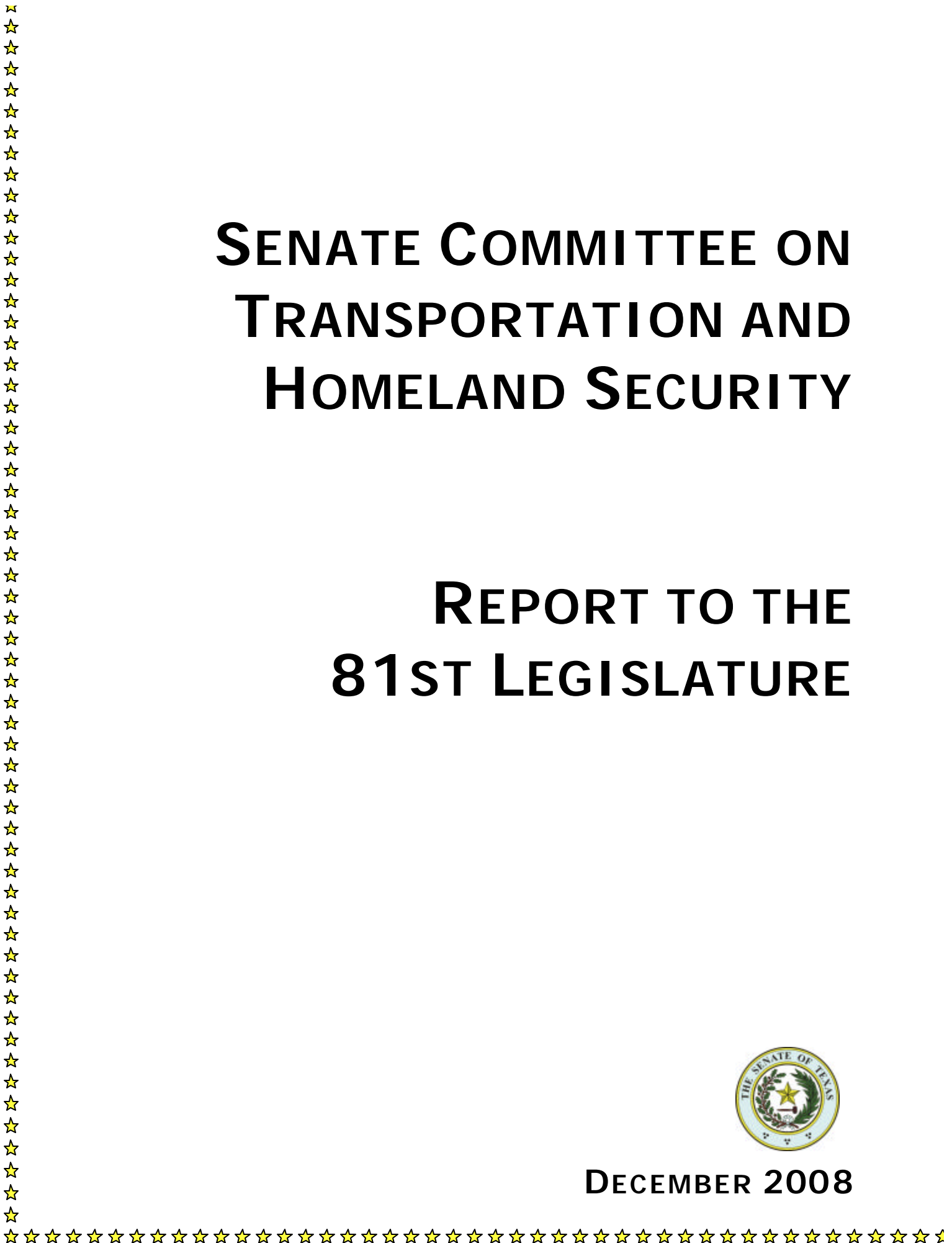


SENATE COMMITTEE ON
TRANSPORTATION AND
HOMELAND SECURITY

REPORT TO THE
81ST LEGISLATURE



DECEMBER 2008





SENATOR JOHN CARONA
CHAIRMAN

SENATOR KIRK WATSON
VICE-CHAIRMAN

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December 1, 2008

The Honorable David Dewhurst
Lieutenant Governor
P.O. Box 12068
Austin, Texas 78711


Dear Governor Dewhurst:

The Senate Committee on Transportation and Homeland Security is pleased to submit its final report with recommendations for consideration by the 81st Texas Legislature.

Respectfully submitted,




Senator John Carona
Chairman




Senator Kirk Watson
Vice-Chairman

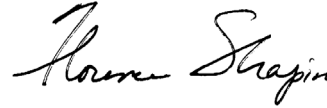
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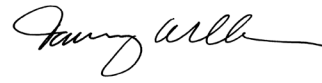
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Interim Study Background, Findings, and Recommendations

Evaluate the state's homeland security efforts and the state's recent \$140 million investment in law enforcement to help secure the border and study and make recommendations to deter transnational and drug-related gang violence and crime, including the use of injunctions and any possible improvements to Chapter 125 of the Civil Practices and Remedies Code, relating to membership in street gangs.

BACKGROUND

Criminal gangs in Texas pose an immediate significant threat to public safety, particularly those organizations identified by the Texas Department of Public Safety. These criminal organizations demonstrate high levels of organizational development, broad geographic control, and strong technological abilities. They are also very well-funded and threaten to undermine law enforcement and government through violence, bribery, and corruption.¹ The Texas-Mexico border region has been experiencing an alarming rise in the level of activity that threatens Texas homeland security, including the "triple threat" of drug smuggling, illegal and unknown crossers, and rising violence. This increase has placed significant additional burdens on State resources and agencies and has become the overwhelming reality facing communities in Texas. This threat has been identified by Governor Rick Perry in February 2006 as the most imminent homeland security threat to the state. He has mobilized multiple state agencies and resources to begin to turn the tide and protect the State of Texas. Cartels and gangs are waging a violent turf battle over control of the key smuggling corridors including those around Nuevo Laredo, Laredo's neighboring city on the Mexico side of the border; Ciudad Juarez, across from El Paso; and Reynosa, across from McAllen, and others. Contraband enters the United States from points along the Texas border and coast, and also exits the state in the return direction. Recent Department of Homeland Security initiatives have identified Dallas, Houston, and San Antonio as primary targets of transnational gang activity and associated threats to our homeland defense. As one indicator, over 60 gang members affiliated with Mara Salvatrucha (MS-13) have been taken off the streets in Dallas since mid July 2007.²

Transnational Gangs

Transnational gangs are considered a unique public safety threat due to their members' propensity for violence and their involvement in transnational crime. National gang threat assessments have noted that a large share of members in the most notorious gangs such as MS-13, Sureños-13, and 18th Street are illegal aliens. Federal sources estimate that 60 to 90 percent of the members of MS-13 were illegal aliens. Eight percent of transnational gang members arrested had committed serious crimes in addition to immigration violations. The ICE offices that logged the largest number of immigrant gang arrests were San Diego, Atlanta, San Francisco, and Dallas. According to the National Drug Intelligence Center gangs are the primary conduit and distributors of illegal drugs in the United States. Relationships between street gangs and transnational gangs have grown to where many true street gangs now have international ties that have transitioned them from retail distributors to smugglers and wholesalers.

¹ Testimony by Captain Shane Byrd, Texas Department of Public Safety to the Senate Committee on Transportation and Homeland Security on July 9, 2008.

² Published news reports.

Summary of Organized Threats

The organizations identified on the this list are believed responsible for most of the violent offenses in Texas, including border-related gang shootings, murder, vehicle theft, drug trafficking, kidnapping, robbery, and gun running.³

- Aryan Brotherhood of Texas
- Aryan Circle
- Barrio Azteca
- Gatekeeper/Plaza Boss-Ciudad Acuna/Del Rio
- Gatekeeper/Plaza Boss-Ciudad Juarez/El Paso
- Gatekeeper/Plaza Boss-Matamoros/Brownsville
- Gatekeeper/Plaza Boss-Nuevo Laredo/Laredo
- Gatekeeper/Plaza Boss-Ojinaga/Presidio
- Gatekeeper/Plaza Boss-Piedras Negras/Eagle Pass
- Gatekeeper/Plaza Boss-Reynosa/McAllen
- Hermandad de Pistoleros Latinos
- Mexican Mafia
- Raza Unida
- Tango Blast (to include Houstone Tangos, D-Town Tangos, Orejones, West Texas Tangos)
- Texas Syndicate

These groups have also been known to be more actively involved in public order crimes, the corruption of government officials, and the use of violence than any other identified criminal threats.⁴

Texas' proximity to Mexico poses challenges in dealing with powerful Mexican cartels. These cartels rely on an intricate layer of "plaza bosses" or "gatekeepers", along with trained security forces, who move fluidly across the border and interact with criminal gangs to exercise local control and the handling of contraband. These organizations also employ ex-military "special forces" groups to use commando-style tactics and violence to control territory. They also recruit and employ transnational gangs and US-based prison gangs to extend their reach and control well into Texas. This allows these complex and structured groups to operate in border communities and control virtually all of the illegal commodities smuggled to and from Mexico.⁵

In addition to Mexican border criminal organizations, the list identifies violent gangs whose influence and power in the state were strengthened in the Texas prison system throughout the 1980s and 1990s. Prison gangs operate as middle men between cartels and criminal street gangs, who sell the product on the street. They collect a 10% "tax," also known as "the dime", while facilitating drug transactions in their area of control. Members also earn money through other

³ Email from Captain Lisa Sheppard, Texas Department of Public Safety-Criminal Intelligence Service to Angelica Cervantes on October 23, 2008.

⁴ Testimony by Captain Shane Byrd, Texas Department of Public Safety to the Senate Committee on Transportation and Homeland Security on July 9, 2008.

⁵ Ibid.

criminal enterprises, including drug and weapons trafficking, alien smuggling, auto theft, extortion, kidnapping, robbery, and contract murders.⁶

There are also a number of smaller regional and municipal street gangs that maintain a presence in local communities and are known to engage in a variety of criminal and violent activities. Members of criminal street gangs have an involvement in drug trafficking and often serve as recruiting platforms for the larger, better organized prison gangs. Some of these gangs are developing a more sophisticated hierarchy or sphere of influence.⁷

Many also believe that there is not enough focus on intervention in gang involvement and drug use at middle school and high school level.⁸ The average age of gang entrance is 12 years old. Members of youth gangs often continue to be involved through adulthood and play a role in gangs overall. The El Paso school district uses a system called the Blue Card System. A student gets on the system for participating in gang activity at school.

Gangs are more involved in technology, thus targeting the internet through websites such as Myspace are crucial.

What Other States Are Doing

Florida

Florida has implemented a gang reduction strategy that is intended to provide intervention programs for young people who are the most vulnerable targets of gang recruitment. Civic associations, including the Boys and Girls Clubs and the NAACP, are critical in the program's success to reach children before they become part of a gang. The strategy helps emphasize job training and mentoring to the almost 4,000 incarcerated gang members so that, once released, they will turn away from their previous life-styles. In addition, several objectives are identified for law enforcement officers, including the dismantling of every major criminal gang in the state, with the most dangerous gangs as top priority.⁹

Arizona

Arizona created the Illegal Immigration Prevention and Apprehension Co-op Team designated to assist with the investigation of property, financial, and violent crimes associated with illegal immigration and human smuggling in the Phoenix and Maricopa County areas. The team is managed by the Gang and Immigration Intelligence Team Enforcement Mission (GIITEM), a multi-agency task force within the Arizona Department of Public Safety, and works alongside with Phoenix Police, ICE, and the Arizona Fraudulent Identification Task Force (AFIT) in the efforts to reduce violent illegal-immigrant related crimes in the counties. Since it began operations at the end of 2007, 81 human smugglers have been arrested, with 71 felony charges filed.

⁶ Ibid.

⁷ Ibid.

⁸ Testimony by Rob Gallardo, CI/PI Director, Operation No Gangs, to the Senate Committee on Transportation and Homeland Security on July 9, 2008 in El Paso, Texas.

⁹ Kramsky, Magen. "Reaching a Critical Mass- Illegal Immigration in the United States and Legislative Efforts to Curtail it", A Report for the Senate Committee on Transportation and Homeland Security. July 2008.

Including Florida and Arizona, several states have developed statewide databases to track gang activity on both convicted and non-convicted gang members. These states have developed criteria that must be met before a person is entered into the database, and both require that two or more of the criteria be met before a person's name is entered in the database. The criteria include if the individual:

- admits to criminal street gang membership
- is identified as a criminal street gang member by a parent/guardian
- is determined a criminal street gang member by a documented reliable informant
- resides in or frequents a particular street gang's area and adopts their style of dress, use of hand signs, tattoos, and associates with known criminal street gang members
- is identified as a criminal street gang member by an informant of previously untested reliability and such identification is corroborated by independent information
- is identified as a criminal street gang member by physical evidence such as photographs or other documentation
- has been stopped in the company of known criminal street gang members four or more times.

California

California began its Street Terrorism Enforcement and Prevention (STEP) initiative in 1988. It has since served as a model for other states, and survived several constitutional challenges. The program serves to guide police in tracking gang activity and help law enforcement officers in the identification and arrest of criminal gang members. The law is similar to many anti-gang statutes that have been implemented in Texas, including definitions of "criminal street gangs" and "participation" in such gangs. STEP additionally enhances penalties for crimes committed by gang members, and provides for a one to three year state prison sentence for any adult convicted of using physical violence to coerce, induce, or solicit anyone under the age of 18 to join a criminal street gang.

Other states have a broader approach to gang recruitment and established penalties for any person, adult, or minor, who attempts to coerce a minor into joining a gang. These states include Alaska, Arizona, Arkansas, Florida, Illinois, Indiana, Iowa, and Oklahoma.¹⁰

Texas

Currently, Texas state law prohibits a statewide database on information related to the investigation and prosecution of specific cases of criminal gang behavior. The state does, however, maintain a juvenile criminal records database which tracks identifying features of convicted criminals including tattoos, scars, and gunshot wounds. In addition, the Office of the Attorney General's Juvenile Crime Intervention Division tracks statistical information on criminal gangs from local police departments throughout the state. While there is no statewide

¹⁰ Ibid.

system that tracks criminal gang members without convictions, several local law enforcement departments have implemented the use of regional databases, which are permitted. Recently, the Austin Police Department's Gang Unit received a \$750,000 federal grant for purposes of upgrading its gang database, which includes photos and biographies of around 3,200 documented gang members. Moreover, this information is shared between Gang Unit officers and street officers.¹¹

Local police departments, and even school districts, are advocating the benefits of a statewide criminal gang member database to help officials investigate and curtail gang activity. Austin police officers, while benefiting from a regional database of this sort, note that Texas gangs are becoming more organized and have more ties to traditional crime rings that go beyond their current system's restricted data set. Prosecutors in Tarrant County also already have an automated gang-activity tracking system, but push for a statewide database that would be critical in the information sharing about gangs. Furthermore, the Spring Branch Independent School District Police Department, which is having problems in the identification of gang members, some of whom are dealing drugs on school campuses, have stated the benefits of such a statewide gang database in ending these activities. It is estimated that among Spring Branch's 31,000 students, there are around 40 gangs with more than 600 members undertaking criminal operations.¹²

A federal effort in the tracking and identification of criminal gang members is conducted through the National Crime Information Center (NCIC), an automated database of unlawful and justice-related records from participating states (thirty nine so far). Files may include wanted and/or missing persons and stolen vehicles or property. NCIC contains information on gangs that identifies what members wear, how they communicate, and the types of crimes committed. Texas is one of the states that does not compare records with NCIC. The same language in the Texas Code of Criminal Procedure that restricts the implementation of a statewide database allows the state to make inquiries to the database, but the state is not allowed to enter information into the database.¹³

Other initiatives that Texas has undertaken to proactively address the drug trafficking situation in our state include "Operation Linebacker" and "Operation Rio Grande" that have a wide range of support including the Texas Narcotics Officers Association.

Drug Trends in Texas

The Texas Legislature enacted laws that placed tighter controls on the precursor chemicals used to manufacture methamphetamines (meth). This resulted in a dramatic decrease in the amount of methamphetamine labs throughout the State. However, the Mexican Cartels saw an opportunity to meet the demands of the methamphetamine users and began shipping large amounts of meth into our State. One of President Calderon's initiatives in targeting the drug cartels was to place stricter controls on the precursor chemicals to manufacture meth, which has led to a decrease of Mexican produced meth being shipped to our State. Because of this change in the market, law enforcement officers are reporting that they are beginning to see an increase in the "mom and pop" meth labs, especially in Central and North Texas. Teams of meth cooks and users, known

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

as "pill posses" are driving from city to city and purchasing the pseudoephedrine pills from different drug stores. They are purchasing enough to produce one or two ounces of the finished product of meth.¹⁴

There are also reports that large amounts of cocaine and meth are arriving in Texas, but these drugs are bypassing the Texas/Mexican border and are being shipped from Southern California and Arizona.

Crime interdiction units have proved successful throughout the state. There are three High Intensity Drug Trafficking Area (HIDTA) programs in Texas. They are limited by the amount of federal funding available and a region must apply to be part of the HIDTA program. It is important to take the designated areas and expand them.¹⁵ The most successful ones involve community participation. An example provided was the West Texas HIDTA Stash House Task Force. The Stash House Task Force proactively targets stash houses by sharing the indicators of a possible stash house with the public. This HIDTA initiative is comprised of state, local, and federal law enforcement agencies and has been responsible for shutting down hundreds of drug stash houses. Several of these stash houses were found to be drop homes used for smuggling illegal aliens.

The Texas situation is comparable to the Chicago situation in the early 2000's when the vast majority of violent gangs controlled street narcotics.¹⁶ Gangs such as the Barrio Azteca who were later charged with federal racketeering, collected quotas from anyone selling in their "turf" and retaliated with violent crimes if they didn't pay. Agent David Cuthbertson testified that there were 666 murders in Chicago in 2001; 70% of these murders were drug/gang related. There were also 25,533 aggravated assaults (drive-by shootings, etc.). Chicago law enforcement, DEA, and ATF met monthly and gathered information from street cops in Chicago. By the end of 2005 murders were down 33% to 448, and aggravated assaults were down by 31% to 17,943. While other factors may have contributed to this decrease in crime, this initiative definitely played a part in it.

RECOMMENDATIONS

Amend Chapter 125, Section 125.064, Civil Practices and Remedies Code to better define the term "habitually associates." If this definition and section of code are strengthened the right people can be properly targeted.

Amend the Texas Penal Code to define as assault any threatening of minors intended to coerce them to join a criminal street gang. Those convicted can be charged with a third-degree felony.

Amend state law to require the Department of Public Safety to track information on convicted gang members and to provide information to the National Crime Information Center database so

¹⁴ Testimony by Robert Almonte, Executive Director, Texas Narcotics Officers Association to the Senate Committee on Transportation and Homeland Security on July 9, 2008 in El Paso, Texas.

¹⁵ Testimony by Jack Riley, Special Agent in Charge, Drug Enforcement Administration, to the Senate Committee on Transportation and Homeland Security on July 9, 2008 in El Paso, Texas.

¹⁶ Testimony by David Cuthbertson, Special Agent in Charge, Federal Bureau of Investigation before the Senate Committee on Transportation and Homeland Security on July 9, 2008 in El Paso, Texas.

that information on convicted gang members can be shared with law enforcement departments throughout the nation.

Without infringing on constitutionally guaranteed liberties and protections, amend state law to allow the establishment of a statewide database on all gang members, including those who have not been convicted of a crime, and to require DPS to work with local law enforcement agencies and prosecutors to develop criteria and time limits for the placing of an individual in the system. The Committee recommends funding the approximate \$15 million that it would cost to get such an interoperable system running.

Since prepaid cell phones are used by organized criminal units for their illicit business, prepaid cell phone regulations should be passed by the 81st Legislature. This legislation should make it easier for law enforcement to find those who use such devices for criminal activities.

The State's monetary investment should focus on technology and increased patrol. As Steve McCraw said at the July 9, 2008 Senate Committee on Transportation and Homeland Security hearing in El Paso, Texas, you cannot just investigate your way to border security-- patrol matters. The Legislature should encourage the coordination of state, local, and federal law enforcement to carry out initiatives such as those done to clean up crime in Chicago. A state increase in such programs can see a decrease of crime since a collaborative effort is the best way to reduce the number of gangs in the State. The State should leverage technology and enable license plate readers which can help to identify criminals and stolen vehicles and address drug trafficking.

The State should be proactive in targeting youth in gangs and gang recruitment. This can be done by greater punishment of those that commit internet crimes, recommending schools perform assessments on a student who is sent to alternative school, and allowing for schools to get judges to order gang affiliation programs to pull students out of gangs. It is also recommended that school districts be allowed, in coordination with local law enforcement agencies, to provide gang resistance education and training to students in grades K-12.

