 4(f), or involve financial decisions regarding the reasonableness of mitigation. The Section 106 PA entrusts to TxDOT eligibility determinations, Findings of No Historic Properties Affected, and Findings of No Adverse Effect With Standard Conditions. The PA also identifies classes of projects that meet the criteria for projects with no potential to affect historic properties. Under the PA, most projects are approved by TxDOT because they are defined as projects with no potential to affect historic properties.

Since 2002, the FHWA and TxDOT have signed PAs with 16 federally-recognized Native American tribes to streamline the Section 106 tribal consultation process. The Tribal PAs streamline the review process by allowing TxDOT to coordinate directly with the tribes while clearly indicating FHWA is always available for government to government consultation, if requested by the tribe. The PAs clarify for the tribes the process that TxDOT will use to coordinate on Section 106 eligibility, effect, and mitigation, thus improving communication with the tribes and preventing delays. The procedures outlined in each of the PAs with tribes are identical, except for the Areas of Concern which are specific to each tribe based on the tribes' ancestral occupation of different areas of Texas. The correspondence between the specific tribes and TxDOT is limited to projects within the tribal Area of Concern. The Tribal PAs greatly reduce the amount of correspondence TxDOT sends and the amount of information the tribes review. Although the PAs provide a mechanism for the tribes to coordinate projects directly with TxDOT, the FHWA, as the federal agency responsible for government-to-government tribal consultations, has final authority to conduct formal consultation with tribes under Section 106.

Currently, TxDOT has a PA with the US Fish and Wildlife Service (USFWS) and the FHWA, called the Programmatic Agreement for Biological Evaluations, which addresses protocols for Section 7 consultation under the Endangered Species Act (ESA). TxDOT regularly acts on behalf of FHWA as the designated non-federal representative under the federal ESA. TxDOT routinely conducts informal consultations with USFWS and National Marine Fisheries Service (NMFS) and works collaboratively with FHWA on all aspects of the formal consultation process under Section 7 of the ESA and the Fish and Wildlife Coordination Act consultation process. TxDOT and FHWA also currently have a cooperative agreement with USFWS for a designated Transportation Liaison dedicated to reviewing TxDOT projects. In addition, TxDOT prepares essential fish habitat assessments and consults with the NMFS on projects that may affect essential fish habitat. TxDOT has a long history of working cooperatively with these and other federal agencies, as evidenced by a number of MOUs and memorandum of agreements (MOAs) developed over the years with these agencies.

## Internal Monitoring and Process Reviews

TxDOT regularly assesses its environmental compliance program and identifies and implements actions designed to improve the program's effectiveness and timeliness. Its guidance tools are designed to support staff in accurate development and review of project environmental documentation to meet federal and state standards and requirements.

Since 2008, TxDOT has conducted routine performance reviews for projects certified in the districts as PCEs or State d-list CEs. CE projects are evaluated by the performance review team to determine if findings were appropriate, decisions were made by authorized staff, project scopes were complete and accurate, project descriptions were complete, and tasks required in the project scope were undertaken and appropriately documented in the ECOS file. A new branch within the ENV Programs Management Section, the Self-Assessment Branch, has recently been created to carry out these performance reviews. It is intended that this program will expand to evaluate all types of environmental documentation.

In addition to these internal reviews, TxDOT environmental staff also participate in FHWA-sponsored process reviews undertaken to evaluate various potential risk elements of the TxDOT environmental program, and otherwise work together to examine and improve elements of the TxDOT environmental compliance program. Recent joint process reviews have examined TxDOT PCE processing, use of EPICs, and the Section 106 process. TxDOT and the Texas Division of FHWA have also collaborated on

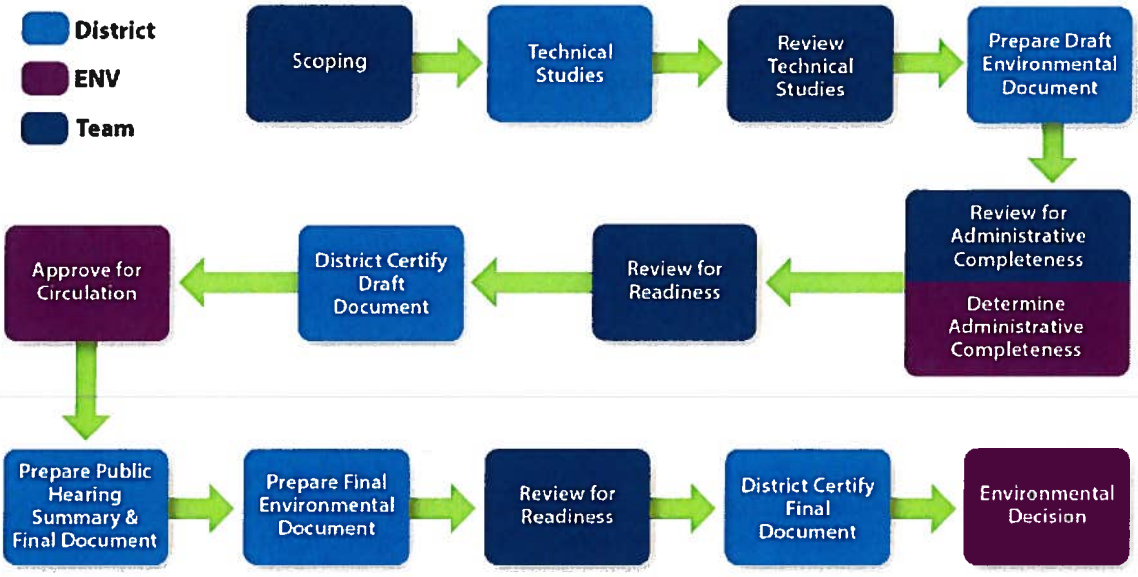
development of "Common Comments" and on initiatives to improve the quality and readability of NEPA documents in Texas.

## §773.106 (b)(3)(ii): Changes to be Made for Assumption of Responsibilities

TxDOT has recently made a number of changes to its organization and procedures in anticipation of the NEPA Assignment Program. These changes are designed to further strengthen its well-developed environmental program. Because of these recent changes, further procedural changes are anticipated to be few. Additional changes could occur as teams gain experience in using the new procedures and note the need for clarity, adjustment, augmentation, or additional procedures; procedural change would also result when TxDOT self-assessments or FHWA audits identify the need for additional change. The major change that will occur with the NEPA Assignment Program is TxDOT's assumption of FHWA's role as environmental decision-maker. The Assignment Program will enable TxDOT to expand its tradition of environmental compliance by TxDOT assuming Federal responsibility and liability for making independent NEPA decisions on federal projects. The Assignment Program will also allow TxDOT to deepen its strong proactive working relationships with its federal and state resource agency partners and to continue its commitment to work collaboratively with its resource agency partners to develop and implement innovative environmental mitigation. TxDOT's existing staff capabilities and mature environmental compliance program, together with the steps that have recently been taken to strengthen its program and staff, will ensure success of the NEPA Assignment Program. The new assignment process is depicted in Figure 8.

This section describes how TxDOT's existing environmental compliance program has been and will continue to be modified to implement its new responsibilities under the NEPA Assignment Program. This section also describes the procedures that TxDOT has been recently implementing to ensure that all NEPA documents meet quality standards, and that all NEPA decisions are compliant, sound, supportable, and made independently. As the need is identified, additional procedures will be developed to improve the program.

**Figure 8. NEPA Assignment Program Environmental Compliance Process for EAs and EISs**




## Organization and Procedures under the Assignment Program

To implement the NEPA Assignment Program, TxDOT recently began a systematic update of its environmental standards and procedures to support appropriate environmental analysis and decision-making under NEPA. These standards and procedures, combined with TxDOT's expert staff and consultant resources, will provide appropriate tools and expertise in areas where TxDOT has requested assignment of FHWA's environmental responsibilities. The program will rely on the professional judgment of TxDOT's environmental staff in determining the necessary scope and environmental analyses for specific projects, supported by established standards for environmental documents and technical studies, and a strong QA/QC program. This approach will strengthen the environmental process TxDOT uses for project development environmental compliance. TxDOT will continue strict adherence to FHWA's public outreach requirements as defined in 23 CFR 771.111 and EIS public and agency collaboration requirements at 23 U.S.C. §139, and will continue to conduct its robust public involvement program in concert with TxDOT's Public Information Office.

TxDOT believes that on-going project-specific collaboration between the district and ENV will provide the foundation for an effective environmental project development process and will result in final environmental documents that comply with NEPA, and will be more efficiently processed. This result will come from district and ENV professionals developing mutual expectations and maintaining communication throughout the process, while being supported by an effective QA/QC process and a rigorous training program. One of the primary causes of delay is iterative reviews of submitted environmental documents. Errors identified after the environmental document is submitted increase the total level of effort needed for the environmental process by adding time to correct errors and resubmit the environmental document for review. TxDOT's recently updated process is intended to both reduce the total time in the environmental process by heading off errors and iterative reviews during environmental document development, and to improve the initial quality of environmental documents. This structure recognizes district responsibility for the project, provides strong ENV support for project environmental scoping, analysis, and approval, and emphasizes a collaborative approach to connect the appropriate resources and expertise to the project and continually build the knowledge and experience of

team members as they collaborate in project NEPA compliance activities. TxDOT will use the organizational structure described in the section of this application labeled "§773.106 (b)(3)(i)".

TxDOT has been actively updating its procedures, guidance, manuals, and policies in recent months in preparation for the NEPA Assignment Program. TxDOT will use its existing and recently updated procedures, guidance, manuals, and policies in undertaking the NEPA Assignment Program responsibilities with the expectation that statewide use of those procedures, internal self-assessment and FHWA audit will identify opportunities to improve those standards and procedures, or staff implementation of those standards and procedures. Problems that are identified will be accompanied by development of corrective actions and adoption of recommendations for continuous improvement of TxDOT's environmental program.

One fundamental change that will occur with the onset of the NEPA Assignment Program is in documentation of the class of action determination. When the class of action decision falls outside of standard expectations as defined in FHWA's NEPA regulations at 23 CFR 771.115, a clear written rationale for the determination will be provided.

## Expanded Quality Control Procedures

TxDOT believes that its approach to quality is sound, and that its emphasis on internal collaboration among its professional district and ENV NEPA staff, augmented by environmental technical subject matter experts (SMEs) as needed, will result in quality environmental documents. As TxDOT environmental staff and its consultants become increasingly experienced with recently-implemented procedural changes, TxDOT will continue to strengthen its reliance on a reinvigorated quality assurance model under the NEPA Assignment Program that will further support development of NEPA-compliant environmental documents and decisions with quality built in. Updates, modifications, and expansions of its QA/QC procedures will occur as TxDOT determines them necessary for the successful implementation of the program. Team collaboration in development of the environmental document will also serve as a de facto mentoring program, with more experienced team members serving to build the knowledge, skills, and abilities of less experienced team members as they work together to produce the environmental document. This collaboration creates a form of program-level quality assurance. Quality assurance occurs at the project level as well as the program level. Quality control elements added to this quality assurance model further reduce the opportunity for error.

Quality assurance and quality control will occur at several steps during the development of all NEPA Assignment Program environmental documents. Quality assurance begins when the project environmental core team initially collaborates in the development of the Texas-mandated project environmental scope. The scope identifies mutual district and ENV expectations for the project class of action, environmental analysis, need for technical studies, extent of technical study review, and membership of the project environmental team. Technical studies are then prepared following established standards and the agreement for studies made in the project scope. The first QC step takes place when key technical studies undergo QC by a SME, as determined appropriate by the core team, prior to their approval. Once technical analyses and studies are completed, the project environmental team will lead development of the environmental document following established document standards. Because of increased reliance on development of technical studies as part of the environmental compliance process, rather than comprehensively reporting studies directly into the environmental document, the environmental document itself may briefly summarize studies and focus on the information necessary to support an informed decision. After completion of the environmental document, administrative completeness review, as described earlier in the application, takes place. This review serves as the second QC step, and concludes when the ENV team member determines that the environmental document presents all issues required to be addressed and necessary participating agency coordination has occurred.

The complete environmental document is then reviewed by the core team, performing a "review for readiness." Review for readiness is designed to ensure that the environmental document is NEPA

compliant; internally consistent; consistent with the supporting technical studies and with the project design concept and scope as described in the local or statewide plan; and meets the requirements of federal and state environmental statute, regulation, and policy.

All Section 4(f) processing options will follow a similar procedure involving review by appropriate SMEs, an administrative completeness review and the review for readiness in preparation for signature by a deputy director or senior manager/director. In addition to these steps, individual Section 4(f) evaluations will be submitted to OGC for legal sufficiency review. Individual Section 4(f) evaluations will be signed by the ENV Director after legal sufficiency is determined.

FEISs are also required to undergo legal sufficiency review that will be conducted by TxDOT's OGC, Attorney General legal staff, TxDOT's outside environmental counsel, or a combination of these. The legal sufficiency determination occurs after completion of the readiness review but before the district certifies that the EIS is ready for signature. District certification must be completed before the ENV director signs the draft EIS. The final EIS will only be signed after the legal sufficiency review is complete. Following approval of the final environmental document, the FONSI or ROD is developed by staff responsible for the environmental document and submitted to the ENV Director for decision.

The ENV Director will sign all FONSIs, draft and final EISs, RODs, and individual Section 4(f) determinations. At the written discretion of the ENV Director, signature authority for FONSIs and draft EISs may be delegated to a deputy director or senior manager/director. Signature authority for final EISs, Individual Section 4(f) evaluations, and RODs will not be delegated.

The process is different for project activities that qualify as CEs. Pursuant to 23 CFR 771.117 (a) and (b), the district will document its decision regarding the need for studies to confirm that the project meets the criteria for a CE.

If no studies are needed for projects listed in 23 CFR 771.117(c), the project is approved by the district environmental project manager as a CE with no further review. If studies are needed, those studies are identified in the project scope. After completion of all tasks identified in the scope, the district determines whether the results of studies confirm or invalidate the proposed classification. If the classification is valid, the CE is approved with no further review by an individual with signature authority delegated by the District Engineer. Approval is then electronically documented in the project file. If the classification is invalid, the district reclassifies the project and proceeds with environmental approval as required under the new classification. If no studies are needed for projects listed in 23 CFR 771.117(d) the district environmental project manager produces a determination of categorical exclusion. If studies are needed for projects listed in 23 CFR 771.117(d), they are be entered into a project scope. After completion of all tasks, the district environmental project manager produces a determination of categorical exclusion and forwards it for review to a qualified environmental staff member not involved in producing the determination. The environmental staff member then reviews the determination and project file to verify that the project meets the criteria for categorical exclusion. Following this review, the determination is forwarded to the District Engineer for approval and signature. The approval is electronically documented in ECOS, the electronic project file of record, and reported quarterly to FHWA.

Projects with a designated local government sponsor will follow the same basic approval processes as TxDOT-sponsored projects. When environmental documents are submitted, they will be subject to QC reviews, legal reviews (if applicable), review for readiness prior to signature, and legal sufficiency review (if applicable).

Projects listed in 23 CFR 771.117(c) will conclude with staff completion of the form. For projects listed in 23 CFR 771.117(d), peer review will be conducted (if applicable) by an individual not involved with completing the CE and the final approval will be made by the District Engineer.