Accordingly, internet gang utilization and recruitment should be criminalized. Communicating through social networking web sites for gang purposes should be a felony. Many internet sites have pictures of alleged gang members, gang colors, signs and their weapons, as well as details of a gang's history and memorials for their dead members. Many also feature online chat rooms and bulletin boards for communication. These sites are a new means for gangs to advertise drugs and recruit new members.

The Committee also recommends making the recruitment of minors a civil offense. It also recommends making it a felony to encourage or threaten people to join gangs on or adjacent to school property and criminalization of the act of recruiting gang membership on or adjacent to school property or in public parks.

The Committee recommends requiring violent career offenders, released from Texas prisons, to register when they move to a new community. This can be structured on the current sex offender and child murderer laws and apply to all violent career offenders who are not required to register under existing State law. As mentioned in the report Florida has passed a similar law. Kansas has also enacted similar legislation.

The Committee recommends increasing penalties for aggravated assault when the act is committed with a firearm from a motor vehicle. Drive-by shootings are spreading from inner city neighborhoods to the expanse of rural Texas where stray bullets are far more likely to travel greater distances causing greater danger to innocent people. The Committee also recommends increasing criminal penalties for a wide variety of acts that further gang activity, including first offenses. Every criminal penalty imposed for the acts of kidnapping, assault, battery, robbery, arson, or unlawful use of weapons should be increased by one level when these offenses are committed in furtherance of gang activity. These acts can be charged as aggravated kidnapping, aggravated assault, aggravated battery, aggravated robbery, aggravated arson, aggravated unlawful use of a weapon. Simple gun possession in furtherance of gang activity, such as the possession of a gun inside a crack house, would be a serious felony. The penalty for aggravated unlawful use of a weapon for a non-felon gang member must be strengthened to ensure that a gang member who carries a loaded gun around on the street will receive a harsher penalty.

The Committee recommends isolating street gang members from each other by prohibiting street gang members from contacting each other while on parole or probation. A street gang member on parole would be committing a felony if he or she knowingly has direct or indirect contact with a street gang member, after having been ordered by a judge in any non-criminal proceeding to refrain from direct or indirect contact with a street gang member or members.

The Committee recommends increasing prison time for repeat gang-related felony offenses, making it similar to the three strike rule. This would be for three-time offenders who have committed three separate serious felonies in furtherance of gang activity.

The Committee recommends creating an enhanced penalty for criminal damage to government supported crime fighting property, such as police motor vehicles or surveillance cameras.

The Committee recommends toughening criminal penalties for manufacturing and selling false identifications. Recent research indicates that criminal gangs are engaged in the widespread manufacture of false identifications and ID numbers for their members.

The Committee recommends making gang related non-firearm felonies against police, firefighters, and first responders a penalty enhancement.

The Committee recommends keeping gang members who are arrested for committing a crime in jail without bail until their initial appearance. This would keep them from intimidating witnesses and allows time for the protection of witnesses prior to trial.

Gang "kingpins" who organize and lead criminal gang activities should face increased penalties, such as first degree felony charges punishable by up to life in prison.

The Committee recommends administrative revocation of a driver's license for a conviction of a gang related activity with a permanent three strike rule. The Legislature should also consider driving while a license is suspended for a gang related conviction to be a felony.

The Committee recommends establishing the Office of Statewide Violence and Gang Prevention within the Governor's Division of Emergency Management or Office of Homeland Security. This office would oversee the collection and analysis of data on gang membership statewide and the effectiveness of various gang prevention efforts. It would also oversee the development of a clearinghouse for research on gangs, at-risk youth, and prevention and intervention programs in order to identify best practices and promote effective strategies. This office shall provide the Governor and Legislature with recommendations.

In considering legislation addressing criminal activity, the Committee recommends an awareness of the effects penalty enhancements may have on prison capacity and costs, and cautions against an overreliance solely on penalty enhancements. Toward that end, the Committee recommends implementing an integrated approach to reducing gang violence that includes evidence-based practices that are proven to reduce crime -- composed not only of punishment enhancements, but also preventative measures to combat the root causes of gang activity.

Study and make recommendations for the creation of a tamper-proof driver's license or photo ID that complies with the federal Real ID Act, including the implementation of the Secure Enhanced Drivers' License Program (SB 11, 80th Legislature), by the Department of Public Safety and issue recommendations for improving and expanding the pilot program.

BACKGROUND

The state of Texas issues a license to authorized drivers. While the state also issues other forms of identification, the driver's license has become widely accepted as a de facto ID card. There is currently a trend from the federal government and other states to implement a tamper proof driver's license or identification. Furthermore, federal initiatives are requiring more secure documents for citizens to travel and do business. These initiatives include the Real ID Act and The Western Hemisphere Travel Initiative (WHTI), which requires all travelers to and from Canada, Mexico, the Caribbean and Bermuda who have historically been exempt from passport requirements, to present a passport or other approved document for identification in order to enter or re-enter the United States. On March 23, 2007 Department of Homeland Security Secretary Michael Chertoff formally approved the first pilot program of a high-security driver's license pilot program in the state of Washington. SB 11 of the 80th Texas Legislature allows the Department of Public Safety to create a similarly enhanced driver's license to cross the Texas/Mexico border.

Texas driver's license statutes contain certain loopholes that can and have been used to commit driver's license fraud. Fraudulent identification or driver's license fraud is a potential homeland security threat because of Texas' proximity to the border.

Real ID

The Real ID Act of 2005¹⁷ requires certain state standards and procedures for issuing driver license and identification cards (DL/ID) if they are to be accepted forms of identification by the federal government. It is important to look at these standards when evaluating changes that would be needed to create a tamper proof Texas driver's license or identification. The final rules for the Real ID Act have been issued, which give Texas an initial extension until December 31, 2009 to comply with the Act. States that do not comply with the Real ID will not be able to use their state driver's licenses and identification cards for federal purposes.

Under the Real ID, all DL/ID applicants will be required to provide evidence that they are either a citizen of the U.S. or lawfully residing in the U.S. Any non-U.S. citizen will be required to present valid documentation of their lawful presence in the U.S. at their driver license office which will then require verification through the Systematic Alien Verification Entitlements (SAVE) program.¹⁸

¹⁷ Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act (H.R. 1268)

¹⁸ Testimony of Judy Brown, Chief of Driver License Division, Texas Department of Public Safety to the Senate Committee on Transportation on July 9, 2008 in El Paso, Texas.

Texas does not require I-94s, immigration papers that ensure a visa is current to obtain a driver's license. This loophole was recently exploited in the case of Mr. Isaac Banai. Mr. Banai spent days training foreign nationals to pass the written and driving portions of the state's license test. He would list a Motel 6 address and phone number as their current residence.¹⁹

Texas would need over \$129 million through the biennium to fully implement Real ID. Texas was awarded \$3.2 million in DHS grants to fund state-specific projects toward that end.²⁰

Creating a Tamper-Proof ID

Secure IDs are documents that include sophisticated security features to prevent fraud, theft, and tampering. These features come in many different varieties. These identifications enable electronic and machine readable verification of the authenticity of the document itself. Such an element is critical to know definitively if the document is legitimate. Secure ID documents also require verification before issuance so that documents are only issued once an individual is verified and vetted. Because of the information the ID holds, there must be a way to protect the information the secure ID holds.²¹

For an identification document to meet the level of a secure ID it must include multiple security features and use both "passive" and "active" security features.²² "Passive" technologies are visual and forensic and include:²³

- security printing
- optical variable device/ optical variable ink
- holograms
- laser stripe
- plastic laminates
- UV links

"Active" technologies have computational, electronic capabilities and include:²⁴

- contactless RF
- contact smart card
- dual interface smart card
- hybrid smart card

Many times with current ID inspection methods the officer only has the visual inspection tool as a resource and is therefore limited in the ability to verify documents that can be easily forged, faked, or duplicated. A secure ID can be verified both electronically and visually for added security that the ID does belong to the person possessing it. Another critical security element is

¹⁹ Ramshaw, Emily. "DPS responds to foreign nationals obtaining fake licenses". *Dallas Morning News*. August 4, 2007.

²⁰ Testimony by Judy Brown, Chief of Driver License Division, Texas Department of Public Safety to the Senate Committee on Transportation on July 9, 2008 in El Paso, Texas.

²¹ Testimony by Kelli Emerick, Executive Director, Secure ID Coalition on July 9, 2008 in El Paso, Texas.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

the incorporation of machine readable technology into the secure ID. Machine readable technology can include "passive" technologies such as magnetic stripes, bar codes, or laser stripes; or "active" technologies such as radio frequency identification technology (RFID) tags, contactless RF, contact smart cards, dual interface smart cards, or hybrid smart cards.²⁵

RFID technology is a computer chip paired with an antenna used to identify the individuals carrying the item with the RFID chip remotely. The RFID broadcasts a unique identifying number tied to a driver's license with this feature. The RFID reader receives this number and pulls up the appropriate file for the EDL. RFID technology is used in enhanced driver's licenses. However, RFID chips are susceptible to duplication; being spoofed and replayed, and there are no privacy protections for the tag number.

Secure Contactless Smart Cards are a different technology. Contactless Smart Cards are sophisticated microprocessors with secure operating systems that are capable of preserving the privacy of the information they hold with encryption capabilities and by protecting against duplication and spoofing. Contactless smart cards are based on open, interoperable standards.²⁶

Some examples of secure IDs that have been created through secure technology include the e-passport, NEXUS document, as well as the enhanced driver's license. The e-passport is the passport that includes electronics in the back cover of the document. It is based on international specifications created by the International Civil Aviation Organization which governs international travel documents. The document also incorporates a closed RF shield, random number ISO 14443 Answer to Query, basic access control for access to electronic credentials, and updated page designs and printed security features. The smart card chip in the back cover of the book provides a three way match at the point of inspection: the person in front of them; the information printed on the data page, and the information on the secure chip including a digital signature from the U.S. Department of State.²⁷

Enhanced Driver's License Program

SB 11 of the 80th Legislature allows the Department of Public Safety to create an enhanced driver's license to cross the Texas/Mexico border.²⁸ The program's implementation in Texas was stalled pending an opinion by the Attorney General to determine if the program conflicts with current federal law that requires a passport to be used to cross international borders.²⁹ The Department of Homeland Security issued a letter in September of 2007 saying that the Secretary is fully authorized under current law to accept an enhanced driver's license at land and sea ports of entry.³⁰ The Attorney General of Texas has since issued an opinion, finding that the enhanced driver's license statute (Section 521.032, Transportation Code) does not conflict with or would not be preempted by federal law regarding passports. The statute requires an agreement between the Department of Public Safety and the Secretary of Homeland Security, and such agreement would be consistent and actually help further federal law regarding passports.³¹

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Section 521.032, Transportation Code

²⁹ Attorney General opinion request by The Texas Department of Public Safety July 26, 2007

³⁰ Letter from the Department of Homeland Security to the Attorney General of Texas

³¹ Attorney General Opinion No. GA -0598, Letter to Thomas A. Davis, Jr, Director of Texas Department of Public Safety, issued on January 22, 2008

If implemented the enhanced driver's license could use a biometric matching system that could be used only to verify the identity of the applicant for purposes relating to implementation of the initiative.

Washington State has been successful with their enhanced driver's license program. The program is voluntary with a \$15 additional charge to their current driver's license fee. The card provides heightened security measures that are aligned with standards of the American Association of Motor Vehicle Administrations (AAMVA). There is a special protective sleeve that shields the card from unauthorized radio frequency identification readers. For extra security the card does not include any personal information, just a unique reference number. As of June 30, 2008 Washington has issued 19,462 enhanced driver's licenses and identification cards.

RECOMMENDATIONS

Continue efforts to create a tamper-proof ID.

Explore with the federal government alternatives to Real ID that are less intrusive, burdensome, and costly.

Establish a legal presence requirement in order to obtain a Texas Driver License (DL) or Identification Card (ID). There are currently only 9-10 states that do not have such a requirement.

Give DPS the authority to issue temporary licenses or IDs when a person's stay in the country is shorter in duration than the validity of their license or ID and when there is no permanent address. Limit the expiration date of the DL/ID to the period of lawful presence or for one year for those without a fixed term of stay.

Amend the Transportation Code to allow operation of a motor vehicle in this state for up to 90 days and create an affirmation by a new resident that the person has been in the state for a minimum period of 60 days and intends to remain a resident of this state.

Require address verification for the issuance of a DL/CDL/ID, unless active duty military or military dependent. In addition, provide deny issuance authority for the inability to verify address if electronic verification and manual validation efforts fail.

Define residency and amend the definition of domicile to enhance language and establish a clear statutory requirement that all applicants for a DL/CDL/ID must be a resident of the State of Texas with intent to stay.

Amend statute to increase the time requirement for vehicle operation under another jurisdiction's license to 90 days and require an applicant to establish residency for a 60 day minimum to obtain a Texas DL/CDL/ID.

Repeal requirement to accept an offender identification card or similar form of identification issued to an inmate by Texas Department of Criminal Justice (TDCJ) as satisfactory proof of identity. Abolishing this requirement will enable the Department to further ensure that the identification document used by individuals to obtain Texas DL/IDs can be verified.

Create an affirmative duty for operators and owners of mailbox sites, motels, other temporary housing/lodging locations, and other businesses of a similar nature to report to the Department when DL/CDL/IDs are mailed to their place of business to persons who do not actually reside at those locations.

Create a criminal offense when businesses aid in the fraudulent acquisition of Texas DL/CDL/IDs, or aid individuals trying to conceal their true and current residence address.

Apply accepted principles for protection of individual information to the collection, storage, and use of such information.

Examine the roles and best practices among individuals, state and local governments, hospitals and other health care providers, and the insurance industry for disaster planning and first response efforts. Explore what changes are needed to better prepare for natural disasters to mitigate claims and losses. Include an assessment of the state's implementation of recent recommendations for evacuations, including movement of medically fragile populations. Study the level of preparedness among critical infrastructure entities in both the public and private sector, the effectiveness of state disaster relief policies relating to this infrastructure and the sufficiency of personnel needed to restore this infrastructure. Assess the state's preparedness to handle a public health emergency. Examine the challenges of interoperability of communications technologies to improve coordination of different plans across jurisdictions.

BACKGROUND

In 2006, Governor Rick Perry ordered state officials to revise and improve disaster preparedness and response plans; more specifically, hurricane evacuation plans. Under the guidance of the Governor's Division of Emergency Management (GDEM), several state agencies have drafted State Emergency Management Plans.³² In an effort to revise and improve the State's disaster response, this report will analyze and make needed recommendations for improvements to current disaster preparedness and response procedures.

Hurricane Ike

On September 13, 2008, Hurricane Ike made landfall at 2:10 a.m. CST, near Galveston, Texas. Although wind speeds only equaled that of a Category 2 storm, it brought much more intense destruction to the State of Texas. It was an unusually large storm with a tropical storm wind field estimate to have been up to four hundred miles across. In fact, Hurricane Ike's measured storm surge destructive potential was among the highest of any Atlantic storm in the last forty years, include Hurricane Katrina. Hurricane Ike severely flooded the Bolivar Peninsula, downtown Houston, and other surrounding cities such as Bridge City, Galveston and Orange, Texas, and became the standard for evaluating disaster response even though it followed on the heels of major storms such as Hurricane Dolly.

Disaster Preparedness and Planning State and Local Government Participation

As defined by the Governor's Strategic Plan 2005-2010, Homeland Security in Texas encompasses all efforts, both strategic and tactical, that optimally position our state to prevent, protect from and prepare for all hazards. The term "all hazards" refers to all disasters, both manmade and natural, from a terrorist attack to a catastrophic hurricane. Homeland security includes all activities aimed at preventing terrorist attacks within Texas, gathering intelligence and analyzing threats, reducing vulnerability, protecting our critical infrastructures, and coordinating responses to all hazards. The Governor's Office of Homeland Security and the Governor's Division of Emergency Management lead disaster preparedness efforts for the State. In addition, the Texas Military Forces serve as the key manpower resource for disaster relief.³³

³² <http://www.txdps.state.tx.us/dem/pages/planning.htm>, Texas Department of Public Safety website

³³ Governor's Strategic Plan 2005-2010

The Governor is charged with providing guidance and direction for state emergency management efforts. The Governor may declare a state of disaster and exercise emergency powers set out in the Texas Disaster Act. If state resources are inadequate to resolve an emergency situation, the Governor may request assistance from other states pursuant to interstate compacts. The Governor may also request specific assistance from the federal government or request that the President issue federal emergency or disaster declarations that activate a variety of federal assistance programs. Accordingly, the Stafford Act, a federal law, designates the Governor of each state as the primary coordinating officer for disaster management. The Governor of Texas carries out that responsibility through the Governor's Office of Homeland Security and the Governor's Division of Emergency Management.³⁴

The Governor's Office of Homeland Security

The Governor's Office of Homeland Security operates under the direction of the Governor; and unlike most states, the leadership and structure of this division serve a leadership role in addition to an advisory function. During all disasters, the office serves as the central nexus for executive branch decision making during times of crisis. Additionally, it monitors federal actions regarding disaster management and the overall impact on the lives of Texans. Lastly, the office is the focal point for interaction with the federal government during the declaration of disasters and the negotiation of reimbursement from the federal government after disaster.³⁵

The Governor's Division of Emergency Management

The Governor's Division of Emergency Management (GDEM) is the focal point of emergency management operations in the State. It operates the State Operations Center and coordinates day to day operations, decision making and the application of resources for emergency management. It has gained national recognition for its ability to effectively handle emergency situations and conduct thorough and realistic self assessments, which has improved performance since Hurricane Katrina. GDEM is an operating division of the Texas Department of Public Safety, as well as a division of the Governor's office.³⁶

Responsibilities of GDEM include assisting cities, counties, and state agencies in planning and implementing their emergency management programs. These comprehensive emergency management programs include pre and post-disaster mitigation of known hazards to reduce their impact; preparedness activities, such as emergency planning, training, and exercises; provisions for effective response to emergency situations; and recovery programs for major disasters. GDEM is also responsible for supporting development of the Governor's Homeland Security Strategy and implementing programs and projects to achieve state homeland security goals and objectives. The Governor has designated the Division to serve as the State Administrative Agency (SAA) for US Department of Homeland Security homeland security grant programs in Texas.

³⁴ Ibid.

³⁵ Testimony of David Dewhurst, Lt. Governor of Texas, Before the U.S. Senate Ad Hoc Subcommittee on Disaster Response, September 23, 2008.

³⁶ Ibid.

GDEM officials compiled and reported statistics regarding the most recent implementation of emergency management and disaster planning, Hurricane Ike. Many disaster first responders included law enforcement, emergency and medical professionals. In fact, local responders assisted 5,798 Texans; rescuing over 3,540. Approximately 305 shelters opened across the state; and thirty-eight volunteer organizations lend their services to those in need. More specifically, the State of Texas took the following actions before Hurricane Ike made landfall

- Evacuated 1.2 million people, including 12,500 individuals with special needs by ambulances and C-130 aircraft;
- Pre-positioned equipment, aircraft, supplies, and other assets which had to be moved over 300 miles as we followed the hurricane from Brownsville to Galveston and Beaumont and East Texas;
- Conducted the largest search and rescue operation in Texas history which saved more than 3,540 lives. For the first time, Texas started flying search and rescue missions before hurricane landfall, in just one example rescuing 120 stranded people on Bolivar Peninsula;
- Supported 254 shelters across Texas, which at the height of the evacuation housed up to 40,000 people;
- Coordinated the distribution of food, water, ice and medicine, at 60 points of delivery (POD) sites throughout the affected area. Importantly, the PODs were intended for mass deployment into heavy impact areas, such as the cities of Galveston, Orange, Bridge City, and Chambers County and Southeast Harris County.³⁷

Texas Military Forces

The Texas Military Forces (TMF) serve as the key manpower resource for disaster relief as a vital part of the state's emergency preparations and response to major disasters. Accordingly, TMF responds at the request of the Governor's Division of Emergency Management. In FY 2008, TMF responded to 21 events with over 13,000 personnel. Recently TMF budget allocations from the federal government have decreased, despite an increased mission response and efforts. This is important since manpower is equally split between state and federal salary costs, in regards to deployed personnel. Additionally, TMF was asked to provide 8 training personnel to enhance the State's disaster response capabilities. In order to comply with this request TMF requires more funding for the training for State missions, especially since federal funds cannot be applied to this training.³⁸

The Texas State Guard (TXSG) is a rapidly deployable, highly mobile emergency action force, capable of a wide range of augmentation missions in Direct Support to Civilian Authorities (DSCA). As the third branch of the State Military Force, the Texas State Guard has unique experience providing DSCA throughout several hurricanes and many other disasters. It maintains emergency management expertise through the Military Emergency Management designator and has multiple expert and senior level soldiers. Members are locally based and can respond to emergencies, within 2 hours of notification, anywhere in the state. Consequently,

³⁷ Testimony of Jack Colley Chief, Governor's Division of Emergency Management, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

³⁸ Testimony of Major General Allen Dehnert, Assistant Adjutant General, Texas Adjutant General, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008

TXSG advises that command headquarters are located in larger cities for operation, while smaller hubs are located in surround areas.³⁹

The State Guard interacts with local leadership, staffs local shelters, provides fill-in capability for shortfalls in the local emergency management structure, and runs local Points of Distribution. TXSG also provides communication support to supplement the National Guard communications, damage assessment training, and supplements local authorities, but does not directly police. Additionally, the State Guard has flexibly acquired missions as needed by the local government. Recently, TXSG activated the Special Needs Evacuation Tracking System (SNETS) missions to track special needs evacuees. Lastly, members of the Texas State Guard serve in an unpaid capacity, unless called to state active duty.⁴⁰

Civil Air Patrol

The Civil Air Patrol took over 40,000 aerial photographs, employed 212 volunteers, and flew 350 aerial sorties using 22 aircraft, accounting for 16,841 man hours in support of the State effort with Hurricane Ike. All of this work was done under the direction of GDEM. The Civil Air Patrol also responded to wildfires, Hurricanes Rita and Katrina, 9/11, and the Shuttle loss.

The Civil Air Patrol is a volunteer public service organization that performs emergency missions as well as conducts a youth program and aerospace education programs for teachers and schools. The Civil Air Patrol conducts over 90% of the inland search and rescue in the United States. The Texas Wing has 3100 adult and youth members. Texas has 206 pilots and 424 air crew members. This includes photographers, navigators, radio operators, and other specialties. All are volunteers that work day in and day out to help their communities.⁴¹

Local Government

According to the State of Texas Local Emergency Management Planning Guide (January 2008), “The Mayor of each municipality and the County Judge of each county are designated by Texas law as the Emergency Management Directors for their respective jurisdictions. Emergency Management Directors may designate an Emergency Management Coordinator (EMC) to administer the emergency management program. An EMC for an inter-jurisdictional organization should be appointed by mutual agreement of the Judge(s) and the Mayor(s) concerned.” These documents are required by GDEM to be on file, and this agency provides guidance and follows up on disaster preparation. Current disaster management procedures allow a mayor or county judge to declare a local state of disaster, when appropriate. After such declaration, mayors and county judges may issue orders or proclamations invoking specific emergency powers granted in the Texas Disaster Act. In fact, both city mayors and county judges may order evacuations. The ability to enforce evacuation orders is quite problematic as there are no mechanisms to enforce evacuation, as explained later.

³⁹ Testimony of Major General Christopher Powers, Commanding General, **Texas State Guard**, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008

⁴⁰ Ibid.

⁴¹ Letter from Lt. Col. Gordie L. White, Governmental Advisor, Civil Air Patrol Texas Wing

Other state agencies outside of law enforcement contribute to disaster preparedness and planning as well. Below is a snapshot situation report or more comprehensive look at each state agency's involvement in Hurricane Ike disaster relief and recovery efforts as of October 28, 2008, a month and a half after Hurricane Ike made landfall:

- **Texas Health and Human Services Commission (HHSC):** HHSC currently has 26 staff in the field working in the Disaster Recovery Centers. Twenty staff currently working the disaster Help Line and additional 70 staff processing disaster grants for Other Needs Assistance Disaster Grant program. Total grants processed to date 35,433.
- **Texas Department of Insurance (TDI):** Texas Department of Insurance (TDI) staff is providing insurance assistance at Disaster Recovery Centers. TDI has issued several bulletins to the insurance industry relating to Hurricane Ike. The TDI Hurricane Ike resource page now includes a consumer alert regarding contractors and repairing or rebuilding one's home. That web page also contains information regarding the TDI bulletins, FEMA payments, the National Flood Insurance Program, claim forms for the Texas Windstorm Insurance Association (TWIA) and the Texas FAIR Plan, safety tips for consumers. In addition, TDI's toll-free Consumer Help Line (1-800-252-3439) is maintaining extended hours, operating Monday – Friday 8 a.m. to 5:30 p.m. and Saturday 9 a.m. to 5:30 p.m. TDI has updated its Hurricane Ike Consumer Resource Page on its website at: <http://www.tdi.state.tx.us/consumer/storms/cpmhurrike.html>.
- **Texas Procurement & Support Services (TPASS):** TPASS continues to support the Base Camp on Galveston Island. TPASS will keep necessary equipment on-site until further notice.
- **Texas Department of Transportation (TXDOT):** TxDOT is in the process of removing debris from highway rights of way. TxDOT continues to inspect roads and bridges for damage assessments and monitor road conditions throughout the affected areas. Road conditions continue to be updated on the TxDOT Web site. TxDOT is replacing damaged/missing signs, signals and their supports.
- **Texas General Land Office (GLO):** GLO Coastal Resources staff continued to assist local governments and citizens with questions regarding the GLO emergency rules and the emergency permitting process.
- **Texas Office of Attorney General (OAG):** The OAG Operation Safe Shelter (OSS) Hotline queried 12,860 names through the Texas Department of Public Safety Sex Offender Registration Database. Of those names, 31 were confirmed Sex Offenders (matches).
- **Texas Department of Housing & Community Affairs (TDHCA):** TDHCA is working with FEMA and GDEM to manage transitional housing issues. TDHCA personnel continue to staff the FEMA Joint Field Office for key meetings. Hurricane housing resources for individuals and communities are on the agency's website. Community action agencies within the affected counties are assisting hurricane affected citizens. Information is ready for local communities regarding possible post-disaster housing assistance and TDHCA will provide any technical assistance necessary to help applicable communities apply for post-disaster housing funds

- **Texas Workforce Commission (TWC):** The Liberty workforce center remains closed. A temporary workforce center site was established in Liberty County on 10/09/08 until repairs are completed on permanent location. Workforce Boards are making decisions about whether to dedicate staff to a DRC/MDRC location based on traffic volume in those locations. Staff will continue to assist as needed and ensure that information is available about workforce services and UI/DUA if traffic does not warrant staff being located at a site full-time. In addition to the DRCs and MDRC's, all workforce centers are open and anyone may visit our centers to request assistance with UI/DUA filing online or with job search opportunities. TWC has taken approximately 216,785 claims. (91,632 regular initial claims; 95,335 regular initial claims where the separation was listed as disaster impacted; 17,178 EUC initial claims and 12,640 DUA initial claims). Congressman Al Green has scheduled 3 Town Hall Meetings over the next two weeks and Congresswoman Sheila Jackson Lee will hold another Town Hall meeting later this week. Staff from Workforce Solutions (Gulf Coast) will be available to provide information about applying for UI/DUA claims and workforce services that are available at each of the meetings. Computers will be available for constituents wanting to file online. If possible at any of these events, UI will establish dedicated telephone lines to the TWC Telecenter that will be used to help attendees apply for UI/DUA. Unemployment Insurance Support Services (UISS) field staff continue to distribute flyers and information about UI/DUA throughout the affected areas. As of October 20, 2008, total recovery and cleanup jobs entered by TWC state staff, local staff, and/or employers are 212 postings, 1069 openings, 10,426 referrals and 358 hires. As of this report 26 Ike participants have been enrolled to fill NEG temporary disaster relief assistance jobs. Please check the "Hurricane Ike" link with the latest Workforce information: <http://www.twc.state.tx.us/news/ikeinfo.html>
- **Baptist Child and Family Services (BCFS):** Baptist Child Family Services (BCFS), at the request of the State of Texas, has relocated all shelter guests from the Red Cross Shelter at Alamo Elementary School to the Galveston County Unified Shelter. A security plan has been established and will continue to be evaluated to ensure adequate security is maintained. Case Management activities began on Monday, October 27, 2008, to provide assistance to shelter guests.
- **Texas Department State Health Services (DSHS):** DSHS is providing EMS and medical staff to support BCFS with the Galveston shelter activities.

Health

During times of emergency, the Department of State Health Services (DSHS) is responsible for handling radiation response, assisting with medical special needs citizens, and all other aspects of health issues that are encompassed in disasters. Many of DSHS's responsibilities begin before disasters occur, lasting through disaster relief until after recovery efforts are underway. Patient transport during and evacuation is an important aspect of DSHS's pre-disaster planning. The department coordinates patient transport using aircraft, buses and ambulances, among other modes, to evacuate and care for medical needs populations. In addition during times of disaster, DSHS must supplement citizen's regular means of healthcare by providing sustained care with medical personnel.

Recently, DSHS has performed the following disaster response activities: medically special needs population evacuation and transport to shelters, public health risk assessment and monitor of shelters, healthcare facility support and mosquito vector control. DSHS must also address mental health and substance abuse issues during times of disaster.⁴²

Medical Special Needs Population

The busy disaster season of 2008 presented DSHS with many self-assessment opportunities. In fact, the department discovered they improved preparations of evacuating medical special needs individuals and utilized a state-wide evacuation tracking system. In addition, the department also better utilized facilities and increased EMS capacity for disaster response. They were less reliant upon volunteers and produced a faster medical supply, medicine and health professional staff distribution to shelters. The department also conducted case management teams in medical special needs shelters. DSHS identified challenges including the identification of home-bound medical special need individuals who self-evacuate or stay and need care for chronic health needs. Due to medication and other medical special needs services like dialysis, a service that is often not available in shelters, identification is key. Furthermore, DSHS found it difficult to maintain adequate acuity levels for medical special needs evacuees. This population was much sicker than initially expected. The scarcity of specialized medical special needs assets, especially those needed to accommodate morbidly obese medical special needs evacuees posed a challenge as well. Repatriation is a difficult task, especially of medical special needs evacuees within Texas and neighboring states. Currently, many trauma hospitals and regional healthcare systems face problems of staffing and provide bed space for surge capacity. This problem is only exacerbated during times of disaster.⁴³

Energy

During Hurricane Ike, one of the major concerns was energy sustainability and restoration. Energy providers are critical during times of emergency, for obvious reasons. Without power, many relief measures, such as rescue communication and information distribution, and entities such as law enforcement and medical professionals cannot operate or are severely hampered. Electrical grid issues also affect the availability of fuel and the performance of water treatment plants -- facilities that provide necessities such as water and sewage services.

The process and priority of energy restoration is critical during disasters. Many plans issue top priority of restoration to those facilities used for such services as healthcare, public safety and health. These include hospitals, water treatment plants, police department, fire stations, etc. Facilities like schools and courthouses would follow. The next restoration priority includes service to customers whose power is out due to damage to major power lines, which serve thousands of customers. Next, customers whose power outage was caused by damage to smaller sections of power lines serving hundreds. The priority of restoration continues to those with damage to equipment that serves less than ten customers. The timeline of restoration is directly related to the intensity and damage of the disaster event.

⁴² Testimony of Dr. David Lakey, Commissioner, Texas Department of State Health Services, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008

⁴³ Ibid.

Specifically, Hurricane Ike left 2.8 million customers without power. Most were restored within a three week time period. Fourteen thousand additional workers were brought into Texas to help with the restoration effort as a result of mutual assistance agreements within and outside of the state.⁴⁴

As previously stated, sustainable energy is critical to infrastructure like schools, hospitals, and police departments. These facilities should develop more proactive measures to ensure a more sustainable energy source. In fact, the Public Utility Commission is studying ways to improve electric and telecommunications infrastructure, and minimize the utilities' downtime occurring as a result of Gulf Coast hurricanes. Some of these measures include underground or above flood plain power lines and modernized electric grids.⁴⁵

Combined Heat and Power

Alternative energy sources like generators are recommended for all critical infrastructures, Combined Heat and Power (CHP) is a lesser known alternative that according to testimony provides more sustainable energy to critical infrastructure than emergency generators. CHP is the simultaneous production of electricity and heat from a single fuel source.⁴⁶ Currently, the largest medical center in the world, Texas Medical Center in Houston, utilizes combined heat and power. Thermal Energy Corporation (TECO), the largest campus district energy chilled water system in the country provides combined heat and power service to the Texas Medical Center. TECO testified they have not had a service interruption since 1992 and have only experienced seven hours of total outage in over 30 years of operations. CHP may be a viable energy source that enables facilities to become self sufficient during times of natural disaster and may also allow for more efficient and cost efficient energy use during times of normal operation.⁴⁷

Agriculture

During Hurricane Ike, the State incurred agricultural losses of \$433 million as of late October 2008. This figure does not consider losses due to stunted business activity. The Honorable Todd Staples, Texas Commissioner of Agriculture, estimates a \$900 million cost for the entire recovery effort. Fifteen to twenty thousand livestock were displaced; but most were found, resulting in a loss 5,000-8,000 head of cattle. On the humanitarian front, the Texas Department of Agriculture provided food through the Texas Food Bank network to shelters. It was necessary for the agricultural industry to move the cattle away from the high points where they gathered, especially when these locations were on highways. Consequently, *Operation No Fences* developed a great deal of coordination among state agencies like Texas AgriLife Extension and the Texas Animal Health Commission. In addition to livestock, impacted industries include the rice, hay, forestry, nursery, fishing, and poultry industries. For instance, Hurricane Ike totaled \$11 million in direct losses of rice crop and about 1.5 million acres of devastated pastureland.

⁴⁴ Testimony of John Fainter, President & CEO, Association of Electric Companies of Texas, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008

⁴⁵ Project NO 32182, PUC Investigation of Methods to Improve Electric and Telecommunications Infrastructure to Minimize Long Term Outages and Restorations Costs Associated With Gulf coast Hurricanes, Public Utilities Commission of Texas, August 11, 2006, p. 7.

⁴⁶ <<http://www.epa.gov/chp/basic/index.html>>, Combined Heat and Power Partnership, US. Environmental Protection Agency website.

⁴⁷ Testimony of Steve Swinson, President & CEO, Thermal Energy Corporation, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008

To promote better coordination, the Texas Department of Agriculture has scheduled disaster preparedness conferences to take place before storms reach landfall. Of interest, the State currently does not have an organization that is established to respond to agricultural needs in times of disaster, and industry partners are forced to fill this gap.⁴⁸

Judiciary

In response to Hurricanes Katrina and Rita, the Texas Supreme Court created the Task Force to Ensure Judicial Readiness in Times of Emergency. According to a survey by the Office of Court Administration, most Texas courts do not have a disaster response plan, despite that fact that the Judiciary needs the capability to perform essential functions, especially during times of emergency. Such issues as child protection, supervision of the incarcerated, criminal adjudication, property repair and demolition, and especially, insurance coverage and property damage disputes need to be resolved in a timely manner. Accordingly, the Task Force was charged with the following:

- Identify existing gaps in court security, continuity of operations and other preparedness and response policies within the Texas judiciary.
- Design emergency management program elements, oversee the program, and facilitate outreach to internal and external stakeholders
- Develop templates of response plans for adoption by individual courts, including an annex for a pandemic, evacuation a critical incident plans.

Currently, Texas courts are operating under an interim plan which is designed to assist local judicial officials to continue essential operations during emergencies. Interim plans include a template for actions including orders of succession, authority delegation, loss of courthouse, and alternate courthouse site use. Importantly, the Texas judiciary should not be forgotten in matters of emergency preparedness. Many issues that arise during disasters require judicial assistance. For example, execution of mandatory orders of evacuation and decisions regarding insurance claims and disputes require a functioning judicial system.⁴⁹

Claims and Loss Mitigation

To expedite consumer assistance, the Texas Department of Insurance (TDI) deploys mobile outreach teams and brings together volunteers for disaster recovery centers commissioned by the Federal Emergency Management Agency (FEMA). In fact, TDI has opened disaster recovery centers in non-traditional venues, like Home Depot, since local businesses tend to open before FEMA has established more traditional disaster recovery centers. TDI also extends helpline hours during disasters, establishes storm specific call centers, and posts bulletins on insurance claim timeframes. TDI staffed thirty-six disaster recovery centers during and after Hurricane Ike. The Department also coordinates with the Texas State Disaster Coalition to better understand what is happening in the field to anticipate and expedite timely claim processing.

⁴⁸ Testimony of Todd Staples, Commissioner, Texas Department of Agriculture, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008

⁴⁹ Testimony of Olen Underwood, Presiding Judge, Second Administrative Judicial Region of Texas, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

Specifically for Hurricane Ike, TDI estimates over 430,000 claims, including commercial and residential. Approximately 400,000 of those are due to personal home and auto claims total. Insured claims estimates range from \$6 to \$11 billion.⁵⁰

Many insurance companies that responded to Hurricane Ike are nationwide and have implemented strategies in various areas. Subsequently, these companies have several thousand experienced claims adjusters and mobile units, including RV-type vehicles and satellite communication networks. In fact, insurance companies sent several thousand claims adjusters into the Hurricane Ike storm area using effective tools such as satellite hookups. Timely claims adjustment and processing is extremely important during disasters. Insurance claims are impeded when adjusters are denied reentry access to the disaster site and cannot begin processing. Furthermore, numerous requests for claims extensions deadlines are made during disasters. Typically these requests are granted by the Commissioner, but this process can become confusing as there is no uniform or standard deadline for claims submission.⁵¹

Evacuation

As previously stated, the Governor can *recommend* evacuation, but the authority belongs to county judges and mayors. Currently, a legal mechanism to enforce evacuation does not exist. In fact, residents that refuse to evacuate and place themselves at risk often require the assistance of emergency rescue and recovery teams, putting those teams at risk as well. Because of this fact, California and North Carolina have enacted legal guidelines for evacuations that enforce misdemeanor penalties against those that ignore evacuation orders. According to California Penal Code, Section 409.5 (c):

Any unauthorized person who willfully and knowingly enters an area closed pursuant to subdivision (a) or (b) and who willfully remains within the area after receiving notice to evacuate or leave shall be guilty of a misdemeanor.

According to North Carolina statutes regarding civil liability of persons who willfully ignore a warning in a disaster:

In a disaster as defined by G.S. 166A-4, a person who willfully ignores a warning regarding personal safety issued by a federal, State, or local law enforcement agency, emergency management agency, or other governmental agency responsible for emergency management under this Article is civilly liable for the cost of a rescue effort to any governmental agency or nonprofit agency cooperating with a governmental agency conducting a rescue on the endangered person's behalf if:

- 1. The person ignores the warning, and: (i) engages in an activity or course of action that a reasonable person would not pursue, or (ii) fails to take a course of action that a reasonable person would pursue;*
- 2. As a result of ignoring the warning the person places himself or herself or another in danger; and*
- 3. A governmental rescue effort is undertaken on the endangered person's behalf.⁵²*

⁵⁰ Testimony of Mike Geeslin, Commissioner, Texas Department of Insurance, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

⁵¹ Testimony of Beaman Floyd, Executive Director, Texas Coalition for Affordable Insurance Solutions, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

⁵² §166A-15.1, North Carolina Emergency Management Act

New Jersey has enacted similar misdemeanor penalties as well; in fact, many states specify that violations of the emergency statute are misdemeanors.. In some instances, local police have often asked those who refuse to evacuate for contact information for next of kin to impress on them the gravity of the risk they are assuming. Some legal scholars have recommended this as a more practicable and effective use of police authority.

During Hurricane Ike, Governor Perry issued disaster declarations for eighty-eight counties and President Bush declared the region an emergency, making federal funds available. Local officials ordered evacuations for parts of counties such as Galveston, Aransas, and Matagorda. Nearly 1,350 buses and several ambulances and paramedic buses were available for evacuation transportation near Houston, Matagorda County, Nueces County and Victoria County.⁵³ Many local officials, Galveston County specifically, reported the evacuation went smoothly, since the number of evacuees was smaller than expected and those who were not in harm's way stayed home. Coordination occurred more efficiently as well, due to lessons learned from Hurricane Rita and leadership from the Governor's Division of Emergency Management.⁵⁴ But several problems still persist, including the evacuation authority, medical special needs evacuation and reentry.

The decision to evacuate county jails also relies on county judges, sheriffs and county commissioners. Most recently during Hurricane Ike, the decision not to evacuate the Galveston County jail resulted in conflicting reports surfacing regarding whether minimum jail standards were maintained. These standards continue to apply during any disaster; consequently, the decision not to evacuate does not reduce the burden of meeting minimum jail standards.⁵⁵ More than 1,300 inmates from the Texas Correctional Institutions Division's Stevenson Unit in Cuero were evacuated to facilities in Beeville and Kenedy. 597 were transferred from the substance abuse Glossbrenner Unit in San Diego, in south Texas, to Dilley.⁵⁶

Medical Special Needs

The Department of State Health Services is responsible for patient transport during an evacuation. Using aircraft, buses and ambulances, among other modes, the department evacuates and care for medical needs populations. In fact, Corpus Christi officials began the evacuation process for medical special needs residents, supplying buses to transport them out of town 2 days before Hurricane Ike made landfall.⁵⁷ Federal rules on National Disaster Medical System air-evacuation assets are restricted to those who are hospitalized; this is a significant limitation on the evacuation process.⁵⁸

⁵³ *Texans Evacuate Coast Ahead of Ike*, September 11, 2008, CNN.com
<http://www.cnn.com/2008/US/weather/09/10/hurricane.ike/index.html> .