## Independent Environmental Decision-Making

TxDOT's organization supports environmental decision-making independent of administrative political or performance-based pressure. Approval for all environmental documents prepared under the NEPA Assignment Program will be independent from project design decisions, yet the environmental team will collaborate with project designers throughout the project development process to avoid and minimize impacts to environmental resources of concern. Districts and ENV report to the TxDOT administration through different chains of command (see organization chart at Figure 1). The districts report to the Deputy Executive Director/Chief Engineer, while ENV reports to the Chief Planning and Project Officer. These chains of command meet only at the Executive Director. Project design decisions are the responsibility of TxDOT districts under the authority of the District Engineer or District Administrator. Projects qualifying as categorically excluded from the requirement to prepare an EA or EIS will be confirmed as CEs and approved by district environmental staff. Because these projects do not result in significant impacts, these decisions do not require independent review prior to approval. Nevertheless, CE decisions are subject to TxDOT QA that will include performance review by ENV. All formal environmental documents – EISs and EAs, which are produced by the districts, will be independently reviewed by TxDOT ENV prior to their approval at ENV. ENV staff will participate on environmental document core teams to provide QA throughout the environmental document development process, but responsibility for producing the environmental document remains with the district, while responsibility for approval is retained at ENV.

FEISs and individual Section 4(f) determinations will also require legal sufficiency review. Legal sufficiency review will be performed within a chain of command that reports to the administration separately from the districts and ENV, and therefore is twice removed from production by districts. All EAs will be signed at TxDOT Headquarters by the ENV Director or a delegated signatory. Normally, EISs will be signed by the ENV Director. At the written discretion of the ENV Director, signature authority for FONSIs and draft EISs may be delegated to a deputy director or senior manager/director. Signature authority for final EISs, individual Section 4(f) evaluations, and RODs will not be delegated.

## Defining the Class of Action

The class of action for all projects is proposed by the project sponsor during scoping at project initiation. The department delegate reviews the proposed class of action as part of the overall scope review process. When the class of action decision falls outside of standard expectations as defined in FHWA's NEPA regulations at 23 CFR 771.115, a clear written rationale for the determination will be provided. In situations where the project scope changes or anticipated impacts change, the class of action will be reconsidered.

## Consultation and Coordination with Resource Agencies.

Coordination with resource agencies plays a vital role in project planning and environmental development of proposed projects. TxDOT currently performs the primary role in interagency coordination through agreements with the FHWA and various resource agencies. TxDOT maintains a multi-disciplinary staff that works effectively and proactively with state and federal environmental resource agencies. Under current TxDOT procedures, both the district environmental staff and ENV SMEs are responsible for interagency coordination during project planning and development. Under the Assignment Program, TxDOT is committed to continue working positively and collaboratively with its federal and state resource agency partners.

This positive, collaborative approach with agency partners will also be evident as TxDOT assumes responsibility for NEPA scoping on EIS projects. TxDOT will meet the NEPA scoping requirements of the CEQ NEPA regulations (40 CFR 1501.7) and of FHWA (23 CFR 771.123(b)), as well as the early consultation and coordination plan requirements articulated in 23 U.S.C. 139. TxDOT will request agencies, as appropriate, to become cooperating agencies, and will identify agencies to serve as

participating agencies. All federal, state, tribal, regional and local government agencies that may have an interest in the project will be invited to be participating agencies. Participating agencies and the public will be given an opportunity for input in the development of the purpose and need and the range of alternatives, and throughout the project development process as appropriate. TxDOT will also collaborate with the cooperating and participating agencies during the environmental study process on methodology used and level of detail required for the analysis of project alternatives.

TxDOT biologists or consultants supervised by TxDOT currently prepare Section 7 biological evaluations and biological assessments, and essential fish habitat evaluations under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). TxDOT district environmental staff and ENV perform informal consultation responsibilities with the USFWS and NMFS on biological evaluations and essential fish habitat assessments. Under the NEPA Assignment Program, ENV will take on the FHWA role of formal consultation with USFWS and NMFS under Section 7 of the ESA and under the MSA. However, TxDOT will not assume responsibility for Biological Opinions (BOs) issued prior to the implementation of the NEPA Assignment Program but will continue to adhere to the current terms of BOs coordinated between FHWA, TxDOT, and USFWS or NMFS prior to Assignment. Under the NEPA Assignment Program, TxDOT is requesting to assume responsibilities for BOs issued for NEPA Assignment projects, for compliance oversight of BO terms and conditions. Formal consultation correspondence and documentation prepared under the NEPA Assignment Program will be submitted to the agencies from ENV, and will specify that consultation is being requested pursuant to 23 U.S.C. 327.

In addition, ENV works collaboratively with USFWS and NMFS to develop mitigation strategies to ensure that projects will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat or essential fish habitat. TxDOT also consults with the USFWS on projects which require review under the Fish and Wildlife Coordination Act (FWCA). Under the Assignment Program, TxDOT is requesting to assume responsibility for ESA compliance and will continue FWCA coordination, informal ESA consultation responsibilities and assume responsibility for formal Section 7 consultation on behalf of the FHWA.

ENV recently developed a Standard Operating Procedure (SOP), *Accessing USFWS Ecological Services for Technical Assistance and Section 7 Consultations*, which outlines steps for ENV and Districts to follow to comply with the ESA under the NEPA Assignment Program. TxDOT will adhere to the SOP for all projects under the NEPA Assignment Program.

Under a PA with the THC, ACHP, and FHWA, TxDOT is currently entrusted with responsibility for formal consultation with the SHPO on Section 106 issues. The PA provides for internal TxDOT review and approval for projects not involving adverse effects to eligible resources under Section 106. For projects involving adverse effects to eligible resources, TxDOT consults with the THC and other consulting parties to resolve adverse effects. The PA provides for FHWA and ACHP participation at the request of the public, consulting parties as defined in 36 CFR 800.2 and at the request of FHWA or the ACHP. Under the Assignment Program, TxDOT is requesting to assume responsibility for compliance with Section 106 of the National Historic Preservation Act and will continue coordination with the THC on behalf of the FHWA regarding cultural resource issues through formal assumption of Section 106 responsibility.

TxDOT is currently entrusted with responsibility for coordination with multiple Tribal Governments through PAs with the Tribal government and FHWA. FHWA cannot assign its government-to-government Tribal consultation responsibilities to TxDOT under the NEPA Assignment Program, but TxDOT would continue to use the procedures outlined in the PAs to coordinate the meaningful input of Native American tribes with interests in Texas in the Section 106 process.

TxDOT does not have a formal PA with the U.S. Army Corps of Engineers (USACE), but TxDOT currently manages permit submittals when Section 10 and Section 404 permits are required. TxDOT administers three mitigation banking instruments for use on projects that impact waters of the U.S., and

follows USACE expedited coordination and permitting procedures for emergency situations. Projects requiring an individual Section 404 permit are required to comply with the Section 404(b)(1) guidelines (40 CFR, Part 230). TxDOT will continue to follow Section 404(b)(1) guidelines in analyzing project alternatives and determining the least environmentally damaging practicable alternative while working with USACE to obtain individual permits. Under the NEPA Assignment Program, TxDOT requests to assume FHWA's responsibility as the lead federal agency to coordinate with USACE and will continue to perform these coordination and permitting functions. TxDOT will be considered the "Federal Agency" on actions under the NEPA Assignment Program.

In addition, TxDOT currently coordinates with the U.S. Coast Guard regarding projects within navigable waterways subject to the General Bridge Act of 1946, formerly known as Section 9 of the Rivers and Harbors Act of 1899.

TxDOT coordinates stormwater quality and hazardous material issues with the Texas Commission on Environmental Quality (TCEQ). Although ENV reviews and approves air quality analyses, FHWA would retain transportation conformity determinations for Assignment Program projects. TxDOT is actively involved in coordinating with the U.S. Department of Interior, and, as appropriate, other federal agencies, on Section 4(f) issues. Also, TxDOT actively coordinates with the Federal Emergency Management Agency (FEMA) regarding any amendments to National Flood Insurance Program (NFIP) floodplain maps, and TxDOT coordinates with the International Boundary and Water Commission (IBWC) if a project would impact the floodplain of the Rio Grande River. When necessary and to ensure compliance with the Farmland Protection Policy Act (FPPA), TxDOT completes coordination with the Natural Resource Conservation Service (NRCS). TxDOT also is requesting to assume responsibilities for compliance with these acts and would continue to perform these coordination functions under the Assignment Program.

## Issue Identification and Conflict Resolution Procedures

### *Internal Process*

Per 43 TAC§2.52, Dispute Resolution, the project sponsor and department delegate will attempt to informally resolve any dispute concerning environmental document review before using other methods of dispute resolution. Each project scope includes informal dispute resolution procedures. Those procedures are to be implemented in accordance with the deadlines indicated in the project scope.

If a project sponsor is a department district or division, a dispute between the project sponsor and department delegate that cannot be resolved informally under subsection (a) of this section will be brought to the attention of and resolved by the department's executive director within 60 days of request for dispute resolution by the project sponsor or department delegate. If a project sponsor is a local government and a dispute cannot be resolved informally under subsection (a), the project sponsor and department delegate will ask their attorneys to meet and attempt to resolve the dispute. If the parties' attorneys are unable to reach a resolution, the project sponsor or department delegate may refer the dispute to mediation or other alternative dispute resolution process. Cost of mediation or alternative dispute resolution will be shared equally between the parties. Once mediation or an alternative dispute resolution process is requested by either party, the resolution process must be completed within 60 days of the request.

### *Process with External Agencies*

TxDOT has long had a practice of proactive engagement with its resource agency partners. TxDOT strives to be transparent in identifying impacts, working with agencies on appropriate mitigation to offset the impacts of its projects, and following through on its commitments. The department seeks to understand the basis for resource agency requirements and to diligently meet those requirements. Following this forthright approach, TxDOT is largely successful in avoiding conflicts with external agencies. TxDOT expects to continue this general approach under the NEPA Assignment Program, and will assume FHWA's role in resolving conflicts with external agencies without FHWA involvement. In

this role, TxDOT will continue to be diligent in resource agency engagement, particularly with cooperating agencies and those agencies designated as participating agencies, following the requirements and spirit of 23 CFR 139(h). Where issues arise that create conflict between agencies, TxDOT will be committed to forthright conflict resolution and good faith efforts to address concerns of the other party. Because of TxDOT's experience, expertise, and current level of involvement in consultations, its existing resources will be adequate to assume FHWA's responsibilities for resolving issues with external agencies.

TxDOT's long history of working cooperatively with its federal and state partners and with Tribal Governments is evidenced by the numerous PAs, MOUs and MOAs developed over the years to entrust certain responsibilities to TxDOT or to improve coordination between TxDOT and federal and state resource agencies, one of which can be found at http://ftp.dot.state.tx.us/pub/txdot-info/library/pubs/bus/env/programmatic.pdf. The PAs highlighted below specify procedures for resolving conflicts with external agencies. These procedures were developed with FHWA as a partner. Under the Assignment Program MOU process for handling PAs, TxDOT could assume the FHWA role in the PA if acceptable to the resource agency involved.

**Section 106 Programmatic Agreement** (*Programmatic Agreement Among the Federal Highway Administration, the Advisory Council on Historic Preservation, the Texas Historical Commission, and the Texas Department of Transportation Regarding Compliance With Section 106 of the National Historic Preservation Act*):

- Stipulation X (A) and (B) addresses dispute resolution procedures for SHPO, or other consulting party, objections to any plans or proposed actions provided by TxDOT or FHWA for review. These dispute resolution procedures generally stipulate that when TxDOT and SHPO cannot concur on an eligibility or effect determination, then they will consult with FHWA to resolve the conflict. If FHWA is unable to resolve the conflict, FHWA will provide all relevant documentation to the ACHP for review and comment. The ACHP will provide FHWA with recommendations that FHWA may take into account to resolve the issue.
- Under the Assignment Program, if TxDOT is not able to resolve the conflict with the SHPO, TxDOT will provide all relevant documentation directly to ACHP to obtain recommendations for consideration for a final decision.

**Endangered Species Act, Section 7 Determinations and Coordination** (*Programmatic Agreement Among the Federal Highway Administration, the Texas Department of Transportation, and the U.S. Fish and Wildlife Service for Biological Evaluations*):

- If a difference between staff arises at any point in the process, the issue will be referred to the next higher level for review and decision within 10 working days. If the Director of ENV and the appropriate USFWS Administrator are unable to agree on a decision, FHWA will request the initiation of formal consultation.
- Under the Assignment Program, if TxDOT and USFWS are unable to agree on an effect determination during informal consultation, TxDOT will initiate formal consultation and will assume FHWA's role in the formal consultation process.

**Native American Tribal Coordination** (*Programmatic Agreements between TxDOT, FHWA, and multiple Tribes with Areas of Concern in Texas regarding compliance with Section 106 and Native American Graves Protection and Repatriation Act*):

- If the Tribes object to TxDOT findings, eligibility determinations, effect determinations, or treatment plans within the PA-prescribed review period, TxDOT-ENV shall review the documentation provided by the Tribe to support its objection and make a reasoned response to the Tribe.
- If the Tribe continues to object, TxDOT-ENV shall provide FHWA a copy of the documentation along with copies of the results of consultation with other parties.
- If the objection is in response to a finding of no historic properties, eligibility determination or effect determination, then FHWA will review the documentation and will consult with the Tribe

or the Keeper of the Register to resolve the objection and notify all consulting parties of the outcome.

- If the objection is in response to a treatment plan, then FHWA will review the documentation and will consult with the Tribe or the ACHP to resolve the objection and notify all consulting parties of the outcome.
- For emergency discoveries, TxDOT will follow appropriate emergency discovery guidelines, which include notifying the culturally associated Tribe, and determining if any additional investigations of the site are needed. If the Tribe objects to additional investigations, TxDOT-ENV shall provide FHWA a copy of the documentation along with copies of the results of consultation with all consulting parties. FHWA shall review this documentation and render its decision, notifying all parties of its decision.
- Under the NEPA Assignment Program if TxDOT and a tribe are unable to agree, the parties will follow the dispute resolution processes of TxDOT's Programmatic Agreement with FHWA, the Texas SHPO and the ACHP for Section 106 compliance, unless the tribe requests government-to-government consultation with FHWA.

Where the issue needing resolution does not involve one of the regulatory processes described above, TxDOT will implement the Issue Identification and Resolution Process under 23 U.S.C. 139(h), assuming FHWA's role. The regulation provides a formal process for resolving major issues that may delay or result in denial of a required approval or permit for a project. This process may be invoked by the project sponsor or the Governor of the State and requires that the FHWA Division Administrator, heads of the lead agencies and affected participating agencies, and the project sponsor meet to resolve issues. Under the NEPA Assignment Program, the Executive Director of TxDOT would assume the FHWA Division Administrator role. Issues identified for resolution or elevation through 23 U.S.C. 139(h) would be logistically coordinated with the Office of the Secretary of Transportation at the federal Department of Transportation.

## Record Keeping and Retention

TxDOT intends to use its electronic ECOS data management system as the environmental file system of record for NEPA Assignment Program projects.

The TxDOT record retention policy is established by TxDOT's General Services Division. For documents pertaining to TxDOT's discharge of responsibilities under the NEPA Assignment Program, TxDOT will comply with the requirements of FHWA Records Disposition Manual (Field Offices) Chapter 4, FHWA Order No. 1324.1B, issued July 29, 2013.

TxDOT will maintain its project and administrative files pertaining to its NEPA Assignment responsibilities, as required by the program. As required, files will be available for FHWA review within five business days' notice, at the location of the files. These files will include, but are not limited to, all letters and comments received from governmental agencies, the public, and others relative to TxDOT's NEPA Assignment responsibilities. Project files will include the NEPA document, technical reports and studies, consultation/coordination correspondence, and public comments and responses. E-mails that support project decision-making, reflect deliberation, and demonstrate a "hard look" under NEPA will be retained as part of the project file. Any attorney-client privileged documents will be kept in a separate file, and will not be made available upon request.