⁵⁴ Testimony of Jim Yarbrough, Judge, Galveston County, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

⁵⁵ Data submitted to Senate Committee on Transportation and Homeland Security upon request

⁵⁶ *Texans Evacuate Coast Ahead of Ike*, *ibid.*

⁵⁷ *Ibid.*

⁵⁸ Testimony of Dr. David Lakey, Commissioner, Texas Department of State Health Services, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

The 211 system is a great asset for the state during evacuation and sheltering process. According to Galveston County Judge Jim Yarbrough, many buses were available to evacuate special needs citizens because of the resource.⁵⁹

Reentry

Many local and state officials cite reentry as a source of confusion during the evacuation process. Often county, city and DPS officials have not coordinated or consulted each other for agreement of who is allowed into the disaster region. Whether it is claims adjusters or residents who need medication that was left in their home, these decisions to allow reentry should not be made arbitrarily. General protocols need to be constructed with coordination from all entities with reentry authority.

Contraflow and the Texas Department of Transportation

In accordance of Executive Order RP 57, the Texas Department of Transportation (TxDOT), in conjunction with the Department of Public Safety, developed and refined contraflow plans in response to hurricanes. Contraflow involves opening all main lanes on an evacuation route for vehicles leaving the impacted area. Opening all lanes for outbound traffic allows for the movement of the maximum number of vehicles in the shortest amount of time. It also allows for almost twice as many vehicles to depart an evacuation zone as normally would be possible. Interestingly, the decision to contraflow a road is made by local emergency management officials, not TxDOT. Currently, contraflow plans exist for specific routes. State officials have also developed plans for their local jurisdictions. During times of emergency, TxDOT can also suspend all road projects and clear all routes in predicted impact regions. TxDOT also pre-stages signage and equipment along the routes to prepare for the evacuations and re-entry and clean-up phases. Other disaster management tasks organizing comfort stations and courtesy patrol units. To support the flow of traffic, TxDOT coordinates with the railroad industry and overweight trucks. After hurricanes specifically, the Department tests roadways and bridges for public safety. Another immediate post-event responsibility includes signage repair for safe re-entry. Estimated damage to federal and state roadways after Hurricane Ike are expected to exceed \$70 million.⁶⁰

State Disaster Relief Claims and Loss Mitigation

Federal assistance is absolutely vital for disaster recovery. More specifically, approval of the FEMA and the Stafford Act for 100% mitigation, levels A-G, are crucial. Without it, small communities such as Jamaica Beach may not be able to recover from Hurricane Ike. For instance, the city levies roughly \$600,000 in taxes per year, but estimated costs to clear out Jamaica Beach's canals are about \$10 million.⁶¹

⁵⁹ Testimony of Jim Yarbrough, Judge, Galveston County, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

⁶⁰ Testimony of John Barton, Assistant Executive Director of Engineering Operations, Texas Department of Transportation, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

⁶¹ Testimony of Victor Pierson, Mayor, City of Jamaica Beach, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

Texas was granted Category A, Debris Removal, 100% reimbursement for two weeks dating back to the Disaster Declaration, but as Lieutenant Governor David Dewhurst observed, that is insufficient time. While Texas was granted 100% reimbursement for Category B (emergency protective measures, such as shelter, search and rescue, and Texas Task Forces 1 and 2), the state still needs 100% reimbursement for the remaining categories: Category C – Roads and Bridges; Category D – Water Control Facilities; Category E – Buildings and Equipment ;Category F – Utilities; and Category G – Parks, Recreational Facilities, and other items. Many officials, notably Lieutenant Governor David Dewhurst, Senator Tommy Williams and Homeland Security Director Steve McCraw have requested that FEMA treat Texas with the same standard of reimbursement as that seen during Hurricane Katrina in Louisiana. Without 100% mitigation, the twenty-five percent that is left to local jurisdictions totals in the billions of dollars, a price tag many communities consider insurmountable.⁶²

FEMA is a great resource for states affected by emergencies and disasters, but Senator Williams gave voice to concerns that FEMA is "letting the clock run out" by delaying reimbursement decisions beyond the deadline; thereby negating reimbursement responsibilities.⁶³ Furthermore, the length of Individual Assistance deadlines may not be sufficient. More specifically, Texas was granted 100% federal cost share for evacuees for 30 days; but this short period is not effective. The city of Galveston with 57,000 inhabitants, the city of Orange with more than 18,500 inhabitants, plus other heavily impacted areas are greatly devastated. Most homes and businesses have been damaged. During the 30 day period most electricity systems were not operating, most water facilities were damaged, and most sewage service and treatment facilities were down. It is estimated to take up to six months to make Galveston, Orange and other heavily impacted areas totally habitable. Individual Assistance deadlines need to be extended until the heavy impact areas are rebuilt and totally habitable.⁶⁴

Due to the severe nature of Hurricane Ike, the Texas Department of Insurance estimated over 430,000 claims were filed, including commercial and residential property. Approximately 400,000 of those are due to personal home and auto claims. Insured claims estimates range from \$6 to \$11 billion.⁶⁵ An important aspect of loss mitigation includes personal claims for wind and water damage. Currently, Texas windstorm insurance policies do not cover any loss or damage caused by or resulting from flood, surface water, waves, storm surge, tides, tidal water, tidal waves, tsunami, seiche (backflow when a storm has passed), overflow of streams or other bodies of water, or spray from any of these, all whether driven by wind or not. The State could see an unprecedented number of lawsuits stemming from the wind insurance exclusion of certain water damage, resulting in a large toll on the State's resources.

⁶² Testimony of Jack Colley, Chief, Governor's Division of Emergency Management, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

⁶³ Comments made by Senator Tommy Williams, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

⁶⁴ Testimony of David Dewhurst, Lt. Governor of Texas, Before the U.S. Senate Ad Hoc Subcommittee on Disaster Response, September 23, 2008.

⁶⁵ Testimony of Mike Geeslin, Commissioner, Texas Department of Insurance, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

Shelters

Due to a lack of FEMA housing assistance, shelters played a vital and sustained role in the State's disaster relief. Many reports criticize FEMA for taking too long to enroll Hurricane Ike victims into the Disaster Housing Assistance Program. By the end of October, almost a month and a half after the hurricane, only 500 of 6000 families were referred. In fact, U.S. Department of Housing and Urban Development officials claimed FEMA failed to send referral letters to public housing authorities. Others reported that letters of notification were mailed to victims' addresses in the disaster region. Furthermore, FEMA was unable to deliver its guarantee of 300 trailers per week, due to inspection and permitting standards; in fact, only 200 trailers had been made available six weeks after the storm. While FEMA offers a hotel assistance program, many of the affected communities do not have adequate hotel vacancy capacity; therefore, hotel reimbursement or vouchers are not helpful. Once a family is deemed ineligible for housing assistance, FEMA discontinues hotel reimbursement. Even eligible families face a deadline of November 30 for hotel reimbursement.⁶⁶

Issues of population integration arose during Hurricane Ike. People with various backgrounds sought refuge in shelters; some of these backgrounds may have posed security or health risks or considerations. In Waco, reports surfaced that fights occurred inside an old Wal-Mart used as a shelter during Hurricane Ike. One fight in Tyler may have affected a mentally retarded youth.⁶⁷ Others reported that sex offenders were allowed to shelter with families, while some sex offenders were refused shelter assistance. As temporary housing facilities, it is difficult for shelters to accommodate specific populations such as the mentally ill, medical special needs and sex offenders. Volunteer organizations like the American Red Cross and other Volunteer Organizations Active in Disasters (VOAD) cannot open shelters until the disaster has passed, which may also delay shelter services. Barbara Bass, Mayor of Tyler, testified to the importance of local officials being given authority to control where evacuees are go within their communities. This could provide for better shelter assignment, with accommodations more befitting evacuees with special needs. Witnesses called for county officials and sheltering organizations to coordinate guidelines such as a minimum time for evacuating, constructing more hardened shelters closer to the Gulf of Mexico, utilizing state facilities first, and having more organized, trained shelter teams.⁶⁸

Long term sheltering needs must be considered as well. During Hurricane Ike, many sheltering facilities that were used during Hurricane Dolly and Gustav were no longer available. Convention centers no longer offered use of their facilities since lost revenue is not reimbursable by FEMA. School and church facilities stepped up and offered shelter assistance, but may not in the future due to concerns about funding and security. Some church facilities were greatly damaged during their use as shelters, and have reported they will not offer such assistance in the future.

⁶⁶ *Texas Residents Criticize FEMA for Slow Paced Response to Needs of Ike Victims for Shelter*, October 30, 2008, AllHeadlineNews.com <<http://www.allheadlinenews.com/articles/7012846245>>.

⁶⁷ *Hurricane Ike evacuees complain of violence at Tyler shelter*, October 1, 2008, Dallas Morning News.

⁶⁸ Testimony of Barbara Bass, Mayor, City of Tyler, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

Schools face difficulties in offering campuses for shelter use for both security and funding reasons. For example, Hurricane Ike shelters housed victims during the school year, so schools were forced to cancel classes or allow children to attend class with evacuees on campus.⁶⁹

Public Health Emergency Preparedness Surge Capacity

Disasters and emergencies are placing an ever-increasing burden on hospitals, health care providers, and the larger health care system. Following a disaster or public health emergency, hospitals are called upon to treat three kinds of patients: home bound individuals and those with chronic health care problems who can no longer address their health care needs at home, especially pediatric and geriatric patients, possibly involving specialized equipment such as respirators; patients directly affected by the disaster or public health emergency, both from the normal service area and beyond such as evacuees; and patients the hospital sees on a daily basis, independent of a disaster or public health emergency. Even with dedicated, vital, and successful volunteer efforts from organizations such as the Medical Reserve Corps, surge capacity and funding are every day issues that are only exacerbated further by the influx of disaster victims and evacuated patients, especially with Texas having only one trauma center per one million residents -- one of the lowest ratios in the nation. Intensive care unit beds are filled to 98-99 percent; so disaster victims do not have adequate emergency care available. Parkland Health and Hospital System in Dallas alone has spent \$75,000 to \$300,000 in capital dollars annually since 2004 to upgrade disaster response capabilities.

Sustainability of electricity, fuel, and water is also a challenge. Further, while mutual aid allows for non-local EMS services to be reimbursed upon returning from disaster relief work, it does not apply to hospitals that deploy to disaster areas and deal with the increase in population from disaster evacuation locally. Healthcare systems cannot provide adequate care to disaster victims and evacuees if they cannot provide a sufficient level of care under normal circumstances.⁷⁰

Social Distancing

Public health emergencies including communicable diseases such as measles, smallpox, pneumonic plague and influenza can spread rapidly in a population by airborne or person-to-person contact. Whether the illness occurs naturally or as an act of terrorism, such infectious diseases can cause a great deal of illness and mortality. Consequently, these diseases have serious public health and homeland security implications for the State. Pandemic influenza is perhaps the greatest threat to the state in terms of magnitude and impact. Social Distancing is an effective tool in containment of such a disease pandemic. In fact, the Spanish influenza pandemic of 1918-1919 proved that cities which implemented a variety of social distancing measures, kept them in place for sufficient time, and were extraordinarily stringent in their implementation, experienced rates of illness lower than those cities who did not implement such strategies, waited too long to implement them, or removed the measures too soon.⁷¹

⁶⁹ Testimony of Pete Baldwin, Emergency Management Coordinator, Travis County, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

⁷⁰ Testimony of Jorie Klein, Director of Trauma Services, Parkland Health and Hospital System, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

⁷¹ Written testimony of Dennis M. Perrotta, PhD, CIC, pg. 3

There are a number of other tools which may be used by responders in the event of a flu pandemic in Texas, including antiviral medications, vaccinations, early detection, planning and training exercises, and effective communication.⁷² In contingency preparation for a Texas flu pandemic, the Texas Legislature has appropriated \$10 million toward an antiviral cache which will bring the State's total number of courses to over 800,000.⁷³ The Texas Department of State Health Services, in conjunction with the Centers for Disease Control, recently examined Texas' preparedness for pandemic influenza, looking specifically at agency planning. The results of this examination will be presented to Congress and may impact future preparedness funding.⁷⁴

Social distancing is a means of limiting the health effects of such outbreaks on the population of the State. "It is a measure taken to increase the space between people and reduce the frequency of contact among people...[to] reduce the number of healthy persons who become infected and ill."⁷⁵ Specifically, because influenza viruses do not travel very far from the ill person who sneezes or coughs, the result of social distancing can be fewer illnesses overall or a slowing of the progress of the epidemic.⁷⁶ Implementation of social distancing in Texas would apply separately to adults and children. Regarding adults, workplace measures and postponement of mass gatherings are the most effective preventative steps. Regarding children, closing schools may be the most effective preventative steps as they are the most efficient spreaders of respiratory viruses. Timing and uniformity are the critical aspects of implementation and the most difficult issues relating to implementation would likely relate to community infrastructure, such as hospitals, public safety, and public works facilities. The greatest impact of school closures may be workplace absenteeism since parents and guardians would stay home to take care of their children.⁷⁷

There are a number of specific social distancing strategies which may be applied to stem the spread of influenza. Those include proper coughing etiquette and hand-washing, isolation of ill individuals, voluntary home quarantine of those exposed to ill or with probable flu, closing schools and childcare programs, canceling public events, staggering work hours or telecommuting, and developing workplace leave policies that support adherence to non-pharmaceutical interventions.⁷⁸ A number of legal issues must be considered regarding the use of social distancing. As pointed out by the Social Distancing Legal Review Project carried out by the Association of State/Territorial Health Officials and the Centers for Disease Control, restrictions on people's movement, curfews, inter-jurisdictional cooperation in restricting movement, closure of public places, and mass prophylaxis readiness constitute legal concerns which must be addressed before implementation of a social distancing program.⁷⁹ A further issue which must be considered is the altered standard of care available to patients in the event of a pandemic. This may result in lower nurse-to-patient ratios, especially at alternate care sites. Also, allocation of scarce resources such as ventilators may be an issue.⁸⁰

⁷² Testimony of Dr. David Lakey, Commissioner, Texas Department of State Health Services, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Testimony of Dr. Dennis Perrotta, Former State Epidemiologist, Texas A&M Health Science Center, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Social Distancing presentation by Dr. David L. Lakey, 10/27/08, pg. 8

⁷⁹ Ibid.

⁸⁰ Ibid.

Finally, various emergency rules may need to be suspended, such as requirements for supervision by licensed professionals or non-licensed personnel dispensing antivirals or giving injections.⁸¹

Radio Interoperability

In 2007, Governor Rick Perry appointed the Texas Radio Coalition as the governing body for the Texas Statewide Communications Interoperability Plan to ensure oversight of the public safety communications interoperability plan in Texas. Responsibilities include making official recommendations to the Governor of Texas, making official recommendations to the Texas Homeland Security Director, and the Governor's Division of Emergency Management. In April 2008, the Texas Statewide Communications Interoperability Plan was approved by the US Department of Homeland Security Office of Emergency Communications (OEC). In fact, OEC deemed the Texas plan one of the top plans in the country. Over the next year Texas' 24 Councils of Government will be authoring regional interoperability plans to align those plans with the statewide plan. Over the next seven years, an estimated \$813 million will need to be spent to achieve the Governor's goal, the APCO Project 25 digital interoperable communications standard, by 2015. Texas is responsible for \$420 million. Accordingly, this proposed schedule of Project 25 conversion provides for a consolidated figure of regional systems whereby all jurisdictions would compile and share resources, thus reducing the overall cost.⁸²

Radio interoperability and the inability to communicate is a major concern for many first responders. For example, seventy DPS troopers were sent to secure Chambers County. During their mission, the troopers could not communicate with the local sheriff's department. In fact, the troopers could talk to law enforcement in other counties, but not Chambers County.⁸³ Difficulties arise in the implementation of communication systems since those that are best for rural areas are not necessarily efficient for urban areas and vice versa. Similarly, different state and local agencies use systems that are not compatible, making interagency communication even more complex. The cost of equipment and different regional and agency needs are major impediments to radio interoperability.

Coordinated communications are critical to safe and effective operations at any level of government. Without it, command is difficult; lack of communication delays resources and fragments deployment. A coordinated communication group, similar to the GDEM Air Coordination Cell, could assist with controlling communications and reporting situational information on a near real-time basis.

Interestingly, those communications systems using amateur radio were able to communicate with others for the duration of their equipment's battery life during Hurricane Ike. For example, an amateur radio operator at the Galveston Emergency Operation Center provided communications and remained in contact with the State Emergency Operations Center.⁸⁴

⁸¹ Ibid.

⁸² Testimony of Mike Simpson, Statewide Communications Interoperability Plan Coordinator, Texas Radio Coalition, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

⁸³ Testimony of Brian Hawthorne, President, Department of Public Safety Officers Association, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

⁸⁴ Testimony of Lee Cooper, Amateur Radio Emergency Service, Before the Senate Committee on Transportation and Homeland Security, October 27, 2008.

Climate Change

Senator Rodney Ellis brought to the Committee's attention the effects of climate change on the environment. As one of the nation's leading producers of energy, the State of Texas should consider what role energy production and pollution have in the dramatic shifts in climate. The most recent disaster season was especially volatile. If the State does not consider less harmful, pollution-reducing measures of energy production, Senator Ellis advised that storms may become more frequent and severe and result in even more damage to the State and its citizens.

FINDINGS AND RECOMMENDATIONS

1. The committee finds that there have been many improvements in disaster management since Hurricanes Katrina and Rita and that the key state agencies involved in disaster management have been recognized as national leaders in disaster management and should be recognized for their efforts.
2. The committee finds that cooperation among state, regional, and local entities and the private and nonprofit sectors have led to great successes in disaster preparation and response in every area of the state.
3. The committee also finds that there still remains a threat to the citizens of Texas with insufficient safeguards and processes supporting key aspects of the state's disaster planning and its impact on the lives of Texans.
 - a. Across the Board
 - i. The Legislature should require all agencies involved in disaster preparedness and response to conduct after-action reviews after disaster response activities in order to perform timely self-assessment and identify areas for improvement.
 - ii. In order to provide the most flexible response with the expertise available, the Legislature should extend the period for state employees involved in disaster response and recovery to use compensatory time from one year to 18 months.
 - iii. State travel management policies should be revised to provide an exception to the lodging cap for employees impacted by high rates caused by temporary room shortages in disaster areas so that these employees are adequately reimbursed for their lodging expenses when other lodging options are not available.
 - iv. GDEM and other agencies should improve integration of the faith-based community into various aspects of disaster preparation and response with an eye toward inclusiveness.
 - v. The Legislature should consider creation of a State Catastrophe Fund in addition to existing disaster funding mechanisms.

b. Evacuation and Reentry

- i. The Legislature should adopt measures to improve compliance with evacuation orders, including penalties for knowingly failing to evacuate an area under an evacuation order.
- ii. The Legislature should adopt measures to standardize procedures and strengthen the ability to enforce laws regarding reentry into a disaster area.
- iii. The Governor's Division of Emergency Management (GDEM) should continue to refine its evacuation timing and pacing. Due to the unpredictable nature and speed of storm development and movement, statutory guidelines in this area are not recommended.
- iv. The appropriate state officials should seek to have federal rules changed to allow National Disaster Medical System air-evacuation assets to be used for non-hospitalized medical special needs cases in a disaster.

c. Disaster Preparedness

- i. Since disasters and even the delivery of health care rely heavily on networks of regional centers that cut across county boundaries, DSHS should provide the Legislature in the opening days of the 81st Legislature with financing options and operational structures that accommodate delivery systems serving multi-county and cross-county areas that could be expected to be activated for a major health-related disaster.
- ii. The Legislature should consider implementing the recommendations of the Task Force to Ensure Judicial Readiness in Times of Emergency (not available at the time of this writing).
- iii. To help defray local government expenditures made at the request of the State of Texas in the course of disaster response, the Legislature should appropriate sufficient funds to the Disaster Contingency Fund to implement HB 2694 (80th Legislature).
- iv. The Legislature should clarify or repeal Section 418.005, Government Code, regarding emergency management training required of appointed public officers.
- v. The Legislature should encourage governmental entities to seek the provision of continuing education credits for employees or volunteers required to attend disaster training.
- vi. The Legislature should authorize GDEM to recover state preparedness costs for nuclear power plants and other facilities that warrant extensive state and local emergency planning, regular drills and exercises involving state and local personnel, and extensive coordination with FEMA.
- vii. The Legislature should formally authorize the GDEM Disaster Reservist Program and enable the division to enroll, organize, train, and equip a cadre of disaster reservists to augment its staff and provide disaster recovery, hazard mitigation, and community outreach and public information expertise.

- viii. The Legislature should clarify in statute that control over human assets and equipment deployed by the State of Texas rests with the State of Texas.

d. Shelters

- i. The Legislature should direct GDEM, working with public and private sector stakeholders, to establish statewide minimum standards for short and long-term shelter operations, including guidance regarding amenities such as cots.
- ii. The Legislature should direct DSHS to develop guidance for local shelter operations in the area of medical special needs categorization and requirements.
- iii. The Legislature should direct GDEM to ensure that state disaster preparation information resources, including Internet portals, include information on how volunteers can become involved, and require state agencies to cooperate with GDEM in this effort.
- iv. The Legislature should direct GDEM to develop guidance for shelter operations in the area of providing appropriate oversight and segregation for populations such as sex offenders.

e. Health

i. Surge Capacity

- 1. The Legislature should adequately fund regional trauma care facilities so that they are able to accommodate surge, especially during times of emergency and disaster, but also due to local or regional health care demand.
- 2. The Legislature should direct DSHS to develop regional planning for surge capacity, including support for health care workers and volunteers. Development should include input from health care facilities, county officials, and other stakeholders.
- 3. The Legislature should authorize hospitals to be eligible for reimbursement through mutual aid or other sources for deployment of hospital services and evacuee treatment in addition to non-local EMS service reimbursement.
- 4. The Legislature should continue efforts to address health professional shortage areas by increasing the number of nursing graduates.

ii. Medical Special Needs

1. The Legislature should enable an expansion of capability and public awareness programs for the 211 system, including benefits of the system and information about the process of registration and renewal.
2. The Legislature should require public and private facilities serving those who would require assistance in evacuations, such as medical special needs, assisted living centers, nursing homes, and home health agencies, to maintain registry with 211 or a similar system.
3. The Legislature should also require these providers to provide information to volunteers as to how they can participate in care during disasters.
4. The Legislature should require GDEM and DSHS to review post-Hurricane Ike medical special needs plans, from identification through evacuation, transportation, shelter, and care, to repatriation, and report their findings and recommendations in the early days of the 81st Legislature.

iii. Public Health

1. The Legislature should improve the surveillance of influenza virus activity by making the DSHS surveillance program more robust and increasing its coverage across the state.
2. The Legislature should clarify the Governor's legal authority to order mass prophylaxis and the circumstances under which this authority could be exercised (e.g. anthrax exposure).
3. The Legislature should amend the Communicable Disease Act to allow and govern the sharing of information with state or local government entities when necessary.
4. The Legislature should require DSHS to seek qualified expertise in social networking and further explore what will be necessary for the successful implementation of social distancing measuring in our communities;
5. The Legislature should require DSHS to develop a clear vision of how non-pharmaceutical interventions including social distancing will be developed, vetted in our communities, implemented and evaluated. This development should involve stakeholders including local elected, health, school, and law enforcement officials, as well as businesses and religious institutions.

f. Hardening Infrastructure

- i. The Legislature should consider the development of dedicated facilities for disasters, including extreme heat days.
- ii. The Legislature should direct DSHS to identify critical medical infrastructure in disaster-prone areas and recommend measures necessary to fortify existing medical infrastructure to withstand natural disasters common to the region (e.g. elevation for flood plains, fortified structures for hurricanes).
- iii. The Legislature should require GDEM to develop minimum standards of infrastructure fortification for shelters.
- iv. The Legislature should require backup or alternative power supplies or energy sources capable of operating effectively for at least 90 days post disaster on infrastructure such as:
 1. Critical Care facilities: Hospitals, Assisted Living Homes, Dialysis Centers
 2. Schools and Universities
 3. Water Treatment and Distribution Facilities
 4. Gas Stations with more than three pumps.
- v. The Legislature should require electric and utility providers to implement strategies such as more aggressive vegetation management methods prior to and during hurricane season as well as upgrading and hardening facilities in disaster-prone areas.
- vi. The Legislature should prohibit construction of state-owned special needs and detention facilities in high risk areas, and bar construction of new state facilities for special needs individuals (including state schools and residential treatment facilities) and for offenders (including prisons, jails, and youth detention facilities) in hurricane surge zones or floodplains.

g. Insurance

- i. The Governor should consider embedding claims extensions, beyond the typical 15 post-disaster deadline, into the declaration of disaster. This is to promote a uniform timeline for claims processing during a disaster for both consumer and adjuster knowledge.
- ii. To expedite claims processing, GDEM should consider pre-authorizing insurance adjusters for reentry to begin immediate claims processing. GDEM should involve the industry and local authorities in the development of a reentry credential process, either independently of or as part of a larger general reentry control process.
- iii. GDEM should work with FEMA to create uniform guidelines for acceptable home repairs made during disasters. GDEM should also promote public awareness of such guidelines.

h. Agriculture

- i. The Legislature should empower and require the Texas Department of Agriculture to compile an emergency response plan to include disaster preparedness for the agriculture community. This plan should include any assessments or need for training and ways to provide information for recovery, relief and assistance.

i. Radio Interoperability

- i. The Legislature should create a Communications Coordination Group under the overall direction of GDEM to assist with coordination/command during emergencies. Group members should include the Texas Military Forces, DPS, FEMA, ESF #2 Coordinator, telecommunications industry, elements of the National Guard Bureau Joint Command and the Joint Communications Coordination Command, amateur radio (RACES/ARES/MARS), affected city, county and state agencies, and others as appropriate.
- ii. The Legislature should consider the consolidation of radio equipment purchasing into a single state agency, such as the Department of Information Resources, similar to the models currently used for the purchase of state telecommunication infrastructure or infrastructure technology.

Study and make recommendations regarding state and local regulation of billboards. Produce a graphical analysis of current billboards, evaluate objective criteria for locations where billboards can be permitted or prohibited, including but not limited to geographical (corridor or urban/rural), land usage (e.g. industrial), or cultural/historical criteria, and include consideration of the impact on any federal funding.

BACKGROUND

During previous legislative sessions, one of the more controversial transportation issues has revolved around outdoor advertising regulations.

Each session, grassroots activists work to restrict new billboards from various scenic roads throughout the State. Organizations such as Scenic Texas have attempted to change Texas' landscape by promoting legislation that prohibits outdoor advertising on specific roads in unincorporated areas of the State. Scenic Texas has also suggested that all Texas counties have the option to ban billboards, vesting that authority in the county commissioners.⁸⁵

The outdoor advertising industry has previously opposed this legislation as they feel it unfairly singles out their business for county regulation and is improper without the appropriate regulatory infrastructure that is present in cities.⁸⁶ This interim report intends to address all of these issues while making recommendations for future outdoor advertising policy in Texas.

Current Outdoor Advertising Terminology, Laws, and Regulations

Outdoor advertising is currently governed by Chapter 391 of the Texas Transportation Code, which is the Highway Beautification Act (HBA) codified into the Texas Transportation Code. The HBA was enacted by President Lyndon B. Johnson with the assistance of Lady Bird Johnson, and called for the control of outdoor advertising on the federally funded highway system⁸⁷. The HBA was passed in 1965, and was codified as the Texas Highway Beautification Act in 1972 by the Texas Legislature.⁸⁸

Roads in unincorporated areas are covered under the Texas Transportation Code, Chapter 394, in a section referred to as the "Rural Roads Act."⁸⁹ This portion of the Transportation Code was codified in September of 1995 and operates similarly to the Highway Beautification Act.⁹⁰ There are substantial differences between the standards of each, however, due to the fact that they regulate such different areas.⁹¹ Although outdoor advertising along rural roads currently

⁸⁵ Tex. S.B. 137, 80th Leg., R.S. (2007).

⁸⁶ Personal interview, Tim Anderson, Vice President Governmental and Regulatory Affairs - Texas, Clear Channel Outdoor, August 28, 2008.

⁸⁷ Federal Highway Administration, How the Highway Beautification Act Became a Law. U.S. Department of Transportation, (2005), at <http://www.fhwa.dot.gov/infrastructure/beauty.htm>.

⁸⁸ TEX. TRANSP. CODE ANN § 391 (2008).

⁸⁹ TEX. TRANSP. CODE ANN § 394 (2008).

⁹⁰ Email from Cary Choate, Government and Public Affairs Division, Texas Department of Transportation, citing Gus Cannon, Resource Management Section Director, Right-of-Way Division, Texas Department of Transportation, September 12, 2008.

⁹¹ Ibid.

makes up less than 6% of the total, the saturation of outdoor advertising space along the highways could lead to its increase in the future.⁹²

The Texas Department of Transportation is charged with administering and enforcing both the HBA and the Rural Road Act. As a result, if Texas, or any other state, violates the stipulations set forth by the Federal Highway Administration in the HBA, the violation may cause the state to lose ten percent of federal highway funds.⁹³

This system of laws applies to what are known as "off premise signs." Off-premise signs are billboards which advertise material that are not promoting the business on the land under the sign.⁹⁴

In Texas, it is the responsibility of the Texas Department of Transportation to handle the permitting of billboard construction outside of cities and their extra territorial jurisdictions (ETJs) that are located within 660 feet of highway right of way in urban areas and within sight of a highway in rural areas.⁹⁵ While a majority of cities in Texas have halted new billboard construction, new boards can still be erected in the counties that are not a part of the ETJ. For the citizens of these unincorporated counties, the only way for them to attempt to halt new billboard construction in their areas is to come to the legislature and ask to have a specific project stopped.

Legislation From the 80th Session

While there were several bills in the 80th session involving outdoor advertising and signage, the two most comprehensive pieces of legislation were the following: first, Senate Bill 111 (80R) as substituted, which shifted the burden of condemnation costs from the State to the municipality if the condemnation was due to the municipality's regulations regarding outdoor advertising. In addition, the legislation granted additional visibility for billboards.⁹⁶ This bill was filed by Senator John Carona and was carried by Representative Isett in the House of Representatives. After making its way through the Senate, the legislation remained in the House Calendars committee through the end of session.

Senate Bill 137 (80R) permitted the largest counties in Texas and their surrounding counties to have the option to set up outdoor advertising regulations.⁹⁷ Current law only permits municipalities to have this right and therefore unincorporated regions do not have an ability to control what their roads look like. As a result, it is typically the people in these rural areas who voice the most concern over the amount of outdoor advertising present in their communities. This bill was sponsored by Senator Jane Nelson, and was approved by the Senate Committee on Transportation and Homeland Security. However, it was never discussed on the Senate floor and was therefore stalled in the legislative process.

⁹² Ibid.

⁹³ Testimony of Tim Anderson, Attorney, Right of Way Division, TxDOT, Written Testimony before the House Committee on State Cultural and Recreational Resources, September 28, 2004.

⁹⁴ Texas Department of Transportation Right of Way Division, Control of Outdoor Advertising Signs, (2003), at ftp://ftp.dot.state.tx.us/pub/txdot-info/row/oas_control_10-03.pdf.

⁹⁵ Ibid.

⁹⁶ Tex. S.B. 111, 80th Leg., R.S. (2007).

⁹⁷ Tex. S.B. 137, 80th Leg., R.S. (2007).

The Graphical Representation and Commercial/Industrial Areas

The current law defining a commercial or industrial area is that one business of 300 square feet must be present for 90 days in order for a billboard to be erected. As shown by the graphical representation⁹⁸ the majority of commercial/industrial areas are located in or surrounding the metropolitan areas. One of the issues in creating this map is that TxDOT does not have complete records of all of the signs permitted in the state. The majority of the major metropolitan areas, such as Dallas-Fort Worth and Houston are called "certified cities."⁹⁹ These cities have been delegated the enforcement power of the Highway Beautification Act in lieu of state enforcement. As a result, the map provided does not accurately reflect the number of billboards in those localities, since the Department does not have a complete record of the number of permits in those cities.¹⁰⁰

RECOMMENDATIONS

The committee sympathizes with those who are trying to preserve the beautiful and rural areas of Texas, while simultaneously respecting the economics of the business environment created by outdoor advertising. As a result, the Senate Committee on Transportation and Homeland Security recommends making the permitting of billboards throughout the state more difficult in unincorporated areas. Some suggestions for accomplishing this goal would be to increase the number of businesses required, increase the length of time a business must be present, and increase the amount of square footage necessary for a business to be considered commercial or industrial. As a result, fewer billboards will be erected in areas that are not actually commercial, and deserve preservation.

The committee additionally recommends allowing the billboard industry to utilize their existing assets to the fullest of their capabilities, by allowing the height of sign structures to be raised in the case of newly erected sound walls or highway flyovers. This will allow the advertiser, who is often a local business person or franchisee, to receive the full benefit of their purchase.

Finally, the committee recommends that both the billboard industry and Scenic Texas examine their relationship and come to an agreement to create a standard billboard policy for the State.

⁹⁸ Graphical representation available from the committee office.

⁹⁹ List of certified cities available from the committee office.

¹⁰⁰ Texas Department of Transportation, Regulating Off-Premise Outdoor Advertising along Texas Roadways, March 2008, p. 9.

Study and make recommendations for improving management and oversight of Metropolitan Planning Organizations (MPOs). Include a review of populations served, MPO governance, oversight, roles, variation among MPOs, and MPO decision-making ability in relation to TxDOT or other agencies.

BACKGROUND

Texas is home to twenty-five MPOs, which provide continuous, cooperative and comprehensive transportation planning for their respective regions.¹⁰¹ Each MPO receives federal funding for transportation planning and some receive state and local funds to carry out their mandated planning activities.¹⁰² All MPOs are required to produce a Metropolitan Transportation Plan, Transportation Improvement Program and a Unified Planning Work Program.¹⁰³

This report examines MPO structure throughout the state with data on each of the state's MPOs. Information on individual MPOs is available from TxDOT's website online at http://www.txdot.gov/services/transportation_planning_and_programming/metropolitan_planning_organizations/default.htm.

Populations Served¹⁰⁴

Population

To carry out the required transportation planning process for federally funded projects, federal law requires the formation of an MPO for any urbanized area with a population greater than 50,000.¹⁰⁵ Urbanized areas with populations greater than 200,000 are designated as transportation management areas (TMAs) by the U.S. secretary of transportation.¹⁰⁶ MPOs that serve TMAs in Texas have the ability to select certain federally funded projects in consultation with TxDOT; in other metropolitan planning areas in the state, these projects generally are selected by TxDOT with the concurrence of the MPO. This is discussed further in the section below on MPO decision-making ability.

Newly urbanized areas that are within or contiguous with the metropolitan planning area of another MPO must join that MPO. Otherwise, an urbanized area that reaches a population greater than 50,000 may request to form a new MPO.¹⁰⁷ MPOs are designated by agreement

¹⁰¹ Association of Texas Metropolitan Planning Organizations, September 28, 2008, available at: <http://www.texasmpo.org/tempo/aboutmpo.htm>.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ This report, with the exception of the introduction and recommendations, is from a memorandum authored by Cindy Ellison and Carey Eskridge, Research Analysts, Texas Legislative Council, September 23, 2008.

¹⁰⁵ 23 U.S.C. Section 134(d)(1) and 49 U.S.C. Section 5303(d)(1). Note: 23 U.S.C. Section 134 relates to metropolitan transportation planning for federal-aid highways, and 49 U.S.C. Section 5303 is the comparable law for federally funded public transportation. The two laws are substantively the same.

¹⁰⁶ 23 U.S.C. Section 134(k)(1)(A); 49 U.S.C. Section 5303(k)(1)(A).

¹⁰⁷ Telephone interview with Jim Randall, director, transportation planning and programming division, (512) 486-5003, and Jack Foster, director, statewide planning and program management, TxDOT, (512) 486-5024, August 4, 2008.

between the governor and local units of government that, combined, represent at least 75 percent of the affected metropolitan population, including the central city or cities as defined by the U.S. Bureau of the Census. A designation remains in effect until it is revoked or replaced by agreement of the governor and the local units of government representing at least 75 percent of the population in the affected area. As in the original designation, the central city or cities must be among those local units of government desiring to revoke or redesignate the MPO.¹⁰⁸

Variation Among MPOs: Texas has eight TMAs, including the Hidalgo County TMA, based on the 2000 census.¹⁰⁹ Hidalgo County qualifies as a TMA because the 21 cities in the county are very close together and have a combined population of almost 570,000.¹¹⁰ Amarillo and Laredo either have qualified for or are close to qualifying for TMA designation, having estimated 2007 populations of 186,106 and 217,506, respectively.¹¹¹ The secretary of transportation will make additional designations following the 2010 census.

Boundaries

The boundaries of a metropolitan planning area (MPA) are determined by agreement between the MPO and TxDOT, acting on behalf of the governor.¹¹² At a minimum, the MPA must include the entire existing urbanized area, as defined by the U.S. Bureau of the Census, plus the contiguous area expected to become urbanized within a 20-year forecast period for the metropolitan transportation plan. The boundaries may be expanded further to encompass the entire metropolitan statistical area or combined statistical area, as defined by the Office of Management and Budget. MPA boundaries may not overlap.¹¹³ An MPO may initiate boundary expansion at any time.¹¹⁴

An MPA boundary may encompass more than one urbanized area and may coincide with political boundaries (e.g., a county) or geographic boundaries (e.g., an air basin).¹¹⁵ If the MPO serves an area designated after August 10, 2005, as a nonattainment area for ozone or carbon monoxide, the boundary may include the entire nonattainment area. Otherwise, it retains the boundary that existed on August 10, 2005, and future boundary changes are determined by the MPO and TxDOT.¹¹⁶

Variation Among MPOs: The Houston/Galveston, Dallas/Fort Worth, and Beaumont/Port Arthur MPA boundaries include all or a portion of the same counties as the ozone nonattainment

¹⁰⁸ 23 U.S.C. Section 134(d); 49 U.S.C. Section 5303(d); 23 C.F.R. Section 450.310; 43 T.A.C. Section 15.3(b).

¹⁰⁹ Note: The eight TMAs are Austin, Corpus Christi, Dallas/Fort Worth, El Paso, Hidalgo County, Houston/Galveston, Lubbock, and San Antonio.

¹¹⁰ Telephone interview with Maria Champlain, Hidalgo County MPO, (956) 969-5778, August 4, 2008.

¹¹¹ American FactFinder - Population Finder, accessible at the U.S. Bureau of the Census website at

http://factfinder.census.gov/servlet/SAFFPopulation?_submenuId=population_0&_sse=on

¹¹² Note: The governor delegated the authority to determine MPA boundaries to the Texas Transportation Commission, which in turn delegated it to the executive director of TxDOT. The governor retained the authority to designate MPOs.

¹¹³ 23 U.S.C. Section 134(e); 49 U.S.C. Section 5303(e); 23 C.F.R. Section 450.312; 43 T.A.C. Section 15.3(c).

¹¹⁴ Telephone interview with Jim Randall, TxDOT, August 7, 2008.

¹¹⁵ 23 C.F.R. Sections 450.312(c) and (d); Federal Highway Administration (FHWA) and Federal Transit Administration (FTA), Transportation Planning Capacity Building Program. "The Transportation Planning Process: Key Issues" (September 2007), <http://www.planning.dot.gov/documents/BriefingBook/BBook.htm>, p. 3 (accessed July 17, 2008).

¹¹⁶ 23 U.S.C. Section 134(e)(4)-(5); 49 U.S.C. Section 5303(e)(4)-(5); 23 C.F.R. Section 450.312(b).

areas (see below). Only the Beaumont/Port Arthur and Waco planning area boundaries include the entire metropolitan statistical area.¹¹⁷ Seven MPAs encompass more than one urbanized area, and six are organized along county lines. The majority of MPAs include a single urbanized area and the outlying area that is expected to become urbanized.

Air Quality

A metropolitan area's designation as an air quality nonattainment area or maintenance area creates additional requirements for transportation planning. In these areas, the MPO is required to coordinate development of transportation plans with development of transportation control measures in the State Implementation Plan (SIP) and to demonstrate that the plans conform with the SIP, a process known as transportation conformity.¹¹⁸

The following information from the Texas Commission on Environmental Quality also includes references to affected MPOs and the requirement for transportation conformity:

- The three current ozone nonattainment areas are Houston-Galveston-Brazoria (Houston-Galveston Area Council), Dallas-Fort Worth (North Central Texas Council of Governments), and Beaumont-Port Arthur (South East Texas Regional Planning Commission). Transportation conformity is required in these areas.
- El Paso (El Paso MPO) has attained the current ozone standard and is subject to a maintenance plan to ensure ongoing attainment. El Paso is designated as nonattainment for carbon monoxide and regulated particulate matter. However, a request to redesignate the area as attainment for carbon monoxide is pending with the U.S. Environmental Protection Agency. Transportation conformity is required in this area.
- Victoria (Victoria MPO) is a near nonattainment area for ozone but is in attainment of the current eight-hour ozone standard. It is under a maintenance plan for the old one-hour ozone standard. Transportation conformity is not required in this area under a special exemption granted by the U.S. Environmental Protection Agency.¹¹⁹
- San Antonio (San Antonio-Bexar County MPO), Austin-San Marcos (Capital Area MPO), and Northeast Texas (Tyler MPO, Longview MPO) were all near nonattainment areas for ozone that chose to put preemptive plans, called Early Action Compacts, in place to avoid a nonattainment designation. Transportation conformity is not required in these areas.
- Corpus Christi (Corpus Christi MPO) is a near nonattainment area for ozone but is in attainment of the current eight-hour ozone standard. Transportation conformity is not required in this area.

¹¹⁷ Information about which MPAs include the entire metropolitan statistical area came from Jack Foster, TxDOT.

¹¹⁸ 23 U.S.C. Section 134(i)(3); 49 U.S.C. Section 5303(i)(3); FHWA/FTA, Transportation Planning Process, p. 18. Note: Transportation conformity requirements are contained in 40 C.F.R. Part 93.