## Expanded Internal Compliance and Self-Assessment Reviews

TxDOT intends to expand its recently established environmental performance review program to evaluate its performance under the NEPA Assignment Program. As this performance review team is already in place and fully staffed, it is well-positioned to effectively undertake the mandatory NEPA Assignment Program self-assessments. As required, TxDOT will periodically conduct self-assessments to determine the effectiveness of its standards, guidance, and procedures under the NEPA Assignment Program and its

staff's adherence to the NEPA Assignment MOU, and to TxDOT's established standards and procedures. Performance reviews will be on-going, with periodic self-assessment reports provided to FHWA. In addition to problem identification, self-assessments will be used to evaluate root causes and to assess whether specific problems are systemic, confined to specific areas of the state or to specific individuals. TxDOT will use self-assessments to identify areas that are working well, as well as areas that need improvement; make specific recommendations to improve adherence to standards and procedures; assess the need for corrective action as well as implement necessary corrective actions; evaluate the improvements achieved from previous corrective actions; and re-evaluate previous program areas where corrective actions have been implemented. Self-assessments will be conducted using a variety of monitoring tools, such as reviews of files and the data management system, interviews of TxDOT and resource agency staff, and distribution of questionnaires. These self-assessments will gauge the success of the NEPA Assignment Program.

It is anticipated that certain elements of the NEPA Assignment Program will be evaluated with each self-assessment (e.g., record-keeping, documented compliance with federal requirements, environmental approval timeframes), while other self-assessment components will be determined for each self-assessment based on input from the performance review team, ENV management, district environmental leads and ENV project managers.

The ENV Director, currently Carlos Swonke, will be responsible for overseeing TxDOT's implementation of the NEPA Assignment Program, ensuring its success, and reporting on its performance to FHWA. The Director of ENV is the highest-ranking environmental official at TxDOT and is committed to the success of the NEPA Assignment Program, as are the entire TxDOT administration and the Texas Transportation Commission. An ENV Deputy Division Director, currently Susan Theiss, will be responsible for day-to-day management of the program and will serve as liaison to the FHWA Assignment Program audit team until a TxDOT audit liaison can be named.

## Performance Measures to Assess the NEPA Assignment Program

TxDOT will monitor a variety of performance measures as part of its self-assessment program to evaluate performance in assuming NEPA Assignment Program responsibilities. These measures include the following:

Compliance with NEPA, FHWA NEPA regulations, and other federal environmental statutes and regulations:

- Maintain documented compliance with requirements of all applicable Federal statutes and regulations for which responsibility is assumed.

Quality Control and Assurance for NEPA decisions:

- Maintain internal quality control and assurance measures and processes, including a record of:
  - Completion of legal sufficiency reviews by counsel; and
  - Compliance with TxDOT's environmental document content standards and procedures, including those related to QA/QC.

Monitor relationships with agencies and the general public:

- Assess change in communication among TxDOT, federal and state resource agencies, and the public resulting from assumption of responsibilities under this MOU.
- Maintain effective responsiveness to substantive comments received from the public, agencies and interest groups on NEPA documents.

Increased efficiency in completion of the NEPA process:

- Compare time for completion of environmental document approvals before and after assumption of responsibilities.

## Training to be Provided to Implement the Assignment Program

TxDOT is committed to maintaining a quality training program for its employees. Training is developed to meet the identified needs of staff and is modified over time as necessary to meet evolving staff needs. TxDOT's existing environmental training program provides training courses that support development of the knowledge, skills, and abilities of its environmental staff necessary to meet state and federal environmental requirements. Certification is required for district environmental staff that develop or review environmental documentation for technical accuracy. The certification requirement took effect April 16, 2012, and all existing employees with at least seven years of TxDOT experience at that time were automatically certified. New employees, and those with less than seven years TxDOT experience, were required to participate in workshop training on the Programmatic Agreement between FHWA and TxDOT on Categorical Exclusions, and on TxDOT's environmental rules. All employees are required to maintain their certifications by participating in a minimum of 16 hours of continuing education per two-year period following their initial certification. Any training, formal or informal, offered by TxDOT or external entities relevant to environmental responsibilities may be used to meet continuing education requirements. District staff manage certification for their staff, and determine which courses will be counted as continuing education hours. As TxDOT prepares to enter the NEPA Assignment Program, it is anticipated that the certification requirements will be modified. Training on the MOU and NEPA Assignment program requirements will be required in order to obtain or maintain certification (see below).

As part of development of the annual training plan and during self-assessment, TxDOT expects to evaluate its existing training to determine if it is consistent with the assignment program and the current TxDOT approach to the environmental process, revise training as needed, and develop new training to support the assignment. TxDOT is committed to augmenting its current training program in support of the NEPA Assignment Program.

To ensure that TxDOT environmental staff have the knowledge and skills necessary to meet their new responsibilities under the Assignment Program, TxDOT will hold training on the NEPA Assignment MOU and its key provisions for its environmental staff that will be most involved in implementing the NEPA Assignment Program prior to the effective date of the MOU. Attendees will include district environmental staff and ENV environmental managers and staff. Training topics will include the content of the MOU and application, revised documentation requirements for CEs, revised environmental document review procedures, QA/QC protocols, the self-assessment process, FHWA regulations, and the current TxDOT environmental rules. A critical component of the training program will be recurring QA/QC training. TxDOT also intends to create a new manager role to coordinate staff development under the Assignment Program. TxDOT will prepare and submit regular NEPA Assignment Program training plans as required by the NEPA Assignment Program MOU.

In addition, ENV and districts will work with the Local Government Projects Office to provide training to local governments and their consultants on changes to environmental procedures under the NEPA Assignment Program, including environmental document quality control procedures and record keeping requirements. This training will take place by September 30, 2014. Finally, additional training to build awareness of NEPA Assignment issues for management personnel, project managers and project design engineers is currently in the planning stages.

TxDOT Headquarters and key district environmental staff completed FHWA Audit training on February 19th and 20th, 2014.

TxDOT has requested that FHWA legal staff provide legal sufficiency training to TxDOT OGC staff, Attorney General staff, TxDOT's outside environmental counsel and key environmental technical staff,

prior to the execution of the 23 U.S.C. 327 MOU to present the fundamentals of legal sufficiency, key areas of concern in legal sufficiency review, and the content of the administrative record.

TxDOT has also requested that FHWA provide training during the first year of the NEPA Assignment Program in the following areas:

- NEPA and Transportation Decision-making
- Purpose and Need/Alternatives Analysis
- Indirect and Cumulative Impact Analysis
- Section 4(f) Evaluation

In addition to TxDOT's in-house training program, TxDOT sends its staff to environmental compliance courses offered by FHWA, National Highway Institute, resource agencies, local universities, and private vendors, on an as-available and as-needed basis.

While not training per se, regular statewide hot topics discussions and updates will be held for the program to regularly share important NEPA Assignment Program information, communicate Assignment Program issues and their resolution, and respond to questions.

## §773.106 (b)(3)(iii): Legal Sufficiency

TxDOT will conduct legal sufficiency reviews of final environmental impact statements (FEISs) and individual Section 4(f) evaluations, which are the only document types for which FHWA is required to conduct legal sufficiency reviews under Federal regulation (*see* 23 CFR 771.125(b) and 23 CFR 774.7(d)). These reviews will be conducted by an attorney or attorneys from TxDOT's Office of General Counsel or the Texas Attorney General's Office, or by TxDOT's outside environmental counsel. The primary goal of this review will be to assess the document from the perspective of legal standards, litigation risk and legal defensibility. TxDOT intends to use the following process:

1) ENV will submit the preliminary FEIS or Individual 4(f) evaluation to TxDOT's OGC.
2) TxDOT's General Counsel will assign the document to an associate general counsel, assistant attorney general, or TxDOT's outside environmental counsel for review.
3) The reviewing attorney will prepare and submit to ENV written comments/suggestions to improve the document's legal defensibility (these comments would be protected by the attorney-client privilege and would not be shared outside of TxDOT).
4) The reviewing attorney will be available to discuss with ENV staff the resolution of comments/suggestions.
5) Once the reviewing attorney is satisfied that ENV staff has addressed his or her comments/suggestions to the maximum extent reasonably practicable, the reviewing attorney will provide ENV with written documentation that the legal sufficiency review is complete.
6) ENV will not finalize an FEIS or the individual 4(f) evaluation before receiving written documentation that the legal sufficiency review is complete.

Should issues of national precedent arise in legal sufficiency review, TxDOT's attorneys would coordinate with FHWA attorneys on the underlying policy issue.

## §773.106 (b)(3)(iv): Prior Concurrence

For selected projects, "prior concurrence" pursuant to 23 CFR 771.125(c), will be obtained, before proceeding with key approvals under NEPA. Prior concurrence will come from one of the Deputy ENV

Directors, after consulting with the Office of General Counsel if necessary, to ensure that the project and environmental document in question are acceptable from a policy and program perspective. Prior concurrence may apply to TxDOT approvals of draft or final EISs. Projects that require prior concurrence will be decided on a case-by-case basis, based on input from the districts and ENV managers, and may include projects that meet one or more of the following criteria:

- impacts of unusual magnitude,
- high level of controversy,
- major unresolved issues,
- emerging or national policy issues,
- issues for which the districts seek policy assistance.

For projects that are believed by TxDOT to involve a constructive use under Section 4(f) of the U.S. Department of Transportation Act, TxDOT will coordinate with FHWA on the underlying policy issue before making a final determination of a Section 4(f) constructive use. Section 4(f) constructive use evaluations will undergo legal review before they are signed by the ENV Director.

Prior concurrence will apply to projects as determined by the ENV Director. In completing the prior concurrence review, the Deputy ENV Director or designee will personally review the elements of the EIS at issue in the prior concurrence review and seek advice and input, as appropriate, from technical SMEs and the Office of General Counsel before the EIS that is the subject of prior concurrence is approved by the ENV Director.

## §773.106 (b)(4)(i): Staff Dedicated to Additional Functions

TxDOT currently employs approximately 150 staff that are responsible for some aspect of environmental compliance, and believes the overall size of its existing environmental staff is sufficient to handle the responsibilities it is assuming under the NEPA Assignment Program and the scale of projects it expects to assume. With its staff, TxDOT planned 1691 environmental documents/determinations in FY 2013 and plans to complete approximately 1380 in FY 2014. In FY 2013, just over 200 of these were planned to involve an environmental document, while in FY 2014 just fewer than 100 are expected to require an environmental document, a fifty percent reduction. This trend reflects both a general reduction in available funding for transportation projects as well as a shift in the use of available funds towards maintaining the existing system rather than expanding the system.

TxDOT has recently added two Deputy Directors at ENV to handle the NEPA Assignment Program and other increasing complexities of environmental compliance. In recognition of the importance of the NEPA Assignment Program, a significant portion of the time of one of these Deputies will be dedicated to managing of the NEPA Assignment Program. Further, ENV recently received a new FTE to hire a Performance Branch manager, and is creating a new role to manage staff development coordination. TxDOT will continue to review environmental staff roles and modify their use, as appropriate, based on the needs of the NEPA Assignment Program. TxDOT does not anticipate adding additional new environmental staff at this time to implement its NEPA Assignment responsibilities. In the future, additional staff may be added in the districts to handle additional environmental workload that may develop – from the NEPA Assignment Program as well as other sources – at the discretion of the District Engineer. TxDOT's large and experienced environmental staff that will contribute to assignment-related functions are distributed around the state, in both districts and ENV, and will bring a wide range of perspectives and experience to the NEPA Assignment Program.

While the addition of environmental staff is not currently anticipated, TxDOT has identified several key Assignment Program roles, as identified elsewhere in this application. Notable among them are the ENV

Deputy Director responsible for day-to-day management of the program and liaison to the FHWA audit team; the Self-Assessment Branch Manager who will manage self-assessments and performance reviews under the program; a manager to coordinate staff development and program development; and the Chief of Natural Resource Management who will responsible for Section 7 consultation. The ENV Director will be responsible for overseeing TxDOT's implementation of the NEPA Assignment Program, ensuring its success, and reporting on its performance to FHWA. The ENV Director will sign all FONSIs, draft and final EISs, records of decision (RODs), and individual Section 4(f) evaluations. At the written discretion of the ENV Director, signature authority for FONSIs and draft EISs may be delegated to a deputy director or senior manager/director. Signature authority for final EISs, individual Section 4(f) evaluations, and RODs will not be delegated.

Legal sufficiency reviews will be performed by one or more attorneys from TxDOT's Office of General Counsel (OGC), the Office of the Texas Attorney General, or OGC's outside environmental counsel. TxDOT intends to hire an additional attorney for legal sufficiency reviews under the NEPA Assignment Program; this attorney is anticipated to be on staff in early 2014.

## §773.106 (b)(4)(ii): Changes to the Organizational Structure

TxDOT does not anticipate any changes in the organization of district functions. District project managers are responsible for ensuring that the environmental process is completed. Environmental staff will continue to support project development. District environmental staff will continue to rely on other districts and ENV to provide expertise that the district does not have. This structure has been proven effective.

ENV recently has been reorganized as described in the section of this Application labeled, "§773.106 (b)(3)(i)" above. The reorganization was motivated in part to adapt the previous organization to the NEPA Assignment Program. TxDOT does not anticipate further organizational change, although roles and responsibilities may be shifted among ENV organizational units for the successful implementation of the Assignment Program or as identified as through the NEPA Assignment Program's self-assessment and FHWA audit process.

TxDOT will continue to use the existing organization for legal sufficiency review. This structure has been effective.

TxDOT will use the NEPA Assignment Program's self-assessment and FHWA audit process to identify any changes that may be needed in organizational structure.

## §773.106 (b)(4)(iii): Use of Outside Consultants for the Assignment Program

There will be no change in TxDOT's general approach to using consultants as a result of the NEPA Assignment Program. ENV is responsible for the review of environmental documents prepared by districts as well as consultants under contract to TxDOT. Following completion of this review, ENV either approves these documents or recommends them for approval. Both districts and ENV have the authority to hire consultants. Consultants may be used for environmental analysis, technical studies, environmental document preparation, review services, administrative record development, and general staff support.

Currently, consultant services fluctuate in proportion to the annual TxDOT workload. The level of consultant services used to augment TxDOT's project development staff is based on legislative authority and project delivery needs, which vary from year to year. The practice of using consultants to manage

workload fluctuations allows the TxDOT workforce to remain stable. Most districts provide for consultant assistance on an as-needed basis by maintaining "on-call" environmental contracts. Under the NEPA Assignment Program, consultants will continue to be used as previously. This use of consultants to handle workload fluctuation will also effectively serve to manage adjustments in workload that may occur with NEPA Assignment. Consultants will not be permitted to make NEPA determinations under the NEPA Assignment Program.

Environmental consultants are used for a variety of tasks, including undertaking specific technical studies, implementing aspects of the QC review, and preparing project specific environmental documents. Consultant-prepared reports are reviewed by districts and ENV staff following TxDOT's requirements for document review and approval.