¹¹⁹ Telephone interview with Jim Randall and Jack Foster, TxDOT, August 4, 2008.

Multiple MPOs

If more than one MPO has authority in a metropolitan planning area, including a multistate metropolitan planning area, or in an area that is designated as an air quality nonattainment area or maintenance area, the MPOs must consult with each other and with the states into which the area extends to ensure the preparation of integrated transportation plans and transportation improvement programs for the entire planning area.¹²⁰

Variation Among MPOs: The El Paso and Texarkana planning areas encompass territory in two states. The Houston/Galveston, Dallas/Fort Worth, and Beaumont/Port Arthur planning areas include all or a portion of the same counties as the ozone nonattainment areas. There are no overlapping MPO planning areas in the ozone nonattainment or maintenance areas.

MPO Governance

Administering Entity

The MPO designated by the governor may be a council of government, an independent body, or a city or county. The administering entity provides the staff for the MPO.¹²¹

Variation Among MPOs: Of the 25 MPOs in Texas, 4 are councils of government, 9 are independent bodies, and 12 are the central city.

MPO Organization

There is no required structure for an MPO. An MPO may be composed of a policy or executive board, technical and citizen advisory committees, and a director and staff.¹²²

Variation Among MPOs: All 25 MPOs have a policy board, and most of them have a technical advisory committee. Three of the MPOs serving a transportation management area also have an executive committee.

Policy Board Composition

Policy board members are appointed when the MPO is designated.¹²³ Adding members to the policy board does not require redesignation of the MPO unless the proportion of voting members representing the largest incorporated city, other local governments, and the state will be substantially altered.¹²⁴ There are no requirements for policy board composition except that an MPO that serves a transportation management area must include local elected officials, officials of public agencies that administer or operate major modes of transportation in the metropolitan area, and appropriate state officials.¹²⁵

¹²⁰ 23 U.S.C. Section 134(f); 49 U.S.C. Section 5303(f); 23 C.F.R. Section 450.314(e); 43 T.A.C. Section 15.3(e)(5).

¹²¹ FHWA/FTA, Transportation Planning Process, p. 4.

¹²² Ibid.

¹²³ Telephone interview with Jim Randall and Jack Foster, TxDOT, August 4, 2008.

¹²⁴ 23 C.F.R. Section 450.310(k)(1); 43 T.A.C. Section 15.3(b)(3).

¹²⁵ 23 U.S.C. Section 134(d)(2); 49 U.S.C. Section 5303(d)(2).

Variation Among MPOs: All of the federal and state oversight agencies discussed in this memorandum are represented on one or more MPO policy boards in accordance with the MPOs' bylaws. Except for TxDOT, they are always nonvoting members. The Federal Highway Administration (FHWA) is represented on 15 boards, and a representative of the Federal Transit Administration (FTA) is a member of 10 boards. The Environmental Protection Agency is represented on one board (Victoria MPO), and a representative of the Texas Commission on Environmental Quality is a nonvoting member of nine boards.

TxDOT is a voting member of every policy board. The voting TxDOT representative is either a TxDOT district office staff person, or the district/central office classification is not specified. There are two TxDOT voting members on eight boards, and one board, the Amarillo MPO policy board, can have four voting members representing TxDOT, according to its bylaws. Central office TxDOT staff are nonvoting members of nine boards.

Current membership rosters, rather than bylaws, were used to determine the percentage of voting members who are elected officials on each policy board. In the majority of cases, elected officials make up more than half of the voting membership of current MPO policy boards, as shown below.

MPO	Percent of Policy Board Voting Members Who Are Elected Officials
Abilene	47%
Amarillo	31%
Austin	90%
Beaumont/Port Arthur	80%
Brownsville	54%
Bryan/College Station	60%
Corpus Christi	57%
Dallas/Fort Worth	78%
El Paso	75%
Harlingen/San Benito	92%
Hidalgo County	96%
Houston/Galveston	61%
Killeen/Temple	59%
Laredo	78%
Longview	45%
Lubbock	15%
Midland/Odessa	80%
San Angelo	20%
San Antonio/Bexar County	58%
Sherman/Denison	60%
Texarkana	43%
Tyler	38%
Victoria	40%
Waco	25%
Wichita Falls	56%

Policy Board Chair

MPO bylaws may designate the chair of the policy board or specify how the chair is chosen.

Variation Among MPOs: Of the 25 MPOs, 18 elect the chair, and 7 designate the chair.

Oversight

Federal Oversight

Funding: The FHWA and FTA provide funding to MPOs for transportation planning and programming.¹²⁶ MPOs must document their planned use of these funds in a Unified Planning Work Program (UPWP) in accordance with federal and state regulations.¹²⁷ The UPWP identifies work proposed for the next one-year or two-year period by major activity and task, indicating who will perform the work, the schedule for completing the work, the resulting products, the proposed funding by activity or task, and a summary of the total amounts and sources of federal and matching funds.¹²⁸ Regional offices of the FHWA and FTA provide guidance and oversight in preparing and updating this document.¹²⁹

Planning: The FTA and FHWA jointly review the transportation planning process of each MPO serving a TMA (metropolitan area with more than 200,000 in population) at least once every four years to determine if the process complies with federal requirements.¹³⁰ If the planning process is not certified, up to 20 percent of federal funds for the metropolitan planning area may be withheld.¹³¹ This has never happened in Texas, according to TxDOT planning and programming staff.¹³²

Transportation plans developed by MPOs do not require approval from the FTA or FHWA.¹³³ However, the State Transportation Improvement Plan, which is derived from the MPO transportation improvement plans, must be approved by the FTA and FHWA. As part of the approval process, the state and the MPOs must certify at least every four years that the metropolitan transportation planning process is being carried out in accordance with all applicable requirements, including certain federal anti-discrimination laws.¹³⁴ State regulations require this self-certification to be conducted annually by TxDOT and the MPOs.¹³⁵

¹²⁶ Funds provided under 23 U.S.C. Section 104(f), 49 U.S.C. Section 5305(d), 49 U.S.C. Section 5307, and 49 U.S.C. Section 5339 are available to MPOs. At the state's option, other federal funds also may be provided. In addition, an MPO serving a TMA may use certain other federal funds as specified in 23 C.F.R. Section 450.308.

¹²⁷ 23 C.F.R. Section 450.308; 23 C.F.R. Part 420; 43 T.A.C. Section 15.4(b).

¹²⁸ 23 C.F.R. Section 450.308(c).

¹²⁹ FTA. "Planning Programs Overview," http://www.fta.dot.gov/planning/metro/planning_environment_2887.html (accessed July 29, 2008). Note: The FTA regional office that serves Texas is in Fort Worth. The comparable FHWA office is in Austin.

¹³⁰ 23 C.F.R. Section 450.334(b).

¹³¹ 23 U.S.C. Section 134(k)(5); 49 U.S.C. Section 5303(k)(5); 23 C.F.R. Section 450.334(b)(2).

¹³² Telephone interview with Jim Randall and Jack Foster, TxDOT, August 4, 2008.

¹³³ FHWA/FTA, Transportation Planning Process, p. 8.

¹³⁴ 23 C.F.R. Section 450.334(a).

¹³⁵ 43 T.A.C. Section 15.5(h).

State Oversight

Funding: TxDOT distributes federal transportation planning funds to the MPOs in accordance with federal and state laws and regulations. FHWA metropolitan planning funds are awarded by TxDOT's transportation planning and programming division based on a formula developed in consultation with MPOs and approved by the FHWA.¹³⁶ The public transportation division of TxDOT awards FTA metropolitan planning funds based on criteria in the Texas Administrative Code and state statute.¹³⁷ The federal government provides 80 percent of these funds, with the remaining 20 percent required to be state and local funds.¹³⁸ The district engineers and the agency's chief financial officer are responsible for oversight of the grant funds. District office staff review requests for reimbursement from MPOs to determine whether the expenditures are allowed under the MPO's Unified Planning Work Program (UPWP). If approved, the requests are sent to the finance division for payment.¹³⁹

A March 2007 state auditor's office report on TxDOT's aviation and metropolitan transportation planning grant programs concluded that TxDOT was not providing sufficient oversight for metropolitan transportation planning grants. Specifically, auditors found that district offices were not consistently reviewing and maintaining supporting documentation for the expenditures made by the MPOs. The report recommended that TxDOT: (1) require district offices to review supporting documentation for MPO expenditures consistently; (2) update grant agreements with MPOs so that MPOs are accountable for current requirements; and (3) consider providing training to district offices on administration of the grants.

In response to the auditor's report, TxDOT districts were instructed to improve their monitoring and auditing of the metropolitan planning program. TxDOT is updating its Urban Transportation Planning Process Contracts Procedures Manual to help districts with this directive. The agency signed new grant agreements with 19 of the 25 MPOs; the new agreements specify all of the provisions and requirements contained in the latest regulations, policies, and procedures related to MPO operations. Two other MPOs were very close to signing the agreement as of July 21, 2008. Additionally, TxDOT is conducting a National Highway Institute training course, "Administration of FHWA Planning and Research Grants," for all district office staff involved in MPO operations.¹⁴⁰

Planning: The TxDOT transportation planning and programming division works with the MPOs to ensure that federally required documents such as the 20-year Metropolitan Transportation Plan (MTP), the four-year Transportation Improvement Program (TIP), and the UPWP are prepared and implemented. The division has seven field representatives based in Austin who work with the MPOs on these documents. TxDOT also has a large interagency contract with the Texas Transportation Institute that includes provisions for the institute's assistance in training policy board members and helping MPOs prepare documents.¹⁴¹

¹³⁶ 23 U.S.C. Section 104(f)(4); 23 C.F.R. Section 420.109; 43 T.A.C. Section 15.4(b)(8).

¹³⁷ 43 T.A.C. Section 31.21; Chapter 456, Transportation Code. Note: See Section 456.007(c), Transportation Code.

¹³⁸ 23 U.S.C. Section 120(b); 49 U.S.C. Section 5305(f).

¹³⁹ Telephone interview with Jim Randall, TxDOT, July 18, 2008.

¹⁴⁰ E-mail correspondence from Jim Randall, TxDOT, July 21, 2008.

¹⁴¹ Telephone interview with Michelle Conkle, transportation planning and programming division, TxDOT, (512) 486-5038, July 18, 2008.

TxDOT approval is not required for an MPO's MTP, which requires only MPO policy board approval.¹⁴² The TIP must be approved by the MPO policy board and the governor before it is placed in the State Transportation Improvement Plan.¹⁴³ The governor delegated this responsibility to the Texas Transportation Commission, which in turn delegated it to the executive director of TxDOT.¹⁴⁴

Conflicts of Interest: State law requires each policy board to adopt bylaws establishing an ethics policy to prevent a policy board member from having a conflict of interest in business before the MPO.¹⁴⁵ The law considers a policy board member to be a local public official for purposes of Chapter 171, Local Government Code, Regulation of Conflicts of Interest of Officers of Municipalities, Counties, and Certain Other Local Governments.¹⁴⁶ Accordingly, a policy board member must abstain from participation in a vote or decision if the member has a substantial interest in a business entity or in real property that will receive a special economic benefit from the action as defined by law. In such a case, a member's proxy also is prohibited from participating in the vote or decision.¹⁴⁷ A policy board member who is required to file an affidavit regarding a conflict of interest that does not prevent the member from voting on a matter is not excused from the filing requirement by appointing a voting proxy.¹⁴⁸

A policy board may provide in its bylaws for appointment of voting proxies by its members.¹⁴⁹ A legislative member of a policy board may appoint only a proxy who is: (1) the member's employee or staff member; (2) a person related to the member within the second degree by consanguinity, as defined by law, who is not required to register as a lobbyist under law; (3) another legislative member of the policy board; or (4) a locally elected official.¹⁵⁰

Open Meetings/Open Records: Case law establishes that an MPO is subject to the notice provisions of the Texas Open Meetings Act.¹⁵¹ Accordingly, an MPO policy board must give written notice of the date, hour, place, and subject of each meeting held by the board.¹⁵² The Texas Public Information Act also applies to MPOs. Open records requests are handled by each MPO and not by TxDOT.¹⁵³ TxDOT briefs policy board members about the responsibilities of the board under both acts as part of general training for board members.¹⁵⁴

¹⁴² 23 C.F.R. Section 450.322(c).

¹⁴³ 23 U.S.C. Section 134(j)(1)(D); 49 U.S.C. Section 5303(j)(1)(D); 23 C.F.R. Section 450.324(a).

¹⁴⁴ Telephone interview with Jim Randall and Jack Foster, TxDOT, August 4, 2008.

¹⁴⁵ Section 472.034, Transportation Code.

¹⁴⁶ Section 472.033(a), Transportation Code.

¹⁴⁷ Section 472.033(b), Transportation Code.

¹⁴⁸ Section 472.033(c), Transportation Code.

¹⁴⁹ Section 472.032(a), Transportation Code.

¹⁵⁰ Section 472.032(d), Transportation Code.

¹⁵¹ *Sierra Club v. Austin Transportation Study Policy Advisory Committee*, 746 S.W.2d 298 (Tex. App. --Austin 1988, writ denied).

¹⁵² Section 551.041, Government Code.

¹⁵³ Telephone interview with Sharon Alexander, associate general counsel, TxDOT, (512) 463-8630, August 5, 2008.

¹⁵⁴ Telephone interview with Jim Randall and Jack Foster, TxDOT, August 4, 2008.

Roles

Federal Law

Metropolitan Transportation Plan: Federal law requires each MPO to develop a 20-year MTP that contains, at a minimum, the following: (A) identification of transportation facilities that should function as an integrated metropolitan transportation system; (B) discussion of potential environmental mitigation activities and potential areas to carry out these activities; (C) a financial plan that demonstrates how the adopted transportation plan can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the plan, and recommends any additional financing strategies for needed projects and programs; (D) operational and management strategies to improve the performance of existing transportation facilities; (E) capital investment and other strategies to preserve the existing and projected future metropolitan transportation infrastructure and provide for multimodal capacity increases based on regional priorities and needs; and (F) proposed transportation and transit enhancement activities. If the metropolitan area is designated as a nonattainment or maintenance area under the Clean Air Act, the plan must conform to the State Implementation Plan for air quality. An MPO must update the plan every five years, or every four years in areas not meeting federal air quality standards.¹⁵⁵

Transportation Improvement Plan: An MPO also must update and approve a separate TIP that provides a priority list of proposed federally supported projects and strategies taken from the MTP to be carried out within the next four years.¹⁵⁶ Like the MTP, the TIP is fiscally constrained; that is, the plan must demonstrate a balance between expected revenue and the estimated costs of projects.¹⁵⁷ TxDOT is required to provide each MPO with estimates of available federal and state funds to be used in developing the plan.¹⁵⁸ The TIP is approved by the MPO and by TxDOT, acting on behalf of the governor.¹⁵⁹ After approval, it is included without modification in the Statewide Transportation Improvement Program (STIP), except that in air quality nonattainment and maintenance areas, the FHWA and FTA must first make a conformity determination regarding whether the TIP conforms with the state plan for complying with federal Clean Air Act requirements and standards.¹⁶⁰

Included Projects: Projects that are regionally significant or that will connect to the state or federal highway system must be included in the regional emissions analysis of an approved MPO transportation plan (the MTP and TIP) if they are located within the jurisdiction of an MPO.¹⁶¹ Regionally significant projects are projects that normally would be included in the modeling of a

¹⁵⁵ 23 U.S.C. Section 134(i); 49 U.S.C. Section 5303(i); 23 C.F.R. Section 450.322; 43 T.A.C. Section 15.6. Note: Minimum plan requirements in federal regulations differ somewhat from the minimum requirements in federal law that are listed here.

¹⁵⁶ 23 U.S.C. Section 134(j); 49 U.S.C. Section 5303(j); 23 C.F.R. Section 450.324; 43 T.A.C. Section 15.7.

¹⁵⁷ Note: The MTP and TIP may include, for illustrative purposes, additional projects that would be included in the transportation plan if reasonable additional resources beyond those identified in the financial plan were available.

¹⁵⁸ 43 T.A.C. Section 15.7(b)(1). Note: TxDOT uses an internal document, the Unified Transportation Program, for this purpose.

¹⁵⁹ Note: The governor delegated this authority to the Texas Transportation Commission, which delegated it to the executive director of TxDOT.

¹⁶⁰ 23 C.F.R. Section 450.328(b); 43 T.A.C. Section 15.7(1)(1).

¹⁶¹ Telephone interview with Jim Randall and Jack Foster, TxDOT, August 4, 2008. Note: See also 23 U.S.C. Section 134(j)(3) and 49 U.S.C. Section 5303(j)(3).

metropolitan area's transportation network.¹⁶² They include Trans-Texas Corridor projects and private turnpikes and toll projects. A project financed by revenue from a comprehensive development agreement also must be included in an approved MPO transportation plan.¹⁶³

State law requires a transportation project undertaken by a regional mobility authority to be included in a plan approved by the applicable MPO if the project is located in an MPO planning area.¹⁶⁴ Actions taken by a regional tollway authority or by a county authorized to be a tolling entity under state law also must comply with federal law relating to MPOs.¹⁶⁵ State law prohibits TxDOT from converting a nontolled state highway or highway segment to a toll project unless, among other options, the project was designated as a toll project in a plan or program of an MPO on or before September 1, 2005.¹⁶⁶

Transportation Conformity: Transportation conformity determinations for all MTPs, TIPs, and FHWA- or FTA-funded projects are required in all nonattainment and maintenance areas for transportation-related pollutants such as ozone, carbon monoxide, nitrogen dioxide, and regulated particulate matter for which the area either has been designated as being in nonattainment or has a maintenance plan; conformity requirements also may apply with respect to the emissions of certain precursor pollutants.¹⁶⁷ A conformity determination is a finding by the MPO policy board, and subsequently by the FHWA and FTA, that projected regional emissions for a transportation plan do not exceed the region's motor vehicle emissions budget and that transportation control measures in the plan are programmed for timely implementation.¹⁶⁸ All transportation plan amendments must be found to conform unless they add or delete certain exempt projects. The conformity determination must be based on the transportation plan and the amendment taken as a whole.¹⁶⁹

TxDOT and each MPO must make a conformity determination of the MPO's transportation plan or federally funded transportation project at periodic intervals. If TxDOT and the MPO cannot make a conformity determination according to applicable deadlines, TxDOT and the MPO will have a grace period of 12 months after the deadline is missed before the existing conformity determination will lapse.¹⁷⁰ During the grace period, only projects from the previously conforming plan are eligible for funding.¹⁷¹ If conformity is not reestablished, the transportation conformity status for the area will lapse.¹⁷² During a conformity lapse, FTA and FHWA funds can be spent only on exempt projects such as safety projects, certain public transportation projects, transportation control measures from an approved state air quality plan, and project phases that were authorized by FHWA and FTA before the lapse.¹⁷³

¹⁶² 40 C.F.R. Section 93.101.

¹⁶³ Telephone interview with Jim Randall and Jack Foster, TxDOT, August 4, 2008.

¹⁶⁴ Section 370.033(a), Transportation Code.

¹⁶⁵ Sections 366.301(e) and 284.003(g), Transportation Code.

¹⁶⁶ Section 228.201(a)(3), Transportation Code.

¹⁶⁷ 40 C.F.R. Section 93.102.

¹⁶⁸ Note: Criteria and procedures for determining conformity of transportation plans, programs, and projects are in 40 C.F.R. Part 93.

¹⁶⁹ 40 C.F.R. Section 93.104.

¹⁷⁰ Ibid.

¹⁷¹ FHWA/FTA, Transportation Planning Process, p. 19.

¹⁷² 40 C.F.R. Section 93.104.

¹⁷³ FHWA/FTA, Transportation Planning Process, p. 19.

According to TxDOT staff, there has never been a major conformity lapse in Texas that caused the state to lose federal funding. However, there have been occasions when procedural problems caused lapses in conformity that lasted only several days.¹⁷⁴

Public Participation: MPOs are responsible for actively seeking the participation of all relevant agencies and stakeholders in the planning process. In addition to individual area residents and organized groups, this includes all private and public providers of transportation services, including the trucking and rail freight industries, rail passenger industry, taxicab operators, and all transit and paratransit service operators. The process also should include federal, state, and local agencies with an interest in transportation issues as well as persons traditionally underserved by existing transportation systems, such as members of low-income or minority households and elderly citizens.¹⁷⁵

MPOs must develop and use a documented participation plan that details strategies for holding public meetings, employing visualization techniques, using electronic media, and responding to public input, among other requirements.¹⁷⁶ The public participation plan is not approved by any federal or state entity, but it is considered when the FHWA and FTA certify that the metropolitan transportation planning process is being conducted in accordance with all applicable requirements.¹⁷⁷

State Law

In addition to producing federally mandated transportation plans, Texas MPOs have some new roles under state law. MPOs are playing a role in determining the business terms and conditions for a toll project within the boundaries of a regional mobility authority (RMA) and for certain other toll projects. MPOs also have a role in the prioritization of funding received under a comprehensive development agreement or other project agreement. These roles were added by Chapter 264 (S.B. 792), Acts of the 80th Legislature, Regular Session, 2007.

MPOs and Regional Mobility Authority Toll Projects: Senate Bill 792 included provisions relating to state highway toll projects, other than certain exempted toll projects, that are proposed to be located within the boundaries of an RMA. The law provides that after a market valuation for such a toll project is finalized, the MPO for the region in which the project is located must determine whether the toll project should be developed using the business terms in the market valuation.¹⁷⁸ The purpose of a toll road valuation study is to determine how much toll revenue will be generated and to what extent it will exceed or fall short of the cost to build, operate, and maintain the toll road over a defined period. The valuation may be used to estimate the extent to which bond financing could be used to support the project.¹⁷⁹ If the MPO approves the business terms in the market valuation, the RMA has six months to exercise the option to develop the project. These provisions expire August 31, 2011.¹⁸⁰

¹⁷⁴ Telephone interview with Jim Randall and Jack Foster, TxDOT, August 4, 2008.

¹⁷⁵ 23 U.S.C. Section 134(i)(5); 49 U.S.C. Section 5303(i)(5); 23 C.F.R. Section 450.316; FHWA/FTA, Transportation Planning Process, p. 39-40.

¹⁷⁶ Ibid.

¹⁷⁷ Telephone interview with Jim Randall and Jack Foster, TxDOT, August 4, 2008.

¹⁷⁸ Section 228.0111(g), Transportation Code.

¹⁷⁹ Houston-Galveston Area Council. "State Highway 99 Business Terms & Conditions Negotiations," <http://www.h-gac.com/taq/sh99/default.aspx>.

¹⁸⁰ Section 228.0111(g), Transportation Code.

Terry Brechtel, executive director, Alamo Regional Mobility Authority (ARMA), reported to the Senate Transportation & Homeland Security Committee on April 23, 2008, that ARMA is the first RMA to complete the market valuation process for a proposed toll project that received approval from an MPO (the San Antonio-Bexar County MPO).¹⁸¹ Jeff Austin III, chair, Northeast Texas Regional Mobility Authority, informed the committee that the market valuation for the authority's toll projects is in its final stages and has been submitted to the Tyler MPO for approval.¹⁸²

MPOs and Certain Other Toll Projects: Senate Bill 792 also required the terms and conditions for the procurement and operation of the State Highway 99 toll project to be approved by the local MPO.¹⁸³ The affected MPO is the Houston-Galveston Area Council (HGAC). Alan Clark, director, Transportation Planning, HGAC, reported to the committee on April 23, 2008, that the SH 99 project is in the market valuation process.¹⁸⁴ HGAC is facilitating the process. The requirement for MPO approval expires August 31, 2009.

The North Central Texas Council of Governments (Dallas-Fort Worth MPO) received the commitment submitted by the North Texas Tollway Authority for the State Highway 121 toll project as authorized by Section 223.210(h), Transportation Code.

MPOs and TxDOT Toll Projects: If TxDOT is the tolling entity, the Texas Transportation Commission will set toll rates in consultation with MPOs under guiding principles and policies that were adopted by the commission on May 29, 2008, for toll projects on the state highway system and the Trans-Texas Corridor. The commission's policy will be to approve, in a public meeting, the initial toll rates for a toll project on the state highway system and the methodology for increasing the amount of tolls and to take these actions after consultation with appropriate local MPOs.¹⁸⁵

The policy does not apply to projects of local toll project entities, to completed TxDOT toll projects, or to TxDOT toll projects that already are underway.¹⁸⁶ Toll rates for completed and operating TxDOT toll projects in Central Texas were set in 2002, and the Austin MPO was kept informed. TxDOT intends to keep the Capital Area MPO informed about the toll rates for these projects.¹⁸⁷

MPOs and Project Agreements: TxDOT is required to allocate the distribution of funds received under a comprehensive development agreement for a state highway toll project to TxDOT districts that are located in the boundaries of the MPO in which the project is located. The

¹⁸¹ Terry Brechtel, executive director, Alamo Regional Mobility Authority, April 23, 2008, testimony to the Senate Transportation & Homeland Security Committee.

¹⁸² Jeff Austin III, chair, Northeast Texas Regional Mobility Authority, April 23, 2008, testimony to the Senate Transportation & Homeland Security Committee.

¹⁸³ Section 228.0111(e), Transportation Code.

¹⁸⁴ Alan Clark, director, Transportation Planning, Houston-Galveston Area Council, April 23, 2008, testimony to the Senate Transportation & Homeland Security Committee.

¹⁸⁵ TxDOT, "Transportation Commission Affirms Toll Road Building Principles," press release, May 29, 2008.

¹⁸⁶ Telephone interview with Mark Cross, government and public affairs division, TxDOT, (512) 475-0942, July 7, 2008.

¹⁸⁷ Telephone interview with Caroline Love, government and public affairs division, TxDOT, (512) 463-1965, July 7, 2008.

distribution is to be based on the percentage of toll revenue from users in each of the TxDOT districts. The funds must be used to finance the construction, maintenance, or operation of transportation projects or air quality projects in the region. An MPO is prohibited from taking any action that would reduce the distribution of funds or other resources to a TxDOT district that uses this revenue.¹⁸⁸

TxDOT is authorized to assign to an MPO the responsibility for allocating money received by TxDOT under a comprehensive development agreement, the surplus revenue of a state highway toll project or system, and certain payments from a local toll project entity or TxDOT. The agency must create a separate account in the state highway fund to hold the money and create subaccounts for each project, system, or region. The agency may assign the responsibility for allocating money in a subaccount to an MPO, but the MPO entrusted with that responsibility must be located in the region for which a subaccount is created.¹⁸⁹

An MPO that is allocating money received by TxDOT under a project agreement for a state highway toll project is the North Central Texas Council of Governments. As a result of the State Highway 121 toll road agreement and upfront payment from the North Texas Tollway Authority, the Dallas-Fort Worth region received \$3.3 billion to fund transportation projects in the region.¹⁹⁰ The Regional Transportation Council, the MPO policy board, used an extensive public involvement process to identify projects to be funded with the SH 121 payments. TxDOT has established a work program to account for and track projects in the Dallas District that are to be funded with the payments.¹⁹¹

MPO Decision-Making Ability

Project Selection Decisions

The June 2008 Sunset Advisory Commission staff report on TxDOT compares transportation decision-making by the Texas Transportation Commission, TxDOT divisions, TxDOT districts, and MPOs based on funding levels for 12 project categories in the 2009-2019 Unified Transportation Program (UTP).¹⁹² Not required by federal or state law, UTP is an internal TxDOT document used to guide transportation project development and construction over a 10-year period. It projects how much federal and state transportation funding will be available in each category and how much will be allocated to each MPO and TxDOT district. MPOs and TxDOT district offices use the funding levels to develop projects and prepare annual contract letting schedules.¹⁹³

Given that the UTP approved by the transportation commission in April 2008 estimates that \$28.18 billion will be available for new construction and maintenance projects from fiscal year 2009 through fiscal year 2019, sunset staff estimate that projects selected by MPOs will account for 27 percent of the fund allocations, or approximately \$7.7 billion. Projects selected by

¹⁸⁸ Section 228.0055, Transportation Code.

¹⁸⁹ Section 228.012, Transportation Code.

¹⁹⁰ Telephone interview with John Munoz, deputy director, finance division, TxDOT, (512) 463-8783, August 5, 2008.

¹⁹¹ Texas Transportation Commission Minute Order 111215, dated January 31, 2008.

¹⁹² "Texas Department of Transportation," Sunset Staff Report, June 2008, p. 93.

¹⁹³ Sunset Staff Report, p. 23.

TxDOT districts will account for 49 percent of the fund allocations, projects selected by TxDOT divisions will account for 15 percent, and projects selected by the transportation commission will account for 9 percent of the allocations of available transportation funds over the next 10 years, according to the sunset staff report.¹⁹⁴

Projects Selected by MPOs

The UTP reflects the fact that MPOs that serve an area designated as a TMA (over 200,000 in population) are authorized to select projects in certain categories. These categories are Metropolitan Area Corridor Projects and Metropolitan Mobility/Rehabilitation Projects; projects in both categories are selected in consultation with TxDOT.¹⁹⁵ The selection of the corridor projects by MPOs is a change from the 2008 project selection process, which called for the Texas Transportation Commission to approve the projects.¹⁹⁶

Non-TMA MPOs (serving a population greater than 50,000 and less than 200,000) select Urban Area Corridor Projects in consultation with TxDOT, another change from the 2008 project selection process, which, like the metropolitan area corridor projects selection process, required transportation commission approval.¹⁹⁷ In the state's nonattainment areas, MPOs select Congestion Mitigation and Air Quality Improvement Projects in consultation with TxDOT and the Texas Commission on Environmental Quality. These projects must have final approval by the U.S. Environmental Protection Agency and FHWA before letting.¹⁹⁸

Projects Selected by TxDOT/Transportation Commission with Concurrence of the MPO

Projects that must have the concurrence of the MPO if they are located in the MPO's area of jurisdiction are Preventive Maintenance and Rehabilitation Projects (selected by TxDOT districts), Statewide Connectivity Corridor Projects (selected by the transportation commission), Structures Replacement and Rehabilitation Projects (selected by TxDOT districts), Transportation Enhancement Projects (selected by the commission and by a TxDOT division), Supplemental Transportation Projects (selected by TxDOT districts, a TxDOT division, or the Texas Parks and Wildlife Department), District Discretionary Projects (selected by TxDOT districts), and Strategic Priority Projects (selected by the commission).¹⁹⁹ These projects may or may not be in an approved MPO transportation plan, depending on the size of the project.²⁰⁰

¹⁹⁴ Sunset Staff Report, p. 93.

¹⁹⁵ TxDOT, Unified Transportation Program. "2009 Project Selection Process," with background from the 2007 Statewide Mobility Program (part of UTP), <http://www.dot.state.tx.us/services/finance/utp.htm> (accessed August 1, 2008).

¹⁹⁶ 2009 Project Selection Process compared with the 2008 Project Selection Process, <http://www.dot.state.tx.us/services/finance/utp.htm> (accessed August 1, 2008).

¹⁹⁷ Ibid.

¹⁹⁸ 2009 Project Selection Process, with background from the 2007 Statewide Mobility Program.

¹⁹⁹ Ibid.

²⁰⁰ Telephone interview with Jim Randall and Jack Foster, TxDOT, August 4, 2008.

Projects That Do Not Require Concurrence of the MPO

Safety projects funded under the Federal Highway Safety Improvement Program, Federal Railway-Highway Crossing Program, Federal Safe Routes to School Program, and certain other federal programs do not require the concurrence of a local MPO. These projects are ranked for funding based on federally mandated criteria.²⁰¹

RECOMMENDATIONS

The Senate Committee on Transportation and Homeland Security acknowledges the difficult decisions that MPO leaders must make to provide options for safe and reliable transportation in their areas.

As a result, the committee recommends implementing a code of conduct for all MPO board members, similar to those required for state board appointees. This code would specifically stipulate an across the board ethics and conflict of interest policy. This code would help create uniformity amongst the twenty five MPOs across the state, while promoting integrity in the difficult decision-making process.

²⁰¹ 2009 Project Selection Process, with background from the 2007 Statewide Mobility Program.

Study Comprehensive Development Agreements (CDAs) and make recommendations to ensure the maximum benefit to taxpayers. Study the implications of requiring CDAs to have definitive buyback formulas that can be calculated without using any form of future revenue forecasts. Study requiring potential CDA projects to be solicited only after environmental clearance has been granted. Study the implications of shortening CDA's maximum allowable contract duration. Study provisions affecting competing facilities.

BACKGROUND

In 2003, the structure of Texas transportation finance changed as the Texas Legislature approved House Bill 3588. This bill allowed for public-private partnerships as a means for developing transportation infrastructure through Comprehensive Development Agreements (CDAs).²⁰²

The 2005 legislature authored additional legislation refining the previous statute.²⁰³ By the time the 2007 legislature came into session, more information had come to light about the actual implementation of CDAs, particularly through the negative publicity garnered by the Trans-Texas Corridor.

Additionally, the public learned of competing facilities agreements and termination provisions that were not of the greatest benefit to the state. As a result, the legislature passed Senate Bill 792 which included a two-year moratorium on private participation in toll projects and safeguards on CDA contract provisions.²⁰⁴ This interim report will examine these provisions and others that affect the contractual agreement between developers and the state.

Termination For Convenience

The termination for convenience clause, or more commonly known as the "buyback provision," is the portion of the CDA contract that dictates what the state will have to pay the private developer if the state chooses to terminate the contract before the end of the contractual term.

Senate Bill 792 included provisions requiring that CDAs include a specific formula that cannot include any estimate of future revenue from the project, unless that revenue was known and agreed upon at the time the contract was signed.²⁰⁵ This provision protects the private party's reasonable profit expectation by allowing TxDOT to structure a generous formula while simultaneously preventing developer lawsuits based on speculation about future. The formula also allows TxDOT to pay less if the value of the concession is less.²⁰⁶

At the Senate Transportation and Homeland Security Committee hearing on April 23, 2008, Fredric Kessler of Nossaman Guthner Knox & Elliott, LLP, testified that other approaches to the definitive buyback formula have been discussed. One of these approaches would allow TxDOT to select intervals during the concession term when the department could decide to buy out the

²⁰² Tex. H.B. 3588, 78th Leg., R.S. (2003).

²⁰³ Tex. H.B. 2702, 79th Leg., R.S. (2005)

²⁰⁴ Tex. S.B. 792, 80th Leg., R.S. (2007).

²⁰⁵ Tex. S.B. 792, 80th Leg., R.S. (2007).

²⁰⁶ Fredric Kessler, Partner, Nossaman Guthner Knox & Elliott, LLP, testimony to the Senate Committee on Transportation and Homeland Security, April 23, 2008.

developer, such as every five years. For each interval, proposers would suggest a firm, fixed, buy-out amount that would be the maximum price the department would have to pay. TxDOT would then use the competition to get proposers to moderate these figures. Kessler said that this idea could be recommended with minor adjustments as determined by the legislature and TxDOT.²⁰⁷

Environmental Clearance

On January 1, 1970, the National Environmental Policy Act (NEPA) was signed into law, establishing a process for the protection and maintenance of the environment within federal agencies.²⁰⁸

The NEPA process is a three level evaluation which determines how the undertaking will affect the environment.²⁰⁹ TxDOT works with the Federal Highway Administration in implementing this program. Current law allows a Request for Proposals (RFP) to be issued and design build contracts to be signed prior to the completion of environmental review.²¹⁰

This allows transportation agencies to lock in prices during the years that the environmental review is taking place. If CDA contracts were not procured until after environmental clearance, TxDOT or other transportation entities could lose a significant amount of money due to the rising costs of highway materials and labor.²¹¹

CDA Contract Duration

During the 80th legislative session, there was debate regarding the duration of CDA contracts. Prior to Senate Bill 792, the statutory contract duration was fifty years for the Trans-Texas Corridor concession agreement, and seventy year operating terms for other concession projects. Senate Bill 792 changed this to a flat fifty years, with a two year development period.²¹² This development period was added since it takes approximately two years to develop a facility prior to the beginning of revenue collection.

Senate Bill 792 also permits proposers to submit pricing based on ten year increments of durations from ten to fifty years.²¹³ According to the Texas Department of Transportation, shortening the revenue period of CDA contracts to less than fifty years could negatively affect private sector interest.²¹⁴

While experts say that adding years to the concession agreement does not necessarily increase profits, taking years away could not only decrease the road's profitability, but may potentially

²⁰⁷ Ibid.

²⁰⁸ National Environmental Policy Act, Basic Information, June 25, 2008, at <http://www.epa.gov/compliance/basics/nepa.html>.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Fredric Kessler, Partner, Nossaman Guthner Knox & Elliott, LLP, testimony to the Senate Committee on Transportation and Homeland Security, April 23, 2008.

²¹² Tex. S.B. 792, 80th Leg., R.S. (2007).

²¹³ Ibid.

²¹⁴ Phillip E. Russell P.E., Assistant Executive Director for Innovative Project Management, Texas Department of Transportation, testimony before the Senate Committee on Transportation and Homeland Security, April 23, 2008.

transfer the risk of maintenance to the state.²¹⁵ Kessler suggested that the CDA statute be amended to allow for an additional ten years, making the duration of a CDA contract sixty years plus development.²¹⁶ By extending a CDA contractual term to sixty years, Kessler asserts that the state will bear less risk, and the private entities will be more willing to do business in Texas.²¹⁷

Competing Facility Agreements

The Texas Transportation Code as dictated by Senate Bill 792 requires that if a toll project contains a competing facilities agreement, or "non compete" clause, it must be limited to four miles on either side of the roadway.²¹⁸ The competing facility clause recognizes that projects could have an affect on the revenue brought in by a nearby road, however, development and improvements to other roadways will continue to occur regardless.²¹⁹

At the April 23, 2008, hearing of the Senate Committee on Transportation and Homeland Security, Phillip Russell of TxDOT stated at the April 23, 2008 hearing of the Senate Committee on Transportation and Homeland Security that "The non-compete clause does not prevent any nearby projects from being built regardless if they are listed within the contract or not."²²⁰ He further stated, "These clauses merely set forth a requirement that if a non-exempt project is built that negatively affects a project then compensation will be made."²²¹ Finally Russell asserted that these agreements are a part of standard business agreements used around the world and do not prevent maintenance or new capacity from being built near a toll road.²²²

RECOMMENDATIONS

Over the past several sessions, the legislature has felt the need to clarify or change the course of action for transportation the session after approving a major piece of policy. This session will be similar in that the committee feels that several parts of Senate Bill 792 need to be readdressed.

For the purposes of this report, the Senate Committee on Transportation and Homeland Security recommends that buyback values be set at fixed amounts in intervals at the onset of the contract. This allows for both the state and the private developer to have a price set for the duration of the agreement.

Additionally, the Committee recommends that as a part of the NEPA process, the RFP should be issued when the environmental analysis is far enough along that TxDOT is confident in the likely project alignment, configuration and definition.²²³ This allows TxDOT to maximize its financial resources with current pricing.

²¹⁵ Fredric Kessler, Partner, Nossaman Guthner Knox & Elliott, LLP, testimony to the Senate Committee on Transportation and Homeland Security, April 23, 2008.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ TEX. TRANSP. CODE ANN. § 371.103 (2008).

²¹⁹ Phillip E. Russell P.E., Assistant Executive Director for Innovative Project Management, Texas Department of Transportation, testimony before the Senate Committee on Transportation and Homeland Security, April 23, 2008.

²²⁰ Ibid.

²²¹ Ibid.

²²² Ibid.

²²³ Fredric Kessler, Partner, Nossaman Guthner Knox & Elliott, LLP, testimony to the Senate Committee on Transportation and Homeland Security, April 23, 2008.

This charge asks the committee to examine the current statutes for CDA contract duration as well as competing facility agreements. The Committee recommends leaving both of these current statutes as they were improved by Senate Bill 792.

The current contract duration statute allows for contracts to be up to fifty years in length, with a two year development period. The current competing facilities statute includes protections for the state, particularly limiting the non-compete area to four miles on either side of the road. The Committee feels that both are fair to the state and to developers and recommend that these statutes remain unchanged.

The Legislature should address a potential conflict of interest in the statute that requires the State Auditor to review contracts that may later come under audit by the same State Auditor.

Review the status of structurally deficient bridges and provide increased oversight of TxDOT's bridge repair activities to ensure that any unsafe bridges are identified and repaired as soon as possible.

Background

Concerns about the safety of bridges ascended to national prominence due to the collapse of the I-35W bridge in Minneapolis, Minnesota, on August 1, 2007. This unfortunate event prompted the State to review its own bridge safety procedures to ensure that an adequate system is in place to designate and repair such bridges that are of detriment to public safety.

Status of Bridges in Texas

The Texas Department of Transportation is currently responsible for managing over 33,000 state-owned bridges and for inspecting 17,000 locally-owned bridges. Texas has more than 50,000 bridges across the state, which is approximately 1/12th of the bridges in the country, the most of any state in the nation. With a large number of bridges, the Texas Department of Transportation has devised an inspection, maintenance and repair system to support the large bridge infrastructure.²²⁴

According to the Texas Department of Transportation, there are eight classifications of bridge safety status:

- *Sufficient structure (good or better):* A sufficient structure meets current federal and Texas requirements and is in good or better condition. To be classified in good or better condition, a bridge is not structurally deficient, functionally obsolete, or sub-standard for load only. Desirable change in sufficient structures from year to year is reflected by positive numbers, showing an increase in sufficient structures.
- *Non-sufficient structure:* A non-sufficient structure is structurally deficient, functionally obsolete, or sub-standard for load only. Desirable change in non-sufficient structures from year to year is reflected by negative numbers, showing a decrease in non-sufficient structures.
- *Structurally deficient structure:* A bridge is classified by the Federal Highway Administration (FHWA) as structurally deficient if it meets any of the following criteria:
 - It has an extreme restriction on its load-carrying capacity.
 - It has deterioration severe enough to reduce its load-carrying capacity beneath its original as-built capacity.
 - It is closed.
 - It is frequently over-topped during flooding, creating severe traffic delays.
- *Critically deficient structure:* A bridge is classified by TxDOT as critically deficient if it is structurally deficient and in most need of attention.