## §773.106 (b)(5): Financial Resources under the Assignment Program

TxDOT ENV's current annual budget for fiscal year (FY) 2014 is $15.96 million. Ten million of this budget is for consultant resources, which provides TxDOT flexibility in meeting its project and program environmental compliance needs. The primary costs for operating the NEPA Assignment Program will come from the ENV budget. The staff positions listed below are already on staff to perform activities related to the Assignment Program, and are covered under current budget allocations:

- Deputy Director ENV: Program management
- ENV Self-Assessment Branch manager
- ENV Staff Development Coordinator

The TxDOT environmental budget is one of the largest in the nation. TxDOT considers its budget to be sufficient to cover the costs of any and all additional environmental activities necessary to successfully meet its Assignment Program responsibilities, including consultation with state and federal environmental resource agencies, QC and QA of NEPA documents and supporting technical studies, undertaking self-assessments and preparing for FHWA audits. TxDOT commits to making adequate financial resources available to meet the NEPA Assignment Program responsibilities it is assuming and the staff resources needed to successfully execute those responsibilities. TxDOT will regularly assess financial and staffing resources available for the NEPA Assignment Program as part of its self-assessments.

Other than the costs of hiring an additional attorney, as identified in section 773.106 (b)(4)(i), above, there will be no new costs to TxDOT for the initial year of the NEPA Assignment Program. Any additional environmental staff FTEs for NEPA Assignment work will be redirected from elsewhere in the ENV program. In future years, Assignment Program work on TxDOT projects will become a routine part of performing project environmental compliance. The need for any additional future FTEs would be identified as part of the routine TxDOT budgeting process.

## §773.106 (b)(6): Certification for Consent to Exclusive Federal Court Jurisdiction and Waiver of Immunity

The certification is attached as Appendix C.

# §773.106 (b)(7): Certification that the State of Texas' Public Records Act is Comparable to the Federal Freedom of Information Act

The certification is attached as Appendix C.

# §773.106 (b)(8)(ii): Comments Received on the Assignment Program Application

## Outreach

TxDOT developed an outreach plan that outlined the public and agency outreach to be performed to help build awareness and guide the implementation of the NEPA Assignment Program. To date, TxDOT has conducted a variety of public involvement activities. In December 2013, TxDOT and FHWA jointly hosted an agency workshop to inform the resource agencies of the NEPA Assignment Program and solicit their input regarding the FHWA responsibilities that TxDOT is applying to assume. FHWA, USFWS, TCEQ, THC and Texas Parks and Wildlife Department attended this workshop. EPA, USACE, and federally-recognized tribes that have expressed interest in Texas transportation projects were also invited, but did not attend. TxDOT also sent letters to 25 MPOs and eight Regional Mobility Authorities to inform them of TxDOT's intent to apply for the Assignment Program. TxDOT also developed and delivered a presentation regarding the NEPA Assignment Program and other streamlining initiatives to many counties, MPOs, engineering and environmental groups. TxDOT will continue communication and outreach efforts with external agencies, local governments and other interested parties as TxDOT prepares to implement the program.

## Notice of Draft Application

The availability of TxDOT's NEPA Assignment application was publicly noticed in the Texas Register on March 14, 2014. The notice provided a 30-day comment period and invited those with comments to submit them to TxDOT. The name and contact information for the Director of TxDOT's Environmental Affairs Division was provided for those wishing to comment, ask questions, or request additional information.

TxDOT also notified Federal and State Resource agencies and Native American tribes, by letter, of the NEPA Assignment application and the opportunity to comment.

## Summary of Comments Received and of Changes Made to the Application in Response to Comments

Table 3 identifies the agencies and individuals that commented on the draft application and the date of each comment. The table also summarizes the comments and the changes made to the application in response to these comments. In addition to the comments identified below, the Hays County Commissioners' Court passed a resolution on March 25, 2014, in support of TxDOT's application for assumption of FHWA's NEPA responsibilities, and urged FHWA to approve TxDOT's application as efficiently and expeditiously as possible. Appendix D contains copies of all comments received and the responses that TxDOT provided to each of the commenters.

**Table 3. Summary of Comments Received on the Assignment Program Application**

| Date of Comment Letter | Commenter | Summary of Comments | Summary of Changes Made to the Application in Response to Comments Received |
|---|---|---|---|
| April 9, 2014 | Salvador Salinas, State Conservationist<br>Natural Resource Conservation Service | Finds no issue with the proposal and agrees with TxDOT assuming FHWA responsibility | No changes made |
| April 14, 2014 | Valerie Covey,<br>County Commissioner<br>Precinct 3<br>Williamson County | Supports the proposed assignment and streamlining benefits it would provide in the development and implementation of critical transportation projects | No changes made |
| April 23, 2014 | Lindsey Bilyeau, NHPA<br>Senior Section 106 Reviewer<br>Choctaw Nation of Oklahoma<br>Historic Preservation Department | Email - Since there will be no change to the consultation process between FHWA, TxDOT, and Tribes, the Choctaw Nation of Oklahoma does not have any objections to the NEPA Assignment Program. | No changes made |
| April 27, 2014 | Dave Peterson | Believes that TxDOT is not sufficiently responsible to take on FHWA's duties because, in his view, TxDOT has not always appropriately protected environmental resources on past projects. He specifically mentions projects affecting federal lands in the Lufkin district. | No changes made |
| April 28, 2014 | Dwayne Johnson,<br>Regulatory Project Manager, USACE<br>Galveston District | Email - Notes that TxDOT should be considered the "Federal Agency" on future actions. Expresses concern with the NEPA documents (EA level) submitted to the Corps in support of permit applications and encourages more training on NEPA and the 404(b)(1) Guidelines. Also suggests use of REDBOOK for early environmental coordination for new projects | Changes made to application to identify TxDOT as the lead federal agency and to include information about adherence to 404(b)(1) guidelines. |
| April 28, 2014 | Edith Erfling, Field Supervisor, USFWS | Comments on issues related to Section 7 consultation under the Endangered Species Act (ESA) as it relates to the proposed NEPA assignment | Application updated to reference new TxDOT Standard Operating Procedure for ESA compliance |
| April 28, 2014 | Jose A. Nunez<br>Acting Principal Engineer<br>Engineering Department<br>International Boundary and Water Commission | Letter states that USIBWC will review the application and offer comments through the channels listed in our letter. | No changes made |

# Appendix A. Projects for which TxDOT does not Request NEPA Responsibility

With the exception of those ongoing projects to be identified in the NEPA Assignment Program MOU, TxDOT is requesting to assume FHWA's responsibilities under NEPA for all Class I (EIS) projects, all Class II (CE) projects, and all Class III (EA) projects, both on the SHS and local government projects off the SHS. TxDOT is requesting to continue its existing partnership with FHWA on the projects listed below because FHWA has had an active role in the environmental review process for these complex projects and/or because these projects are in the final phases of environmental review.

Three ongoing projects are identified below for exclusion from assumption under the NEPA Assignment Program. This list is subject to change until the NEPA Assignment Program MOU is signed. These three projects, together with their current environmental document status, are identified below:

- **Trinity Parkway** - CSJ 0918-45-121. This project is in the Dallas District with limits from IH 35E/SH 183 to US 175/SH 310. Project includes of new location construction of a four (4) to six (6) lane tollway with a nine-mile encroachment into a USACE regulated floodway of the Trinity River. The FEIS is currently in development.
- **Harbor Bridge- SH 181** - CSJ 0101-06-095. This project would construct a new harbor bridge over the Corpus Christi Ship Channel in the Corpus Christi District from the north to the south side of the Ship Channel. The project DEIS has been approved for circulation.
- **South Padre Island Causeway 2** - CSJ 092-10-6163. This project is in the Pharr District, South Padre Island. The limits are from SH 100 (mainland) to Park Road (South Padre Island). The project is to construct a new causeway at new location. The project DEIS was circulated for public review in 2012; the FEIS is currently in progress.

# Appendix B. Federal Environmental Laws Other than NEPA for Which TxDOT is Requesting Responsibility

TxDOT is requesting to assume all of FHWA's responsibilities for environmental review, interagency consultation, and other environmental-related actions pertaining to the review or approval of projects assumed under the Program under all applicable federal environmental laws and Executive Orders, including, but not limited to, those listed below. TxDOT will be responsible for complying with the requirements of any applicable federal environmental law regardless of its inclusion on this list (this list is derived from Appendix A of 23 CFR 773):

## Air Quality

- Clean Air Act (CAA), 42 U.S.C. 7401–7671q. *Any determinations that do not involve conformity.*

## Noise

- Noise Control Act of 1972, 42 U.S.C. 4901-4918
- Airport Noise and Capacity Act of 1990, 49 U.S.C. 4751-47533
- Compliance with the noise regulations at 23 CFR part 772

## Wildlife

- Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1531–1544
- Marine Mammal Protection Act, 16 U.S.C. 1361-1423h
- Anadromous Fish Conservation Act, 16 U.S.C. 757a–757g
- Fish and Wildlife Coordination Act, 16 U.S.C. 661–667d
- Migratory Bird Treaty Act, 16 U.S.C. 703–712
- Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801-1884et seq., with Essential Fish Habitat requirements at 1855(b)(1)(B)

## Historic and Cultural Resources

- Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470 et seq.[1]
- 23 U.S.C. 138 and Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303 and implementing regulations at 23 CFR Part 774
- Archeological Resources Protection Act of 1979, 16 U.S.C. 470(aa)–470mm
- Archeological and Historic Preservation Act of 1966, as amended, 16 U.S.C. 469–469(c)
- Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001–3013[1]; 18 U.S.C. 1170

## Social and Economic Impacts

- American Indian Religious Freedom Act, 42 U.S.C. 1996[1]
- Farmland Protection Policy Act (FPPA), 7 U.S.C. 4201–4209

## Water Resources and Wetlands

- Clean Water Act, 33 U.S.C. 1251–1387

  - Section 404
  - Section 401
  - Section 319
- Coastal Barrier Resources Act, 16 U.S.C. 3501–3510
- Coastal Zone Management Act, 16 U.S.C. 1451–1466
- Safe Drinking Water Act (SDWA), 42 U.S.C. 300f–300j–26
- Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 401–406
- Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287
- Emergency Wetlands Resources Act, 16 U.S.C. 3921, 3931
- Wetlands Mitigation, 23 U.S.C. 119(g), 133 (b)(14)
- Flood Disaster Protection Act, 42 U.S.C. 4001–4128

## Parklands

- Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. 138, 49 U.S.C. 303 and implementing rules at 23 C.F.R. 774.
- Land and Water Conservation Fund (LWCF) Act, 16 U.S.C. 4601-4 4601-11

## Executive Orders Relating to Highway Projects

- E.O. 11990, Protection of Wetlands
- E.O. 11988, Floodplain Management
- E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 13112, Invasive Species

Note:

1. Under these laws and Executive Orders, FHWA will retain responsibility for conducting formal government-to-government consultations with Federally recognized Indian tribes. TxDOT will continue to handle routine consultations with the tribes and understands that a tribe has the right to direct consultation with FHWA upon request. TxDOT may also assist FHWA with formal consultations, with the consent of a tribe, but FHWA remains responsible that this consultation occurs. FHWA's retention of formal consultation responsibilities under NAGPRA will not limit TxDOT's existing activities under this law.

# Appendix C. Certifications for Consent to Exclusive Federal Court Jurisdiction and Waiver of Immunity and the State of Texas' Public Records Act is Comparable to the Federal Freedom of Information Act

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 30, 2013

Mr. Victor M. Mendez
Federal Highway Administrator
1200 New Jersey Ave. S.E
Washington, DC 20590-9898

RE: Certification required by FHWA for delegation of NEPA and other responsibilities to TxDOT

Dear Administrator Mendez,

Pursuant to the authority provided by the Moving Ahead for Progress in the 21st Century Act or "MAP-21," and specifically, 23 U.S.C. §327 as amended by MAP-21, the Texas Department of Transportation ("TxDOT") is submitting an application to FHWA for delegation of responsibility for compliance with the National Environmental Policy Act ("NEPA") and other Federal environmental laws ("NEPA delegation"). On August 30, 2013, FHWA published proposed rules setting forth the requirements for such applications (Docket No. FHWA-2013-0022). FHWA's proposed rules specify that a State's application for NEPA delegation must include certain certifications by the State's Attorney General or other State official legally empowered by State law (*see* proposed 23 C.F.R. §§773.109(a)(6) & (7)). The purpose of this letter is to provide the certifications required by FHWA to accompany TxDOT's application for NEPA delegation.

Under Texas Government Code §402.001, if the attorney general is absent or unable to act, the attorney general's first office assistant shall perform the duties of the attorney general that are prescribed by law. In my official capacity as the First Assistant Attorney General of the State of Texas, I certify the following:

- As stated in Texas Transportation Code, §201.6035(a), TxDOT is legally authorized by State law to assume the responsibilities of the United States Department of Transportation with respect to duties under NEPA and other Federal environmental laws.

- As provided for by Texas Transportation Code, §201.6035(c), the State of Texas expressly consents to exclusive Federal court jurisdiction with respect to the compliance, discharge, and enforcement of any responsibility of the United States Department of Transportation assumed by TxDOT.

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Mr. Victor M. Mendez
October 30, 2013
Page 2

- The Texas Public Information Act (Texas Government Code, Chapter 552) is comparable to 5 U.S.C. 552 (Freedom of Information Act), including providing that any decision regarding the public availability of a document under that State law is reviewable by a court of competent jurisdiction.

Sincerely,

Daniel T. Hodge
First Assistant Attorney General

DTH/jlh

# Appendix D: Copies of Comments Received on the Assignment Program Application and Responses Provided to the Commenters

**United States Department of Agriculture**

NRCS

Natural Resources Conservation Service
101 S. Main St.
Temple, TX 76501

April 9, 2014

Mr. Carlos Swonke, P.G.
Environmental Affairs Division
Texas Department of Transportation
125 East 11th Street
Austin, TX 78701

Re: NEPA Assignment Program

Dear Mr. Swonke:

The Natural Resources Conservation Service (NRCS) in Texas has reviewed the Texas Department of Transportation's "Application to Assume FHWA NEPA Responsibilities" and finds no issues with the proposal as it relates to FHWA's responsibilities under NEPA for state high system (SHS) and local government projects off the SHS in Texas. NRCS also agrees with TxDOT to assume all FHWA's responsibilities for environmental review, resource agency consultation, and other environmental regulatory compliance-related actions pertaining to the review or approval of projects as described in the Draft Application dated March 2014. This request for assignment excludes specific ongoing projects that will be identified in the NEPA Assignment Program Memorandum of Understanding (MOU) and project types excluded by the Final Rule. Section 773.106(b)(1) of this application lists three specific ongoing projects that will be excluded from the Assignment Program; this list is subject to change until the NEPA Assignment Program MOU is signed.

NRCS is a federal agency which provides both technical and financial assistance on private lands throughout Texas. We also work closely with our partners as requested to provide sound science-based technical assistance for various projects. NRCS will be happy to assist TxDOT with any requests or needs that might arise.

If you have any questions or comments, please contact Al Leal, Acting State Resource Conservationist, at 254-742-9805 or alfonso.leal@tx.usda.gov.

Sincerely,

For John W. Mueller
SALVADOR SALINAS
State Conservationist

Texas Department of Transportation
125 EAST 11TH STREET | AUSTIN, TEXAS 78701-2483 | (512) 463-8588 | WWW.TXDOT.GOV

May 22, 2014

Salvador Salinas
State Conservationist
Natural Resource Conservation Service
101 S. Main Street
Temple, TX 76501

RE: Notification: NEPA Program Assignment from FHWA to TxDOT

Dear Mr. Salinas:

Thank you for your comments regarding the Texas Department of Transportations' (TxDOT) application for assumption of the Federal Highway Administration (FHWA) responsibilities under the Surface Transportation Project Delivery Program, also known as National Environmental Protection Act Assignment. TxDOT will consider all comments received in finalizing its application to FHWA.

We note that the Natural Resources Conservation Service in Texas finds no issues with TxDOT's proposal to assume all FHWA's responsibilities for environmental review, resource agency consultation, and other environmental regulatory compliance-related actions pertaining to the review or approval of projects as described in the Draft Application.

We appreciate your offer of technical assistance should the need arise and look forward to working with you on future projects.

Sincerely,

Carlos Swonke, P.G.
Director of Environmental Affairs

cc: Michael Leary, Federal Highway Administration

WILLIAMSON COUNTY
1848

Valerie Covey
County Commissioner Precinct 3

3010 Williams Dr. Suite 153
Georgetown, TX 78628

(512) 943-3370 Office
(512) 943-3376 Fax

comm3@wilco.org
http://precinct3.wilcogov.org

April 14, 2014

Carlos Swonke
Environmental Affairs Division
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701

Mr. Swonke:

I am writing in support of the Texas Department of Transportation's (TxDOT) Draft Application for the Assumption of Federal Highway Administration Responsibilities Pursuant to the Surface Transportation Project Delivery Program. As the Commissioner representing Williamson County Pct. 3, I understand the importance of a streamlined environmental review and approval process. TxDOT's participation in this program would beneficially impact the process for environmental review and approval, resulting in significant cost savings to the State and local project sponsors.

Williamson County has once again been listed as one of the fast growing counties in the United States. Acceptance of the application would accelerate the development and implementation of critically needed transportation infrastructure. In the past, environmental review and approval delays have resulted in significant safety issues and cost the County and the development community greatly. Approval of this application would further the strides made during the 82nd legislative session regarding the efficiency of the environmental review process.

Due to my concern for safety and mobility, I support TxDOT's Draft Application for Assumption of Federal Highway Administration Responsibilities Pursuant to the Surface Transportation Project Delivery Program. Additionally, I urge the Federal Highway Administration to approve TxDOT's Application as expeditiously as possible.

Sincerely,

Valerie Covey

Valerie Covey
Commissioner Pct. 3
Williamson County

Texas Department of Transportation
125 EAST 11TH STREET | AUSTIN, TEXAS 78701-2483 | (512) 463-8588 | WWW.TXDOT.GOV

May 22, 2014

The Honorable Valerie Covey
County Commissioner Precinct 3
Williamson County
3010 Williams Dr. Suite 153
Georgetown, TX 78628

RE: Notification: NEPA Program Assignment from FHWA to TxDOT

Dear Commissioner Covey:

Thank you for your letter of support regarding the Texas Department of Transportation's (TxDOT) application for assumption of the Federal Highway Administration (FHWA) responsibilities under the Surface Transportation Project Delivery Program, also known as National Environmental Protection Act Assignment. TxDOT will consider all comments received in finalizing its application to FHWA.

As you note in your letter, the Assignment program will increase the efficiency of the environmental review process and result in significant cost savings to the State and local project sponsors.

We look forward to working with you and your fellow Williamson County Commissioners on future projects.

Sincerely,

Carlos Swonke, P.G.
Director of Environmental Affairs

cc: Michael Leary, Federal Highway Administration

**From:** Lindsey Bilyeu
**To:** Sharon Dornheim
**Subject:** RE: Notification: NEPA Program Assignment from FHWA to TxDOT
**Date:** Wednesday, April 23, 2014 11:28:45 AM

Sharon,

The Choctaw Nation of Oklahoma thanks FHWA and TxDOT for the correspondence regarding the above referenced project. Since there will be no change to the consultation process between FHWA, TxDOT, and Tribes, the Choctaw Nation of Oklahoma does not have any objections to the NEPA Assignment Program. We look forward to our future work together and if you have any questions, please contact our office at 580-924-8280 ext. 2631.

Thank You,

Lindsey Bilyeu
NHPA Senior Section 106 Reviewer
Choctaw Nation of Oklahoma
Historic Preservation Department
P.O. Box 1210
Durant, OK 74702
580-924-8280 Ext. 2631

---

**From:** Sharon Dornheim [mailto:Sharon.Dornheim@txdot.gov]
**Sent:** Monday, March 24, 2014 3:20 PM
**To:** Ian Thompson
**Cc:** Lindsey Bilyeu
**Subject:** Notification: NEPA Program Assignment from FHWA to TxDOT

Good afternoon,

I hope things are going well for you as we begin another week.

Attached is a letter from the Federal Highway Administration Texas Division and the Texas Department of Transportation Environmental Affairs Division that provides notification of recent developments regarding the processing of environmental documents for federal aid funded projects.

If you have any comments or questions regarding the letter or the documentation being referenced, please provide them to the appropriate points of contact identified in the letter.

If you have any other questions or concerns, please do not hesitate to contact me by return email or at the telephone number listed below.

Thank you for your attention to this mailing.

Best regards,

*Sharon*

Sharon Dornheim
Staff Archeologist / Consultation Coordinator
Technical Services Section
Environmental Affairs Division
Texas Department of Transportation
512-416-2638

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Texas Department of Transportation
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May 22, 2014

Lindsey Bilyeau
NHPA Senior Section 106 Reviewer
Choctaw Nation of Oklahoma
Historic Preservation Department
Drawer 1210
Durant, OK 74702

RE: Notification: NEPA Program Assignment from FHWA to TxDOT

Dear Ms. Bilyeau:

Thank you for your comments regarding Texas Department of Transportation's (TxDOT) application for assumption of the Federal Highway administration (FHWA) responsibilities under the Surface Transportation Project Delivery Program, also known as the National Environmental Protection Act (NEPA) Assignment. TxDOT will consider all comments received in finalizing its application to FHWA.

You note that since there will be no change to the consultation process between FHWA, TxDOT, and Tribes, the Choctaw Nation of Oklahoma does not have any objections to the NEPA Assignment Program.

We appreciate your continued coordination and look forward to working with you on future projects.

Sincerely,

Carlos Swonke, P.G.
Director of Environmental Affairs

cc: Michael Leary, Federal Highway Administration

April 27, 2014

Dear Mr. Swonke,

I have reviewed enough of your application to have a found almost complete disagreement with many of the assertions. My comments primarily involve experience with the Lufkin district TXDOT office and the one area of the state where TXDOT projects most profoundly intersect and impact federal lands, having the greatest potential for damage to federal trust resources when federal funds are used or not. It is probably safe to assume that TXDOT's standard procedures are uniform statewide, so my comments are likely applicable to all TXDOT projects.

The following statement from your application would imply that TXDOT is equally qualified and unbiased enough to assume FHWA's roles:

"TxDOT is also applying to assume all of FHWA's responsibilities for environmental review, resource agency consultation, and other environmental regulatory compliance-related actions pertaining to the review or approval of projects."

Let's make note of some indications from history:

-In 2006 a U.S. Forest Service Biologist met with TXDOT representatives at the Lufkin office regarding the widening of a FM road on National Forest holdings. He was somewhat rebuffed as to his authority to comment until he asked if federal funding was involved in the project. At that point the entire tone of TXDOT personnel changed to one of "let's all be reasonable here."

-Following the same meeting, a letter signed by the National Forests and Grasslands in Texas (NFGT), Forest Supervisor was sent to the Lufkin TXDOT office recapping what was discussed in the meeting and what was expected on the project. The project went forward unmodified as if the meeting never occurred.

-In the late 90s, NFGT personnel met with Lufkin TXDOT personnel regarding an ongoing issue with the spraying of herbicides over bridges into streams and streamside management zones (SMZs) with non-aquatic compliant herbicides. TXDOT was asked to and agreed to stop the practice on NFGT holdings, but trees were observed "browned out" over NFGT streams the following season with no observed compliance with the agreement.

-In the mid-90s TXDOT contacted the NFGTs with regard to replacing a small box culvert on a remote FM road in Houston County that had caused considerable damage to an NFGT stream and SMZ. TXDOT was advised to replace it with a bottomless arch or C-span to solve a number of issues, including a hydraulic drop, and continued channel degradation due to accelerated flows over a concrete substrate. TXDOT asserted that they could do no such thing because they had no specification (spec) for a bottomless arch. NFGT personnel later reviewed TXDOT specifications and found a spec for a bottomless arch. When confronted with this, TXDOT failed to respond.

-TXDOT continues to employ archaic "maintenance" procedures, whereby perfectly functional vegetated road ditches are channeled with a Gradall, causing large amounts of sediment to enter streams, but also initiating gullying and even erosive damage to TXDOT road-beds. Upon addressing this concern with the Lufkin TXDOT office, two conflicting explanations were given by engineers and NFGT personnel were told that the practice would continue and comments would not even be considered without a letter to the District Engineer. Following this, photos of the practice on NFGT were sent to a road engineering authority at San Dimas Technology Center, where it was confirmed that not only were NFGT personnel correct in questioning the activity, but also apparent that TXDOT was operating in a time warp without even basic knowledge that roads should not be hydraulically connected to streams. Furthermore, the authority stated that TXDOT was also likely in violation of the Clean Water Act.

These few examples indicate that TXDOT does not have a default knowledge base to assess what is damaging to the environment and has a known history of not being credible in their interactions with a federal land-holding agency. Why should they take on the responsibility of assessing their own actions in the unbiased NEPA process when they are clearly biased from the outset? How would they ever legitimately and voluntarily assess the effects of their actions with their history and continued lack of partnership with the one federal land-holder they impact the most in Texas?

Let's talk about cause-and-effect thinking. Universally it seems most lacking in road engineers. If doing things a certain way results in failure, why go back and do it again the same way? There is an expression that insanity is doing the same thing over and over, yet expecting a different outcome each time. In TXDOT's case, they never seem to recognize that the outcome is a problem, which is why they are ill-equipped to assess the impacts of any project. In a meeting with TXDOT personnel this month, an NFGT Biologist explained that, to TXDOT, a stream has absolutely no value other than acting as a conduit to transmit water away from their road, to which they agreed. The Biologist stated that in the Forest Service value system, the stream could and should have a higher value and precedence than the road. TXDOT personnel seemed in disbelief with such an assessment. So this is the outfit that is going to assess large landscape-changing projects without bias? In the chart in your application, you indicate that the Lufkin office has expertise in storm water/water quality and wetlands. Did this person not show up for the meeting regarding impacts to NFGT streams? Why has this expertise never been apparent in NFGT proceedings prior. I fully admit that the expertise may be there, but the hierarchy and atmosphere does not allow this viewpoint to be heard. Even when you state that you are equipped to assess something, the substance isn't there. The Forest Service has had to evolve with the technology and the demands of an ever-expanding population. It has been very apparent over the years that TXDOT has not evolved in sync and the commodity (roads) still dominates all concerns, voices and assessments within.

Back to the cause-and-effect, if your modus operandi is to design all roads with a V-shaped ditch profile, the most erosive configuration known in hydrology, to accelerate flows as rapidly into waterways as possible, with no drainage control, how are you ever going to justify that in a non-biased format? If you haven't questioned your own outdated, environmentally harmful practices in time with much of the rest of the country, why should you be allowed to oversee a process that was the reason many government entities changed their way of doing business for the better? Here's where the insanity comes in –

hydraulically connecting your roads to streams can double the amount of water your investment (culver/bridge) needs to handle, so you spend money making a bigger one, yet you duct these damaging flows right into your investment. Showing TXDOT pictures of bridge headwalls, etc. pulled lose from such practices has never even registered a response. The right path is a win-win for both agencies, yet the culture of TXDOT is out of sync with today's self-examination of doing business (NEPA).

You assert that you are going to voluntarily carry forth this responsibility in the most credible way, yet you won't even honor the most basic and accepted environmental safeguards to NFGT federal trust resources without frictional debates with their personnel. If your claims are valid, you should be pushing the envelope, not having to be pushed. Clearly that is not happening and can't within your current structure. Granted, there are some very good people in the Lufkin office whom would like to do the right thing and are capable, even engineers, but they are still overshadowed by the "old guard." In the recent meeting with TXDOT, the group quickly divided into two factions, one friendly and willing to do all possible to change the project to minimize environmental impacts and the other isolated, even angry, and overheard making derogatory remarks about "peckerwoods," which refers to the Endangered red-cockaded woodpecker, which had nothing to do with this project. However, this vividly defines where TXDOT is as an agency. The Forest Service was in the center of those debates decades ago, adapted and moved on. If TXDOT's reputation for not doing so is known, even nationwide, why should they be allowed to "govern themselves" in carrying out a non-biased process if they still hold such deep-seeded bias?

As such:

"As required by NEPA, FHWA's NEPA regulations at 23 CFR 771, and in compliance with Texas Administrative Code Title 43, Part 1, Chapter 2, TxDOT examines and discloses the environmental effects of its proposed activities; identifies the ways that environmental impacts can be avoided or minimized; prevents significant, avoidable environmental impacts by modifying its projects and/or implementing mitigation when appropriate; and publicly discloses the impacts of its projects and its project decisions, emphasizing balanced decision-making."

When has TXDOT in their practices governing the NFGTs ever identified ways that environmental impacts could be avoided, modified or mitigated anything on their own without being pulled in that direction by the NFGTs and how many times have they actually implemented what was agreed to?

Making any claims of balanced decision-making is incredulous.

"TxDOT is focused on delivering safe, efficient transportation projects and making sound decisions based on a balanced consideration of transportation needs and of the social, economic, and environmental impacts of proposed transportation improvements."

Where is your balanced consideration that streams and SMZs on federal land, much-less anywhere else, have any value other than storm sewers at your disposal with no regard for destruction of habitat, inhabitants or impacts to other land-holders downstream? Where is your assessment of how much you cost the federal government in lost timber resources by artificially draining upslope timber stands and

subjecting them to greater drought mortality? My contention and the reason for this letter is that your application request should not be granted as discussed above and because it would only incur more work and expense on federal personnel in Texas in protecting themselves and their resources.

A picture speaks a thousand words as they say and you will note below a huge mound of silt in a NFGT stream in Sabine County, deposited over the years from a TXDOT FM road, V-profile ditch. Note also that TXDOT has blocked half the carrying capacity of their culvert, which was never acknowledged even when they were shown this photo. To make matters worse, this stream was also the recent target of the prior mentioned maintenance channeling (following pictures) in an area where water could never sit to begin with because of the gradient into the stream. When shown these, the maintenance engineer said the problem was that they didn't dig the ditch deep enough. TXDOT still maintains there is nothing wrong with these practices or impacts on federal land or anywhere else. Keep in mind that the photos, which were assessed by a national Forest Service road engineering authority as complete errant engineering and likely violation of the Clean Water Act, appear to raise zero concern with TXDOT. The worlds do not align and cannot. I completely disagree with the assertions of your application.

Sincerely,

Dave Peterson

Texas Department of Transportation
125 EAST 11TH STREET | AUSTIN, TEXAS 78701-2483 | (512) 463-8588 | WWW.TXDOT.GOV

May 22, 2014

RE: Notification: NEPA Program Assignment from FHWA to TxDOT

Dear Mr. Peterson,

Thank you for your comments regarding the Texas Department of Transportation's (TxDOT) application for assignment of Federal Highway Administration's (FHWA) responsibilities under the Surface Transportation Project Delivery Program, also known as NEPA Assignment. We note your position that the TxDOT application request should not be granted. TxDOT will consider all comments received in finalizing its application to FHWA.

Your comments contain many observations regarding construction and maintenance practices on National Forests and Grasslands in Texas, with particular focus on the Lufkin district of TxDOT. We note that some of your observations date back to projects or practices from as long ago as twenty years. As with many agencies, TxDOT has modified its practices since the mid- to late-1990s. Among other changes, TxDOT has recently implemented an Environmental Management System (EMS) that focuses on improving environmental compliance and performance on TxDOT construction projects, with an emphasis on storm water requirements. The EMS incorporates new requirements for Stage Gate Checklist (SGC) documentation on environmental issues, including:

- Environmental documentation, community impacts and environmental justice;
- Storm water management;
- Water resources;
- Cultural resources;
- Biological resources;
- Air and noise;
- Hazardous materials; and
- Environmental commitment compliance.

SGC documentation is required during both the environmental compliance and final design phases of project development. Project letting plans, specifications and estimates include documentation of commitments, and, in particular, a contractor requirement to sign a Certification of Compliance with Storm Water when storm water Best Management Practices (BMPs) are required.

In 2012, TxDOT implemented Special Specification/Special Provision 1122. SS1122/SP-1122-001 requires the contactor to sign a storm water certification, train all employees involved in earthwork, and assign a Contractor Responsible Person Environmental (CRPE) who ensures the contractor employees are trained, performs daily monitoring, and participates in joint inspections with TxDOT using the Stage Gate Checklist. Environmental requirements for the project are reviewed with the contractor at a preconstruction meeting that is held for each project.

The EMS also includes a robust training program for TxDOT staff and its construction contractors. Thus far, the training has reached nearly ninety percent of TxDOT District design and construction staff. In excess of 38,000 hours of EMS training has been delivered to TxDOT employees to date. In addition, all contractor

and subcontractor employees working on earthmoving activities are now required to take EMS and storm water training.

TxDOT Districts also hold annual summit meetings to communicate and discuss lessons learned on the environmental compliance elements of project construction. Information from these summits is used as part of EMS continuous improvement to be applied to future projects.

Maintenance environmental practices are improving, as well. In 2011, TxDOT prepared a State Environmental Assessment (EA) for its maintenance program activities in response to requirements of Texas Administrative Code (TAC), Part 1, Chapter 2, Subchapter A, Section 218(b). That section of the TAC requires TxDOT to conduct an environmental review and solicit public input on its maintenance program. TxDOT is required to coordinate the environmental review with appropriate state and federal environmental resource agencies and to collaboratively develop effective environmental protection measures and best management practices. The EA discloses potential environmental impacts of the maintenance program and identifies mitigation measures and BMPs for the program. A large number of BMPs are identified for water resources, drainages/drainage structures, and erosion control.

In 2014, TxDOT and the Texas Parks and Wildlife Department entered into a Best Management Practices Programmatic Agreement under the agencies' 2013 Memorandum of Understanding. The BMPs are to be implemented by TxDOT during construction and maintenance activities, and represent measures the two agencies agree will result in avoidance and minimization of potential impacts to natural resources. To sum up, TxDOT has come a long way in its construction and maintenance environmental practices.

TxDOT is committed to undertaking the NEPA Assignment Program in a responsible and environmentally sound manner. Thank you for your interest in the program and in the responsible stewardship of Texas' environmental resources. Should you wish to discuss your interests and concerns with me further, you may reach me at (512) 416-2734.

Sincerely,

Carlos Swonke, P.G.
Director of Environmental Affairs

cc: Michael Leary, Federal Highway Administration

**From:** Roberts, Adam W (Austin)
**Sent:** Friday, May 23, 2014 11:09 AM
**To:** Roberts, Adam W (Austin)
**Subject:** FW: Corps Comments on NEPA Assignment Program (UNCLASSIFIED)

**Importance:** High

-----Original Message-----
From: Johnson, Dwayne SWG [mailto:Dwayne.A.Johnson@usace.army.mil]
Sent: Monday, April 28, 2014 2:02 PM
To: Susan Theiss; Carlos Swonke
Cc: Cutler, Casey K SWG
Subject: Corps Comments on NEPA Assignment Program (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Thanks for meeting with me and discussing some of the issues. We have two main comments:

1. We need to ensure that TXDOT will have the same roles and responsibilities as the lead Federal Agency. TXDOT should be considered the "Federal Agency" on future actions. This should be identified somewhere in beginning of document.

2. We are concerned with the NEPA documents (EA level) that get turned in support of permit applications. They appear to retro-fit the 404(b)(1) Guidelines and NEPA process to the highway design, rather than the opposite. The reports are not always produced by TxDOT, but rather, by consultants which may or may not have oversight by TxDOT district environmental. It appears that the TxDOT PMs may not always possess a good NEPA and 404(b)(1) background at the district level. So, there is a drop in QA-QC of the documents that we get to review. We usually attend the TxDOT ENV training conference each year and give a talk on our permitting program and issues to District personnel. Perhaps it needs to happen again. There are definitely training opportunities here. Finally, is there a way that we could use the REDBOOK (or some more recent version of the concept), even remotely, for early environmental coordination for new projects? It would help our business process work more efficiently.

Thanks

Dwayne Johnson
Regulatory Project Manager
Policy Analysis Branch
USACE
2000 Fort Point Road
Galveston, Texas 77550
409-766-6353
dwayne.johnson@usace.army.mil

Web: http://www.swg.usace.army.mil
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May 23, 2014

Dwayne Johnson
Regulatory Project Manager
Policy Analysis Branch
USACE
2000 Fort Point Road
Galveston, Texas 77550

RE: Corps Comments on NEPA Assignment Program

Dear Mr. Johnson:

Thank you for your comments regarding the Texas Department of Transportation's (TxDOT) application for assumption of the Federal Highway Administration's (FHWA) responsibilities under the Surface Transportation Project Delivery Program, also known as NEPA Assignment. TxDOT will consider all comments received in finalizing its application to FHWA.

We appreciate you noting the need to ensure that TxDOT will have the roles and responsibilities of the lead Federal Agency under the Assignment Program and that TXDOT be considered the "Federal Agency" on future actions. We have modified the application section entitled *Consultation and Coordination with Resource Agencies* to state that TxDOT will be considered the "Federal Agency" on future actions.

With respect to your observations surrounding TxDOT District knowledge of proper application of the 404(b)(1) Guidelines and NEPA in developing highway projects, TxDOT welcomes the United States Corps of Engineering's (the Corps) training on the Section 404 permitting process and issues. We look forward to discussing the potential for you to participate at this year's Environmental Coordinator's Conference and identifying other mutually-beneficial training opportunities. We will also reach out to you in the next few months as we develop the Assignment Program training plan. In addition, to emphasize the importance of the 404(b)(1) Guidelines, we have added information regarding the Guidelines to the *Consultation and Coordination with Resource Agencies* section of our application.

Finally, TxDOT appreciates that, in this challenging environment and economy, the Corps is an active participant with TxDOT in project development, and is offering to participate in our training efforts. TxDOT looks forwards to continued project coordination and guidance from the Corps. Thank you again for your input on the Assignment Program application.

Sincerely,

Carlos Swonke, P.G.
Director of Environmental Affairs

cc: Michael Leary, Federal Highway Administration, Texas Division

# United States Department of the Interior

FISH AND WILDLIFE SERVICE
Division of Ecological Services
10711 Burnet Road, Suite 200
Austin, Texas 78758
512 490-0057
FAX 490-0974


April 28, 2014

Mr. Carlos Swonke
Environmental Affairs Division
Texas Department of Transportation
125 East 11th Street
Austin, TX 78701-2483

Dear Mr. Swonke:

This letter provides the comments of the US Fish and Wildlife Service (Service) to the Texas Department of Transportation (TxDOT) for your proposal to assume federal agency consultation responsibilities from the Federal Highway Administration (FHWA) for National Environmental Policy Act (NEPA) and related environmental regulations, including the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*). The authority allowing for NEPA assignment is pursuant to provisions in Section 6005(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFTEA-LU) (23 U.S.C. 327) and Section 1313 of the Moving Ahead for Progress in the 21st Century Act (Map-21) (Pub. L. 112-141, 126 Stat. 405). TxDOT published a notice of their application for NEPA assignment in the Texas Register on March 14, 2014.

Section 7 of the Act requires all federal agencies consult with the Service to ensure that the actions authorized, funded, or carried out by such agencies do not jeopardize the continued existence of any threatened or endangered species or result in the destruction or adversely modification of designated critical habitat for such species. FHWA is the responsible federal agency associated with all road projects in Texas which receive federal funding or require federal approval. If the NEPA assignment is approved, TxDOT would be considered a federal action agency for all projects receiving federal funds or authorization and would become responsible for compliance with all requirements of the Act.

The Service has reviewed TxDOT's application to assume FHWA's NEPA responsibilities, including the Categorical Exclusion Memorandum of Understanding (MOU), and has participated in interagency meetings and discussions concerning the proposed assignment. We have also reviewed the CalTrans/FHWA NEPA assignment MOU (originally signed in 2007), which to date is the only state where NEPA assignment has been finalized. We also spoke with CalTrans and Service biologists in Region 8 related to questions that have arisen during our review of the TxDOT application and how similar issues were addressed in California. Our comments are based on these reviews and conversations and will mainly focus on issues related to Section 7 consultation under the Act as it relates to the proposed NEPA assignment.

As mentioned in TxDOT's application, there are a number of existing MOUs and interagency agreements currently in effect between FHWA, TxDOT, and the Service. Specifically, the Programmatic Agreement for Biological Evaluations (PAFBE) and the Interagency Agreement for the Transportation Liaison position both explicitly state section 7 consultation responsibilities for each of the three agencies. These programmatic agreements are formal, legally binding agreements between the signatory agencies and cannot be modified by subsequent agreements without the concurrence of all signatory agencies. Prior to the finalization of any new MOU, TxDOT should coordinate with the Service on any existing interagency agreements that include FHWA as signatory in order to determine if the existing agreements must be amended or terminated.

Previously, TxDOT assumed the FHWA responsibilities for NEPA categorical exclusion (CE) determinations, along with responsibilities for compliance with associated environmental regulations, via a MOU with FHWA on February 12, 2014. TxDOT is currently applying to broaden the scope to include assignment of environmental assessments (EA) and environmental impact statements (EIS). If approved, a new FHWA/TxDOT MOU would replace the approved MOU for CEs.

Based on the information provided, the current proposal lacks sufficient detail regarding how TxDOT will maintain compliance with the Act and other environmental laws administered by the Service (e.g., the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act) after the NEPA assignment takes effect. While there is a detailed analysis and description of how the different classes of highway projects will be evaluated under NEPA in the assignment application, there is minimal information and/or guidance how consultations under the Act are to be analyzed and documented. FHWA has the authority, discretion and responsibility, within the NEPA assignment approval process, to require TxDOT to have procedures in place to guide development of documents, analyses, and consultations required to fulfill environmental review responsibilities. Details about TxDOT's proposed consultation procedures and internal oversight are important factors in FHWA's determination that TxDOT has the capability and authority to complete environmental reviews without FHWA oversight.

FHWA's Director of the Office of Natural Environment produced a 2002 internal memorandum to the FHWA Division Administrators titled "Management of the Endangered Species Act Environmental Analysis and Consultation Process" (attached), providing guidance on the implementation of the provisions of the Act in the Federal-aid highway program. TxDOT's NEPA assignment application states that TxDOT must comply with all FHWA policies and formal guidance. The 2002 FHWA consultation guidance memorandum does an excellent job describing consultation requirements related to different effect determinations and the justification documentation required for those determinations. We believe this guidance is an excellent template for TxDOT to implement in association with the NEPA assignment. The Service believes that written section 7 consultation guidance must be finalized before TxDOT's application is approved and referenced in the final NEPA assignment MOU. This would ensure that TxDOT's implementation of the guidance is part of FHWA's periodic review of NEPA assignment compliance.

In addition to the authority to complete NEPA CE documentation, the Service understands that the individual TxDOT Districts will be solely responsible for section 7 "no effect" determinations on listed species. This would be in direct conflict with FHWA's consultation guidance memorandum mentioned above. We are concerned that failure to follow FHWA's guidance for "no effect" determinations would weaken endangered species protections. Because continuation of NEPA assignment responsibilities relies, in part, on full compliance with all provisions of the Act, we believe TxDOT's Director of the Environmental Affairs Division (ENV), acting as the federal representative (see below), must review and approve of all "no effect" determinations if they are made at the District level.

The difference between a "no effect" vs "may affect" determination for endangered species can be extremely minor and is often very subtle. We are concerned the wide range of experience possessed by individual District biologists in dealing with endangered species consultations and other the provisions of the Act would lead to unequal application of the requirements of section 7 without higher level review. Compounding our concern is the fact that the TxDOT Districts and ENV are on different chains of command within TxDOT's administrative structure, and District priorities may negatively influence the objectivity of the NEPA and/or endangered species analysis performed, and the finding reached. Failure to comply with consultation requirements, even if unintentional, could result in unauthorized take of a protected species which would trigger section 9 enforcement actions, result in modification of future consultation requirements and be reported to FHWA as part of oversight of the NEPA assignment program. Repeated violations could lead to FHWA's cancellation of the NEPA assignment authority. We believe a review of the justification for all section 7 effect determinations must be part of FHWA's periodic audit process. This information would be used in FHWA's determination of whether TxDOT is in compliance with the terms of the NEPA assignment MOU to adequately consult, coordinate, and/or take the concerns of the Service into account in carrying out the environmental responsibilities that are part of the NEPA assignment.

The NEPA assignment application does not provide a specific point of contact, or department delegate (as specified in the Texas Administrative Code Title 43(1)(2)(A)(2.6)), within TxDOT as a responsible party for final section 7 consultation decisions. We believe the final MOU must provide a description of the position within TxDOT that will be the overall responsible party, designated as the point of contact for final agency determinations, legal responsibility, and dispute resolution related to compliance with the Act. The Service believes that responsibility should lie with the ENV Director, who also has final approval for all FONSIs, draft and final EISs, Records of Decision (RODs) and individual Section 4(f) determinations. We acknowledge that ENV staff have extensive experience working directly with FHWA and the Service on consultation issues and understand the implications of inappropriate or unjustified section 7 effect determinations and unauthorized take actions. Due to the significant legal ramifications that could result from incorrect evaluation under section 7 or violations under section 9, we believe all section 7 consultations must be approved by the ENV Director. This would ensure that effect determinations are conducted in a consistent manner across the entire state.

Finally, it is stated in the application that TxDOT will not assume responsibility for existing biological opinions (BO) issued prior to the implementation of NEPA assignment. While this is acceptable, FHWA must designate a point of contact for these consultations for continued coordination through finalization of requirements stipulated in the BO. Please note that some BOs may require monitoring for long periods of time and FHWA will remain responsible for that commitment. No mention is made in the application of TxDOT assuming federal action agency responsibilities for current informal section 7 consultations or projects where "no effect" determinations were reached. The Service therefore presumes that FHWA will maintain the federal action agency legal responsibility for these projects, if they are ongoing.

Thank you for inviting the Service to provide input into the NEPA assignment process in Texas. The Service is willing to work with FHWA and TxDOT to resolve our concerns regarding the proposed NEPA assignment in order to streamline the environmental review process while maintaining the environmental protections stipulated in the Act and other environmental laws. If you have any questions or comments, please contact Darren LeBlanc at 512-490-0057 (ext. 247) or 512-608-7591.

Sincerely,

Edith Erfling

Edith Erfling
Field Supervisor
Coastal Ecological Services Field Office

Enclosure

cc: Mr. Mike Leary, FHWA, Austin, TX

Environment

## Environmental Review Toolkit



Program Overview

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# Memorandum

U.S. Department of Transportation
Federal Highway Administration

Subject: INFORMATION: Management of the Endangered Species Act (ESA) Environmental Analysis and Consultation Process

Date: February 20, 2002

From: James M. Shrouds
Director, Office of Natural Environment

Reply to: HEPN-30

To: Division Administrators
Federal Lands Highway Division Engineers

---

The following guidance is intended to address issues related to implementation of the ESA in the Federal-aid highway program. These issues are:

1. the interaction of the National Environmental Policy Act (NEPA) environmental analysis and ESA Section 7 consultation process,

2. the authority of FHWA divisions to delegate and manage the ESA Section 7 process, and

3. environmental analysis of candidate species for ESA listing.

### Interaction Between NEPA and ESA

The NEPA and the ESA Section 7 processes interact in the early phases of the environmental analysis of a project. The NEPA drives the evaluation of biological resources in the project area concurrent and interdependent with the ESA Section 7 consultation process. Evaluation of impacts to species federally-listed as endangered is required for all levels of NEPA documentation, and the detail of analysis is potentially the same, dependant on the scope of the project, ecological importance and distribution of the affected species, and intensity of potential impacts of the project. A CE determination through NEPA does not exempt any project from sufficient environmental analysis to determine the likely presence and potential impacts of the project on listed species, unless a programmatic determination to that effect has been made at the local level with the concurrence of the Fish and Wildlife Service/National Marine Fisheries Service (Services). A potential impact on species or habitat protected by the ESA

does not automatically require elevation of the NEPA documentation (CE, EA, EIS). This depends on the importance of the resources and the scope of the impacts.

The minimal biological evaluation (BE) under Section 7 for any Federal-aid project not addressed programmatically, is a request to the Services for information on the presence of listed or proposed species or critical habitat in the project vicinity. If the Services respond that protected species or habitat are known not to occur in the action area, the environmental analysis with respect to the ESA is complete and the FHWA concurs in writing with a no effect determination by the State DOT. The determination of no effect should be included in the NEPA documentation, including CEs. A "likely to effect determination" is appropriate when the action area of the proposed project includes areas known to be inhabited, or known to be potentially inhabited, by one or more listed species, or the action area includes designated critical habitat.

If the Services respond that protected species or habitat are known or likely to occur in the project action area, the State DOT has the option of entering informal consultation or directly requesting formal consultation. The process of informal consultation is optional and is described in 50 CFR § 402, Interagency Cooperation-Endangered Species Act of 1973, as Amended, Subpart B, Consultation Procedures. The endangered species analysis should be appropriate to the scope of the project. It may be prepared as a BE or a BA in the case of an EIS. A distinction is made between the process for submitting a BA (which occurs in accordance with Part 50 CFR § 402.12 for EIS projects) and the preparation of a BE (which is developed during informal consultation and may be used to initiate formal consultation for EAs and CEs).

In a BE the groundwork is established for a determination of "may affect, not likely to adversely affect" or "may affect, likely to adversely affect", which is initially made by the State DOT. An analysis of the action area, determination of distribution and occurrence of contributing habitat elements, biological characteristics of the species, and potential impacts of the project (including noise, disturbance, and other factors which could affect the behavior, reproduction, and general ecological functions of the species) should be discussed. The BE should include an "affect" determination for listed species or habitat. These conclusions should be supported by the information in the BE, including a discussion of potential mechanisms of impact on the species or habitat.

Sufficient information must be provided to the Services to make a "not likely to adversely effect" or "likely to adversely effect" determination in informal consultation, or a jeopardy/adverse modification or non-jeopardy/no adverse modification determination in formal consultation. Because the FHWA does not require elevation of NEPA documentation when a project is determined as "likely to adversely affect" a listed or proposed species, the preparation of a BE and formal consultation can be required for CEs and EAs. BEs submitted for formal consultation should contain the same biological information as a BA.

When a programmatic determination on classes of actions which are considered "not likely to adversely affect" listed or proposed species or critical habitat has been concurred in by the FHWA and the Services in writing, no further evaluation is required on these projects. Actions of this nature might include signing, striping, overlays, minor reconstruction, and similar activities which experience has shown to have insignificant, discountable, or beneficial effects on listed species.

**Consultation on Species or Critical Habitat Listed Under the Endangered Species Act - Delegation Authority**

50 CFR Section 402.08, Designation of Non-Federal Representative, allows Federal agencies to delegate informal consultation and preparation of BEs and BAs to a non-Federal representative. The FHWA (by letter to the Services dated August 7, 1986) did this, delegating informal consultation and preparation of BEs and biological assessments in the Federal-aid highway program to State DOTs. The ESA and 50 CFR § 402.08 require that the FHWA furnish guidance and supervision of the consultation process, concur in no effect determinations, and independently review and evaluate the scope and content of BAs. BEs, species lists, habitat descriptions, and other documentation prepared to assess the effects of both major and non-major Federal actions on listed and proposed species and habitats, both programmatic or individual, may be submitted by the State DOT directly to the Services' field office under the delegation authority, at the discretion of the FHWA division office. The FHWA division offices retain discretionary authority to review and participate in any stage of the ESA consultation process on a Federal-aid highway project, from NEPA evaluation of resources through formal consultation.

The FHWA policy encourages the State DOTs to be proactive in informal consultation, including modification of the proposed project where necessary to avoid adverse effects. If, during informal consultation, the State DOT obtains written concurrence from the Services that the action as proposed or modified is not likely to adversely affect listed or proposed species, or listed or proposed habitat, Section 7 requirements have been met. The authority of the FHWA to delegate informal consultation and preparation of BEs and BAs to the State DOTs is not discretionary on the part of the Services.

The ultimate responsibility for compliance with all Section 7 requirements in regard to federally-funded highway projects remains with the FHWA. 50 CFR § 402 does not provide for delegation of formal consultation to a non-Federal representative. All formal consultation procedures with the Services must be carried out by the FHWA division office.

BAs include information concerning all species listed and proposed for listing under the ESA, designated and proposed critical habitat that may be present in the action area of the project, and the evaluation of potential effects of the project on such species and habitat. This information is described in detail in 50 CFR 402.12(f). BAs are prepared for major construction activities, typically EIS projects, and shall be independently reviewed by the FHWA division office, before being submitted to the Services' field office. This review must be carried out in a timely way to facilitate completion of the consultation requirements.

Re-initiation of consultation may be requested by the State DOT, the FHWA, or the Services after initial consultation is completed as made necessary by changes in the scope or design of the project, discovery of the presence of previously unknown listed species or critical habitat, or the listing of new species. Re-initiation of informal consultation can be done by the FHWA or delegated to the State DOT, at the discretion of the FHWA division. Formal consultation must be re-initiated by the FHWA.

### Conference Process for Proposed Species

Species and critical habitats proposed in the *Federal Register* for listing are subject to the conferencing process established in 50 CFR § 402.10, Conference on Proposed Species or Proposed Critical Habitat. Conference is a process of early interagency coordination, similar to consultation, involving informal or formal discussions between a Federal agency and the Services pursuant to Section 7(a)(4) of the ESA regarding the potential impact of a project or action on proposed species or proposed critical habitat. The conference procedure is designed to help Federal agencies identify and resolve potential conflicts between Federal projects and species conservation by developing

recommendations to minimize or avoid adverse effects on proposed species or proposed critical habitat.

Informal conference on proposed species or critical habitat may be carried out by the State DOTs. If a determination is made that a proposed Federal-aid highway project is likely to jeopardize a species or destroy, or adversely affect, critical habitat proposed for listing under the ESA authorities, a formal conference is required and must be initiated by the FHWA. During the conference process, the Services will make advisory recommendations on ways to avoid or minimize adverse effects. If agreed to by the FHWA division office and the Services' field office, the conference can be carried out under § 402.14, Formal Consultation. If those procedures are followed, and the species or critical habitat is listed prior to completion of the project, the Services have the option (in the absence of significant changes in the project or significant, new information on the species) of adopting the conference opinion as the biological opinion for the project. An incidental take statement issued with a conference opinion does not become effective unless the Services adopts the conference opinion as the biological opinion.

### Candidate Species

Candidate species are those species for which the Services have on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposed rule to list, but for which issuance of the proposed rule is currently precluded by one or more of several conditions. These species were formerly called Category 1 candidates. They are now referred to simply as candidate species. The Services emphasize that these candidate taxa are not proposed for listing, but that development and publication of proposed rules for listing of candidate species is anticipated. Species formerly classified as Category 2 and Category 3 candidate species are no longer classified as candidates. The Services maintain data on these species when feasible.

Categorization of a species as a candidate is strong evidence that the species is of special concern, and subject to the full protection of the listing process, if not at present, probably in the future. There are no absolute guidelines on how long it will take a species to go from the candidate list, to being proposed, to a final rule on listing. Impacts on candidate species should be addressed in Federal-aid highway project environmental documents. NEPA documents should identify candidate species as such, and describe any planned conservation measures. The Services encourage Federal agencies to consider implementing conservation measures for candidate species, as these measures may avoid the future necessity of listing. Proactive partnering with the Services to conserve candidate species might reduce future delays on Section 7 processes and/or result in future cost savings if listing can be avoided. However, candidate status does not provide species protection under the listing process, and neither consultation nor conference, formal or informal, is required on Federal-aid highway projects for candidate species under the ESA Section 7 requirements. Any interagency coordination on these species with respect to Section 7 of the ESA by the FHWA or the State DOT is discretionary. However, they have the same status as any other non-regulated resource issue under NEPA.

### Emergency Listing

The Services have the option, when they believe it is warranted, of initiating emergency listing procedures, which can result in a species being listed in less than 90 days. Emergency listing lasts 240 days, during which time the Services can usually complete final listing.

cc: Directors of Field Services

Texas Department of Transportation
125 EAST 11TH STREET | AUSTIN, TEXAS 78701-2483 | (512) 463-8588 | WWW.TXDOT.GOV

May 22, 2014

Edith Erfling
Field Supervisor
Coastal Ecological Services Field Office
U.S. Department of the Interior
Fish and Wildlife Service
10711 Burnet Road, Suite 200
Austin, Texas 78758

RE: Notification - NEPA Program Assignment from FHWA to TxDOT

Dear Ms. Erfling:

Thank you for your comments regarding the Texas Department of Transportation's (TxDOT) application for assignment of the Federal Highway Administration's (FHWA) responsibilities under the Surface Transportation Project Delivery Program, also known as NEPA Assignment. TxDOT will consider all comments received in finalizing its application to FHWA. Should FHWA approve TxDOT's request for NEPA Assignment, TxDOT would be considered a federal action agency for all highway projects receiving federal funds or authorization, and would become responsible for compliance with all requirements of the Endangered Species Act (ESA).

The department also wants to thank you for your participation in our agency workshop held in Austin on December 11, 2013, our first outreach effort to seek the United States Fish and Wildlife Service's (the Service) input on TxDOT's path to NEPA Assignment.

The department is committed to the Section 7 compliance process currently in effect, and we recognize that all parties have gained considerable experience through implementation of the three-party agreement, thereby having all parties contributing to make the process more efficient while maintaining compliance. Under this agreement, procedures are working and all parties understand their respective roles and responsibilities, which has led to open and proactive communication between the parties involved. It is the department's intention to maintain the efficient process developed to the fullest extent possible, but with the following changes regarding the department's assignment of FHWA's current role in the process.

With respect to your comment regarding existing Interagency Agreements between the Service, FHWA, and TxDOT, TxDOT will work closely with the Service to determine if existing agreements can be amended to allow TxDOT to assume the FHWA role in the agreement, or if TxDOT and the Service would need to develop a new agreement, or work together without benefit of an agreement. We are currently working with the Service and FHWA to develop a bridging letter to allow TxDOT to assume FHWA's Section 7 role under the CE Assignment Program. We look forward to working with you on how best to assume FHWA's Section 7 role under the full NEPA Assignment Program.

Your letter states that the TxDOT application lacks sufficient detail regarding how TxDOT will maintain compliance with the ESA and other environmental laws administered by the Service and to demonstrate TxDOT's capacity to complete environmental reviews without FHWA involvement.

To address compliance with the ESA, TxDOT has completed development of a Standard Operating Procedure (SOP), *Accessing USFWS Ecological Services for Technical Assistance and Section 7 Consultations* (please see attached), which outlines steps for the Environmental Affairs Division (ENV) and districts to follow to comply with the ESA. The SOP became effective on May 19, 2014. The procedures outlined in the SOP are based on those in the current Programmatic Agreement for Biological Evaluations (PAFBE) and the scope of services in the Cooperative Agreement for the Service Transportation Liaison. For compliance with other laws administered by the Service, ENV provides guidance on these acts and regulations to help guide district staff in their work. ENV will continue to provide guidance and technical assistance as necessary to the districts, and the districts will continue to implement and monitor their actions under these laws. Compliance will be documented in a biological review, which is required for all TxDOT projects. The SOP also commits ENV to conducting a review of no effect calls as part of TxDOT's self-assessment procedures implemented under the NEPA Assignment Program, and requires all informal and formal consultations be initiated by, and coordinated with, ENV, ensuring ENV is providing oversight on these actions. The TxDOT NEPA Assignment application has been modified to identify the SOP and commit to following the SOP for the NEPA Assignment Program.

You recommend FHWA's 2002 internal memorandum, *Management of the Endangered Species Act Environmental Analysis and Consultation Process,* as an excellent template for TxDOT to implement in complying with the ESA under NEPA Assignment. TxDOT's procedures outlined in the SOP for ESA environmental analysis and consultation are based on current practices outlined in the PAFBE and Cooperative Agreement to fund the Service Transportation Liaison. These agreements were executed after the referenced 2002 FHWA memorandum, and the practices more closely follow the more recent FHWA Memorandum *Joint Agency Agreement on ESA's Formal Consultation Process* dated February 18, 2005, which examines the responsibilities of FHWA and the Service in the Section 7 consultation process.

Your letter cites the expectation that written Section 7 consultation guidance be finalized before TxDOT's application is approved, and that it should be referenced in the final NEPA assignment MOU. The SOP described above became effective on May 19, 2014, which pre-dates formal submittal of TxDOT's final NEPA Assignment application to FHWA. TxDOT's application has also been updated to identify this new SOP. The application commits TxDOT to adhering to the SOP for all projects under the NEPA Assignment Program. The NEPA Assignment MOU will incorporate the TxDOT NEPA Assignment application by reference.

You express concern that individual TxDOT districts with a wide range of experience would be responsible for Section 7 no effect determinations and suggest that TxDOT's Director of ENV, acting as the federal representative, must review and approve all no effect determinations if they are made at a district. TxDOT's SOP is based on the procedures in the current PAFBE. Procedures for no effect calls closely follow the FHWA's role as action agency, as outlined in the FHWA 2005 Memorandum, *Joint Agency Agreement on ESA's Formal Consultation Process*, which examines the responsibilities of FHWA and the Service in the Section 7 consultation process. To address the Service's concern, the new SOP commits ENV to conducting a review of no effect calls as part of TxDOT's self-assessments under the NEPA Assignment Program. In addition, and in keeping with current practice, ENV will continue to provide guidance and technical assistance as necessary to district staff. ENV will provide guidance handbooks, toolkits, training, and direct assistance to ensure district staff understand Section 7 compliance requirements and are implementing procedures properly and consistently.

Your letter further suggests that FHWA should review Section 7 determinations as part of the audit process. TxDOT self-assessments and FHWA audits will review TxDOT ESA compliance practices as appropriate; TxDOT will identify and monitor corrective action should issues with appropriate ESA compliance be identified. I want to assure you that TxDOT is committed to appropriate compliance with the Endangered Species Act under the NEPA Assignment Program.

You are correct that the NEPA Assignment application does not identify a specific responsible party for Section 7 consultation decisions. However, I, as the Director of the Environmental Affairs Division, have final responsibility for Section 7 consultation decisions across the State. Ms. Jodi Bechtel, ENV's Natural Resource Management Director, will have day-to-day responsibility for Section 7 consultation and for district technical assistance and support.

We appreciate your willingness to work with the department to resolve concerns regarding TxDOT's proposed assumption of ESA compliance responsibilities under NEPA Assignment. It is TxDOT's intention with the NEPA assignment program to perform exceptional environmental review and compliance, as has been done with FHWA. TxDOT's QA/QC procedures being established will provide oversight of district staff decisions, and will ensure the process implemented is self-monitored and self-correcting. We look forward to developing an increasingly strong working relationship with the Service under the NEPA Assignment Program and to our work together on future projects.

Sincerely,

Carlos Swonke, P.G.
Director of Environmental Affairs

cc: Michael Leary, Federal Highway Administration

# *Standard Operating Procedure*

*Accessing USFWS Ecological Services for Technical Assistance and Section 7 Consultations*

**Approval Authority: Natural Resources Management Section**
**Effective Date: May 19, 2014**
**Review Authority: Natural Resources Management Section** **Revision: 0**

**Purpose:**
The purpose of this Standard Operating Procedure (SOP) is to:

1. Provide procedures to TxDOT Districts (Districts) for determining if a project will affect threatened or endangered species and/or their habitat;
2. Provide procedures to Districts for requesting services from U.S. Fish and Wildlife Service (USFWS) through the Environmental Affairs Division (ENV); and
3. Provide procedures for conducting Endangered Species Act (ESA) Section 7 consultations with the USFWS.

NOTE: Text highlighted in yellow addresses the current FHWA role in this process for environmental assessments and environmental impact statements. Under the current MOU for categorically excluded projects, it does not apply. After full NEPA assignment it will be removed.

**Background:**
It is the intent of this document to foster an environment where the ENV and the Districts work together to speak with one voice for TxDOT when working with the federal regulatory agency, the USFWS. The project scoping agreement can assign the project sponsor's responsibilities to entities other than a District, but it is the interaction between the District (who may be working with a local project sponsor) and ENV (which is responsible for the informal and formal consultation process with USFWS) that are germane to this document.

The USFWS has been contracted by TxDOT and FHWA to help streamline the environmental process for transportation projects by providing a dedicated transportation liaison (Cooperative Agreement 57-1XXF9001; the contract). The USFWS shall use its authorities under the ESA, National Environmental Policy Act (NEPA), Clean Water Act (CWA) and other applicable federal laws to protect fish and wildlife resources that may be impacted by transportation projects. Protection of these resources will be accomplished through early coordination, technical assistance, assistance with project planning and design, and expedited consultations on issues related to endangered species. When consultation is needed, early coordination with the USFWS can help TxDOT and other transportation entities plan and design transportation projects to effectively avoid, minimize, and offset potential environmental

ENV

impacts to natural resources, thereby reducing the time to achieve environmental clearance.

Authorities:
The USFWS and TxDOT entered into a cooperative agreement (57-1XXF9001) that established the responsibilities of the agencies relative to review and other tasks associated with transportation planning and project development with the goal of achieving timely implementation of transportation improvements that are sensitive to the protection of trust resources for which the USFWS is responsible under federal regulation. TxDOT has the authority to request the services of USFWS by authority granted in Texas Transportation Code Section 201.103.

**Roles and Responsibilities:**

The District is responsible for identifying a potential need for USFWS involvement with a project and, if needed, contacting ENV to start the collaborative process. ENV must be contacted by the District as early in the project development process as possible when the need for USFWS resources is anticipated because the ENV is contractually responsible for implementing the terms of the contract with USFWS, monitoring performance of the USFWS Transportation Liaison, and serves as the point of contact between TxDOT and USFWS.

The District is responsible for providing project-related materials, which may include the preparation of consultation documents, as agreed upon by the District and ENV. The District is responsible for participating in all stages of the consultation or technical assistance process with ENV and USFWS.

The District is responsible for completing the Biological Evaluation Form. The form may be completed by the District staff as long as staff has the appropriate technical expertise. If the District does not have the appropriate technical staff the District may request assistance from their ENV liaison or contract a consultant to complete the form. If it is determined that the project will have no effect on threatened or endangered species, the District will upload the Biological Evaluation Form to ECOS and take no further action (see Step 1 below).

If upon completing the Biological Evaluation Form it is determined that the proposed action has the potential to affect threatened or endangered species then the District and ENV will collaborate and determine the appropriate effect call. Once the effect call is agreed upon, ENV will initiate consultation through the USFWS Transportation liaison. ENV will work with the District in conducting the consultation with the USFWS. ENV is responsible for signing correspondence between TxDOT and USFWS (see Steps 2-4 below).

USFWS, specifically the Transportation Liaison, is responsible for marshalling all appropriate USFWS resources to provide the services as described in the contract. The Transportation Liaison is responsible for being the single point of contact for transportation issues administered by TxDOT.

FHWA responsibilities are outlined in the 2005 PAFBE[1] or as superseded by future agreements.

**Rules, Policy and Procedures Manuals, and Document References:**
Endangered Species Act (ESA) 1973, as amended (16 U.S.C. 1531 *et seq.*)
National Environmental Policy Act (NEPA) (42 U.S.C. 4321-4347)
Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703-712)
Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 668-668d)
Fish and Wildlife Coordination Act (FWCA) (16 U.S.C. 661-667e)
Magnusson-Stevens Fishery Conservation and Management Act (MSFMCA) (16 U.S.C. 1801 *et seq.*)
Sikes Act (16 U.S.C. 670a-670o, 74 Stat. 1052)
Coastal Barriers Resources Act (CBRA) (16 U.S.C. 3501 et seq.)
Clean Water Act (CWA), Section 404 (33 U.S.C. 466 et seq.)

**Personnel:**
USFWS Transportation Staff, District Environmental Coordinators, District Environmental Staff, ENV staff, Metropolitan Planning Organizations (MPO), Regional Mobility Authorities (RMA), and other local and regional transportation entities who serve as project sponsors.

**Step 1: Determining the Need for USFWS Resources**

1. District completes the Biological Evaluation Form, assessing whether or not the project will impact federally protected species and/or their habitat.
   - 1.1 Upon completion of the Biological Evaluation Form, if the District determines the project will have no effect, the District will file the form and any backup documentation in ECOS and the process is complete.
     - 1.1.1 A no effect call is proper when:
       - 1.1.1.1 The action area of the project is <u>not</u> within the range or in suitable habitat of federally listed species.
       - 1.1.1.2 The action area of the project is within the range or in suitable habitat of federally listed species, but assessment by qualified personnel determines that the project will have no effect on the federally listed resources. If District does not have qualified personnel to make the determination, they will request technical assistance from ENV.

[1] Program Level Agreement for Biological Evaluations and for the Development of Further Endangered Species Act Programmatic Agreements Between the Federal Highway Administration, United States Fish and Wildlife Service, and Texas Department of Transportation. August 2005

ENV

1.1.2 ENV will review no effect calls as part of TxDOT's self-assessment procedures implemented under the NEPA assignment Memorandum of Understanding.

1.1.3 For projects that may have a potential effect, the District will proceed to Step 2.

**Step 2 (if needed): Requesting Early Planning/Technical Assistance from USFWS**

2. District initiates and documents a request for early planning/technical assistance to ENV to discuss the project and its potential effects.
   - 2.1 The District will prepare a request for technical assistance and submit the request to ENV via ENV_BIO@TXDOT.GOV. Alternatively, Districts may contact their ENV assigned biologist directly. Districts will provide the following information in the request.
     - 2.1.1 Identify what type of assistance is being requested (e.g. early project coordination, training on technical issues, etc.).
     - 2.1.2 Prepare a brief description of the project or technical assistance requested.
     - 2.1.3 Provide a brief description of the action(s) to be taken that have the potential to impact federally listed or federal candidate species.
     - 2.1.4 List what species/issues of concern are prompting the request.
     - 2.1.5 Identify important project dates.
   - 2.2 District will start the "Coordination" and associated "Tasks" in ECOS to track time.
   - 2.3 District and ENV will come to agreement on level of effect and consultation required.
     - 2.3.1 The project May Affect but is Not Likely to Adversely Affect a species/habitat. ENV will initiate informal consultation, per Step 3 below.
     - 2.3.2 The project May Affect and is Likely to Adversely Affect a species/habitat, has the potential to adversely affect or modify designated critical habitat, or there is the potential for USFWS to make a Jeopardy call. ENV will initiate formal consultation, per Step 4 below.
   - 2.4 If District and ENV biological staff cannot come to agreement on the potential effects, the discussion should be elevated to the ENV Natural Resources Management Section Director and/or the ENV Deputy Director for resolution.
   - 2.5 ENV and the District will ensure that each is informed of project relevant discussions, meetings, recommendations, and other information provided by USFWS.

**Steps 3 & 4 (if needed): Conducting a Consultation with the USFWS under section 7 of the ESA**

Once there is agreement on the level of effect the project has on a threatened or endangered species issue, there are two avenues of consultation under ESA that can be undertaken with the USFWS: informal consultation and formal consultation.

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3. Initiating and documenting an **informal consultation**
   - 3.1 The District or ENV, as specified in the project scope or as otherwise agreed upon, prepares a letter requesting informal consultation with USFWS using the ENV template (available in the Ecological Resources toolkit at http://www.txdot.gov/inside-txdot/division/environmental.html).
   - 3.2 If the District prepares the informal consultation document, then the District sends the draft letter to ENV for review and comment. If ENV prepares the informal consultation document, then ENV sends the draft letter to the District for review and comment.
   - 3.3 ENV and the District work together to resolve all comments to the draft informal consultation request letter. When all comments have been resolved, a final formatted version of the letter is printed on letterhead for signature.
     - 3.3.1 The signature authority for the consultation letter is the Director of ENV or their delegate.
     - 3.3.2 ENV will scan the signed request letter to create a pdf file, and email it to the District.
   - 3.4 ENV will upload the scanned request letter to ECOS associated with the appropriate coordination task.
   - 3.5 The District will upload any supporting documents and reports to ECOS.
   - 3.6 ENV will email the final informal consultation request letter to USFWS and copy the District on the email. If a Biological Evaluation (BE) was prepared, then it will also be uploaded by ENV to ECOS with the request letter.
     - 3.6.1 A draft NEPA document may also be supplied to USFWS, but should be submitted separately from the request letter. Large files can be sent by dropbox, but the email chain is important for the consultation history.
     - 3.6.2 ENV will mail the original signed copy of the consultation request letter and associated documents to the USFWS. Address: United States Fish and Wildlife Service; Attn: Transportation Liaison, 10711 Burnet Road, Suite 200; Austin, Texas 78758.
     - 3.6.3 USFWS will initiate informal consultation in response to the request, respond with a request for more information, make a determination that formal consultation is required, or issue a letter of concurrence.

4. Initiating and documenting **formal consultation.**
   (After February 12, 2014, and if the NEPA classification for the project is a Categorical Exclusion, then ENV assumes the role of FHWA. This is true for all project types after the effective date of TxDOT receiving full NEPA assignment from FHWA. After those dates, ENV assumes FHWA roles highlighted in yellow in the steps below and redundant steps are eliminated.)
   - 4.1 The District or ENV (per scoping agreement or other mutual agreement) prepares a cover letter and consultation package requesting a formal consultation with the USFWS, including a Biological Assessment (BA), prepared using the Standard Operating Procedure (SOP) for BA Reports and the National BA Template located online at: http://www.environment.fhwa.dot.gov/ESAWebTool/Site/Template.aspx.

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4.1.1 If the District prepares the formal consultation package, then they should submit the draft BA and cover letter to ENV for review and comment.

4.1.2 If ENV prepares the formal consultation package, then the District will be given the opportunity review and comment on it.

4.2 When comments are resolved, ENV will upload the draft BA to ECOS associated with the appropriate coordination task.

4.3 The District will upload any supporting documents and reports to ECOS.

4.4 ENV will submit the BA to FHWA for review and comments.

4.5 FHWA will submit comments on the BA to ENV.

4.6 ENV will collaborate with the District on addressing FHWA comments/revisions.

4.7 Once comments have been addressed, ENV will submit the final BA to the FHWA.

4.8 The District will upload the final BA to ECOS associated with the appropriate coordination task.

4.9 FHWA will submit the BA to the USFWS requesting the initiation of formal consultation.

4.10 USFWS will review and determine if the consultation package is complete.

4.11 Once the USFWS has decided they have complete information from the FHWA, they will draft a Biological Opinion (BO).

4.12 FHWA, ENV, and the District will review the draft BO.

4.12.1 District comments and suggestions regarding the BO should be communicated to ENV.

4.12.2 ENV, the District, and FHWA will collaborate to address USFWS comments.

4.13 USFWS will deliver a final BO to the FHWA.

4.14 FHWA will deliver the final BO to ENV and ENV will forward it to the District.

4.15 ENV will upload the final BO to ECOS under the appropriate coordination task and conduct a review of ECOS to ensure all required documents have been uploaded to ECOS. District and ENV will coordinate uploading any outstanding documents that may be needed. This step provides final documentation of the formal consultation process.

INTERNATIONAL BOUNDARY AND WATER COMMISSION
UNITED STATES AND MEXICO
UNITED STATES SECTION

April 24, 2014

Mr. Carlos Swonke, P.G.
Environmental Affairs Division
Texas Department of Transportation
125 E. 11th St.
Austin, Texas 78701

RECEIVED - TXDOT
APR 28 2014
ENVIRONMENTAL
AFFAIRS

Subject: FHWA NEPA Assignment to TxDOT

Dear Mr. Swonke:

The United States Section, International Boundary and Water Commission (USIBWC), is in receipt of your letter dated March 25, 2014, regarding the Texas Department of Transportation (TxDOT) Environmental Affairs Division (ENV) application to assume the Federal Highway Administration (FHWA), National Environmental Policy Act (NEPA) responsibilities by participating in the Surface Transportation Project Delivery Assignment Program pursuant to 23 U.S.C. 327.

With regard to the above, the USIBWC will review the application and offer any comments through the appropriate channels referenced in your letter. As a federal agency, the USIBWC looks forward to continued coordination with TxDOT on the implementation of the NEPA Assignment Program to insure that projects requiring coordination with USIBWC meet the needs of TxDOT as well as comply with USIBWC NEPA federal requirements on projects that affect properties or activities under our jurisdiction.

If you have any questions, please contact me or the person you designate contact Mr. Gilbert Anaya at (915) 832-4702.

Sincerely,

Gilbert G. Anaya

for José A. Nuñez
Acting Principal Engineer
Engineering Department

The Commons, Building C, Suite 100 • 4171 N. Mesa Street • El Paso, Texas 79902-1441
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Texas Department of Transportation
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May 22, 2014

Jose A. Nunez
Acting Principal Engineer
Engineering Department
International Boundary and Water Commission
The Commons, Bldg C, Suite 100
4171 N. Mesa Street
El Paso, TX 79902-1441

RE: Notification: NEPA Program Assignment from FHWA to TxDOT

Dear Mr. Nunez:

Thank you for your letter regarding Texas Department of Transportation's application for assignment of the Federal Highway Administration (FHWA) responsibilities under the Surface Transportation Project Delivery Program, also known as National Environmental Protection Act (NEPA) Assignment.

As we have not received additional comments to date from you or your agency on our NEPA Assignment application to FHWA, we are assuming there were no additional comments.

We look forward to working with you and USIBWC on future projects.

Sincerely,

Carlos Swonke, P.G.
Director of Environmental Affairs

cc: Michael Leary, Federal Highway Administration