²²⁴ Testimony of John Barton, Assistant Executive Director of Engineering Operations, Texas Department of Transportation, Before the Senate Committee on Transportation and Homeland Security, May 20, 2008, p. 3.

- *Functionally obsolete structure*: A bridge is classified by the FHWA as functionally obsolete if it fails to meet its design criteria in any one of the following areas:
 - Deck geometry
 - Load-carrying capacity
 - Vertical or horizontal clearances
 - Approach roadway alignmentIn this report, structures that are both functionally obsolete and structurally deficient are counted only as structurally deficient.
- *Sub-standard for load only structure*: A bridge is considered sub-standard for load only if it is not classified as structurally deficient or functionally obsolete but has a load capacity less than the maximum load permitted by state law. It has not deteriorated or has not deteriorated severely enough to reduce its load capacity beneath its original as-built capacity, but its original as-built capacity was not designed to carry current legal loads. A sub-standard for load only structure is load-posted or recommended for load posting.
- *Load-posted bridge*: A bridge that is load-posted has a safe load capacity less than the state legal load, and its load capacity is communicated by signs at the bridge site. (Note: Certain vehicles, identified in Chapter 622 of the Texas Transportation Code, that exceed posted load capacity can legally use load-posted bridges.)
- *Land-locking bridges*: This report classifies a bridge as land-locking if it restricts traffic into an area because of load limitations or closures. These bridges are load-posted.²²⁵

The term *structurally deficient* designates a bridge that is "not capable" of safely carrying its originally designed load, but is safe to remain in public use with a lower capacity restriction.²²⁶ The Federal Highway Administration also uses this term to classify bridges that are eligible for federal funding. It is important to note that the term *structurally deficient* is not synonymous with *unsafe*, which is closed to traffic. Structurally deficient bridges are still operational, but at a diminished capacity.

Most notable is the classification *structurally deficient*. Currently, the number of structurally deficient bridges in Texas is declining. The number of structurally deficient on-system bridges has decreased from 2.4% in 2000 to 1.3% in 2007. Off-system bridges that are structurally deficient have decreased from 16.3% in 2000 to 9% in 2007.²²⁷ (Classification "on" and "off" system denotes the funding source proportion. For example, on system bridges receive eighty percent from federal funds and twenty percent from state funds. Off-system bridges receive eighty percent from federal, ten percent from state and ten percent for local funds)²²⁸

²²⁵ *Reports on Texas Brides as of September 2006*, Bridge Division, Texas Department of Transportation, May 10, 2007, p. 17.

²²⁶ Testimony of John Barton, Assistant Executive Director of Engineering Operations, Texas Department of Transportation, Before the Senate Committee on Transportation and Homeland Security, May 20, 2008, p. 3.

²²⁷ *Ibid.*

²²⁸ *Ibid*, p. 4.

According to the November 2007 issue of Better Roads, Texas tied for first with Arizona and Florida for states having the smallest percentage of structurally deficient on-system bridges, at one percent. Texas ranked fifteenth amongst the states with the smallest percentage of on and off-system structurally deficient bridges. This figure is impressive considering Texas has the largest number of bridges in the country.²²⁹

In August 2001, then Texas Transportation Commissioner John W. Johnson launched an initiative to increase the public safety of bridges. The goals set were that at least eighty percent of Texas bridges be in good or better condition by 2011. To achieve this mission, TxDOT, accelerated the upgrade of all structurally deficient on-system bridges. The progress of this initiative is documented in the report issued by TxDOT biennially: "Report on Texas Bridges."²³⁰

Maintenance and Repair of Bridges

In August 2007, the Texas Department of Transportation reported an estimated cost of \$2 billion to bring all structurally deficient bridges, both on and off-system, to a good or better condition grade. The current annual appropriation for bridge maintenance, both federal and state, is approximately \$250 million²³¹

Funding

SAFETEA-LU, the current federal transportation bill, authorizes the Highway Bridge Program (HBP), and provides funding to enable states to improve the condition of their highway bridges through replacement, rehabilitation and systematic preventive maintenance. Importantly, HBP does not fund new location bridges. Funding for Texas bridges is administered by the Texas Department of Transportation, which utilizes the Unified Transportation Program (UTP), an eleven year program to guide transportation project development and construction. Under the UTP period of 2006-2016, 1085 on-system and 1650 off-system projects are allocated for funding, which results in \$2.3 billion for on-system and \$765 million for off-system bridges.²³²

The Participation Waived Project/Equivalent Math Project (PWP/EMP), also known as the Behrens Bridge Program, was created in 2001 as assistance for the ten percent allocation for off-system HBP projects local entities are responsible for. Under this program, local entities are allowed to waive the ten percent it is responsible for if the local entity agrees to dedicate that ten percent to rehabilitate other deficient bridges in its jurisdiction. The Texas Department of Transportation covers the deferred ten percent of the HBP bridge project localities are responsible for. This program has proven effective in achieving the goal set by Commissioner Johnson in 2001 to accelerate bridges from deficient to good or better. In fact, more than 740 bridges have been rehabilitated under the PWP/EMP program to date.²³³

²²⁹ Ibid.

²³⁰ Ibid, p. 3-4.

²³¹ Testimony of John Barton, Assistant Executive Director of Engineering Operations, Texas Department of Transportation, Before the Senate Committee on Transportation and Homeland Security, May 20, 2008, p. 4.

²³² Testimony of John Barton, Assistant Executive Director of Engineering Operations, Texas Department of Transportation, Before the Senate Committee on Transportation and Homeland Security, May 20, 2008, p. 4.

²³³ Ibid, p. 4-5.

The State Infrastructure Bank (SIB) and the Economically Disadvantaged Counties Program (EDCP) are additional funding resources for local entities to accelerate bridge upgrades. The SIB is a revolving account in the State Highway Fund from which loans to local governments may be made to fund eligible transportation projects. The EDCP allows TxDOT to waive a county's matching funds requirement after evaluating the local government's ability to meet the requirement. As with the PWP/EMP, TxDOT assumes the local entity's waived ten percent portion under the EDCP.²³⁴

Bridge Inspection Process

In 1967, the National Bridge Inspection Program was created in response to the Silver Bridge collapse at the Ohio River, which killed 46 people. Subsequent legislation, the Federal-aid Highway Act of 1968, instructed the Secretary of Transportation, in conjunction with State highway officials, to establish the National Bridge Inspection Standards (NBIS) and a bridge inspection training program for employees to implement NBIS. Consequently, NBIS regulations were developed with a bridge inspector's training manual and course. Furthermore, state and local bridge inspections standards tend to be more restrictive than national standards to accommodate the special needs and circumstances for each region's infrastructure.²³⁵

According to the Code of Federal Regulations, each state transportation department is required to "inspect, or cause to be inspected, all highway bridges located on public roads . . ." In addition, TxDOT is required to maintain a bridge inspection organization, bridge inventory, inspections, reports and load ratings.²³⁶ Furthermore, each bridge must receive a routine safety inspection at least every twenty-four months, with those requiring additional attention receiving evaluations more frequently. For bridges near water, additional inspections are conducted on the underwater elements at least every sixty months. Bridges that have been designated as susceptible to fatigue damage receive inspections every twenty-four months.²³⁷

Oversight of Texas Department of Transportation

TxDOT inspects all public bridges in the state, regardless whether owned or maintained by the state (on system) or by county, city or other local entities (off-system). Importantly, TxDOT does not inspect privately owned bridges or those on private roads. For private bridges, the findings and recommendations that result from inspection are usually performed by in-house and consulting engineering firms. Furthermore, these resources are made available to the local government that owns the bridge.²³⁸

Approximately, ninety-five percent of all routine safety inspections are outsourced to consulting engineering firms with expertise in performing bridge inspections. TxDOT, specifically, manages twenty-eight engineering contracts which perform routine safety bridge inspections. In addition to the engineering consultant inspections, TxDOT also performs the following duties to ensure bridge quality and safety:

²³⁴ Ibid, p. 5.

²³⁵ Ibid.

²³⁶ 23 CFR, 650.307 (a), Code of Federal Regulations.

²³⁷ Ibid, 650.311

²³⁸ Ibid, p. 5-6.

- Quality control reviews on inspection data,
- Maintains a state-wide bridge inventory database,
- Recommends bridge inspection and maintenance guidelines to local entities
- Evaluate bridge safety for load carrying capacity
- Submit yearly bridge inventory data to the FHWA
- Monitor inspection personnel qualifications

More specifically, TxDOT monitors inspection personnel qualifications in accordance to those standards set by the CFR. (Refer to 23 CFR, 650.309 for specific personnel qualification standards.)²³⁹

FINDINGS AND RECOMMENDATIONS

The tragic collapse of the I-35W bridge in Minneapolis, Minnesota, highlighted the need for an adequate bridge safety and maintenance routine. Not only has Texas adhered to those national guidelines set by the NBIS and the CFR, more stringent guidelines have been implemented on the state level to ensure bridge safety.

The lack of funding for bridge maintenance repair is noticeable. With an estimated cost of \$2 billion to bring all structurally deficient bridges, both on and off-system, to a good or better condition grade, annual apportions to bridge safety are not adequate. More specifically, TxDOT's annual allocation for bridge repair and replacement using federally apportioned Highway Bridge Program funding is only \$230 million. The allocation for maintenance of bridges, which consists solely of state funds, is only \$30 million per year. But due to the detailed and well organized inspection and repair schedule of TxDOT, **it is the finding of this Committee that the Texas Department of Transportation is capable of and should identify acceptable, achievable levels of maintenance based on performance and implement those levels.**

²³⁹ Ibid, p. 6.

Study and make recommendations relating to the status of current and planned toll road projects in Texas, the use of public-private partnerships to build new roads and/or transit services, and the market valuation process. Analyze the impact of lengthening the number of years a toll road authority may issue bonds.

BACKGROUND

In 2003, the structure of Texas transportation finance changed as the Texas Legislature approved House Bill 3588, allowing for public-private partnerships as a means to developing transportation infrastructure through Comprehensive Development Agreements (CDAs).²⁴⁰

The 2005 legislature authored additional legislation refining the previous statute.²⁴¹ By the time the 2007 legislature began, the public had started to learn more about CDAs, particularly through the negative publicity garnered by the Trans-Texas Corridor. As a result, the legislature passed Senate Bill 792 which included a two-year moratorium on private participation in toll projects.²⁴² This legislation also created the market valuation process, which is used to determine the value of a project.²⁴³

This interim report will examine the status of projects throughout the state, and the future of the market valuation process.

Project Status

At the April 23, 2008 hearing of the Senate Committee on Transportation and Homeland Security, the Texas Department of Transportation indicated that there are over 100 toll projects currently in some phase of development.²⁴⁴ These projects are located throughout the state, with a high concentration in the Dallas-Fort Worth metroplex.²⁴⁵

These projects are all currently slated as toll projects, and will most likely be developed as Public-private Partnerships (PPPs). The advantage of a project being developed as a PPP is that the project is financed through a private company which in the past has correlated to a higher concession payment. However, the major disadvantage of this model is that the profits are assigned to private investors instead of a system financing mechanism.

State Highway 130 segments 5 and 6 are being developed as a PPP between Cintra and Texas-based Zachry Construction Corporation. This 40 mile highway segment will run southeast of Austin to Interstate 10 at Seguin.²⁴⁶ The first four segments were financed through traditional methods, but it would have taken decades for the additional funds to become available for the

²⁴⁰ Tex. H.B. 3588, 78th Leg., R.S. (2003).

²⁴¹ Tex. H.B. 2702, 79th Leg., R.S. (2005)

²⁴² Tex. S.B. 792, 80th Leg., R.S. (2007).

²⁴³ TEX. TRANSP. CODE. ANN. § 228.0111 (2008).

²⁴⁴ Phillip E. Russell P.E., Assistant Executive Director for Innovative Project Management, Texas Department of Transportation, testimony before the Senate Committee on Transportation and Homeland Security, April 23, 2008.

²⁴⁵ List available from the committee office.

²⁴⁶ Jose Maria Lopez, Director, Cintra US, testimony before the Legislative Study Committee on Private Participation in Toll Projects, July 22, 2008.

final two segments.²⁴⁷ As a result of this lack of funds, the project was the first PPP approved by the Texas Transportation Commission in June of 2006.²⁴⁸ The right-of-way process began in June 2007 and construction is expected to begin by the end of 2008 or early 2009.²⁴⁹

The Market Valuation Process

During negotiations regarding the final language of Senate Bill 792, the concept of the "market valuation" process was introduced to the legislation by the Texas Department of Transportation.

The Department saw market valuations as a way to ensure that much needed concession payments were maximized, particularly for lucrative urban projects, while giving preference to the local toll agency.²⁵⁰ This process stems from a market value, a figure that represents the value of the transportation asset to the project sponsor, who will either be the Department or the local entity.²⁵¹

The process is as follows: (1) A proposed project is identified by either TxDOT through its planning process or by the local toll project entity (toll authority or regional mobility authority). (2) Once the project is identified, the local authority and TxDOT must agree on the terms and conditions for the development, construction, and operation of the toll project. This includes the initial toll rate and the toll rate escalation methodology. (3) The tolling entity and TxDOT may agree to waive the market valuation. If this occurs, then the local tolling entity would have the first option to build the project. (4) If instead the parties agree to a market valuation, then the tolling entity and TxDOT must agree on who will perform it. If they cannot agree, the project may not move forward as a toll project. (5) Once the valuation is complete, the tolling entity and TxDOT will have 90 days to revise the valuation. (6) The tolling entity is then given six months to exercise its option on the project, which, assuming that it does, it then has 2 years to continue any environmental or legal challenges and to enter into a construction contract.²⁵²

The process saw its first implementation on a significant revenue-generating project with the valuation of State Highway 161 (SH 161), which runs through the Dallas-Fort Worth region.²⁵³ The Department and the North Texas Tollway Authority (NTTA) worked together on the market valuation for over eight months and had reached a stalemate before Lieutenant Governor David Dewhurst and several area legislators intervened to encourage the project to proceed.²⁵⁴ TxDOT and the NTTA ultimately abandoned the formal market valuation process due to not being able to resolve seven remaining financial assumptions.²⁵⁵ Additionally, this process pitted the two

²⁴⁷ Phillip E. Russell P.E., Assistant Executive Director for Innovative Project Management, Texas Department of Transportation, testimony before the Legislative Study Committee on Private Participation in Toll Projects, April 29, 2008.

²⁴⁸ Jose Maria Lopez, Director, Cintra US, testimony before the Legislative Study Committee on Private Participation in Toll Projects, July 22, 2008.

²⁴⁹ Ibid.

²⁵⁰ Phillip E. Russell P.E., Assistant Executive Director for Innovative Project Management, Texas Department of Transportation, testimony before the Senate Committee on Transportation and Homeland Security, April 23, 2008.

²⁵¹ Ibid.

²⁵² Phillip E. Russell P.E., Assistant Executive Director for Innovative Project Management, Texas Department of Transportation, testimony before the Senate Committee on Transportation and Homeland Security, April 23, 2008.

²⁵³ Frank Stevenson, Partner, Locke Lord Bissell & Liddell LLP representing the North Texas Tollway Authority, testimony before the Senate Committee on Transportation and Homeland Security, April 23, 2008.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

agencies against each other, often resulting in harsh criticisms that conflicted with their efforts to establish a strong working relationship.²⁵⁶

After their decision to abandon the market valuation process, the NTTA has worked with TxDOT and the Federal Highway Administration over the last few months to seek federal loan money in addition to the traditional bond components of the financing package.²⁵⁷ The Authority expects to make a final determination on if they will accept the project by October of 2008.²⁵⁸ The official acceptance will be based on the final investment grade traffic and revenue report, rating confirmations of the NTTA's bonds and further financial analysis, as well as approval by the Board of Directors.²⁵⁹

RECOMMENDATIONS

The Committee recommends that revenues from toll projects should be kept in the region or system of infrastructure.

The Committee recommends that primacy for local toll project entities continue.

²⁵⁶ Ibid.

²⁵⁷ Personal interview with Carrie Rogers, Governmental Relations, North Texas Tollway Authority, August 28, 2008.

²⁵⁸ Ibid.

²⁵⁹ State Highway 161 Progress Report, North Texas Tollway Authority, August 2008.

Study the effectiveness of the Trans-Texas Corridor (TTC) and make recommendations for its future role in providing additional roads in Texas. Provide specific recommendations relating to public input in the development of the TTC.

BACKGROUND

With traffic and congestion at an all-time high, in 2002, Governor Rick Perry charged the Texas Department of Transportation with developing a new multi-modal highway system.²⁶⁰ This project, the Trans-Texas Corridor (TTC), was designed to incorporate existing highways with new roads, railways, and utility rights-of-way. These corridors were expected to span the state and relieve traffic, starting with the heavily traveled priority corridors Interstate 35 and Interstate 69/US Highway 59.

House Bill 3588 (2003) authorized the Commission to develop the TTC facilities.²⁶¹ Additionally the legislation granted the ability for the Department or Regional Mobility Authorities to enter into Comprehensive Development Agreements (CDAs) with the use of Public-private Partnerships.²⁶²

A Comprehensive Development Agreement is a comprehensive approach to project procurement which consolidates the design, build, and financing stages of the roadway. Public-private Partnerships are agreements between the state and a private entity, in which the private entity agrees to finance and build the project. The Department sees Public-private Partnerships as a method of offsetting the funding gap between projects identified by TxDOT to reach an acceptable level of mobility, and what traditional funding methods will be able to cover.²⁶³

Current Status of the Trans-Texas Corridor Projects

Trans-Texas Corridor 35 (TTC 35) was identified as a high priority corridor by the commission in 2002²⁶⁴. Since then, the Tier One Draft Environmental Impact Study (DEIS) examined over 560 miles of potential roadway that span over 77 Texas counties.²⁶⁵ In 2005, TxDOT executed a contract with Cintra/Zachry for the Spanish-Texas consortium to develop and build TTC 35, the corridor that will run to the east of the heavily congested Interstate 35.²⁶⁶ In March 2007, the Department entered into the agreement for State Highway 130, which will potentially be the segment of TTC 35 near Austin.²⁶⁷

²⁶⁰ Testimony of Phillip Russell, Assistant Executive Director for Innovative Project Development, Texas Department of Transportation, before the Senate Committee on Transportation and Homeland Security on April 23, 2008.

²⁶¹ Tex. H.B. 3588, 78th Leg., R.S. (2003).

²⁶² Ibid.

²⁶³ Testimony of Phillip Russell, Assistant Executive Director for Innovative Project Development, Texas Department of Transportation, before the Senate Committee on Transportation and Homeland Security on April 23, 2008.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

The TTC 69 project is centered around US 59 and stretches over 650 miles from Texarkana to Laredo and will also use extensions of US 281 and US 77 near the Rio Grande Valley.²⁶⁸ On November 13, 2007, the Tier One DEIS was released for TTC 69 which examined the impact of potential locations for the corridor. TxDOT issued a request for proposals in November 2007, and awarded the development contract to Zachry American and ACS Infrastructure in the summer of 2008. On June 11, 2008, TxDOT announced that they would pursue a path for TTC 69 that followed the footprint of existing highways, therefore easing opposition by reducing the amount of land scheduled for acquisition. On June 16, 2008, at the House Appropriations Committee, Subcommittee on Transportation hearing, Executive Director Amadeo Saenz stated that while this is a viable option for the rural TTC 69, it would not be feasible on the more developed path of Interstate 35 between San Antonio and Dallas.²⁶⁹

TxDOT envisions that both of these corridors will eventually encompass freight rail, commuter rail, and high speed rail facilities. Additionally, controlled access passenger and truck lanes will be used by the traveling public and business community. However, in the near future, only passenger vehicle are being planned in order to reduce the immediate need of right-of-way acquisition required for the projects.²⁷⁰

Controversy Surrounding the Trans-Texas Corridor

On March 1, 2007, the Senate Committee on Transportation and Homeland Security held a day-long hearing primarily on the issue of the Trans-Texas Corridor.

This hearing was a result of the thousands of calls, letters, faxes, and emails that the committee received denouncing the route, the financing method, or other aspects of the TTC. Nearly one thousand Texans descended upon the Capitol in person merely to have the opportunity to be heard, something they felt had not happened until that point.

At the August 7, 2007 hearing, which focused on general transportation and homeland security issues, David Stall, co-founder of Corridorwatch.org stated, "The TTC is a flawed project that has grown out of a flawed process. The TTC is not the product of open debate and collaboration aimed at addressing the state's transportation needs. The TTC is the product of a mandate to generate revenue, albeit transportation revenue."²⁷¹

Rural Texans in the path of one of the corridors were displeased with the possibility of their land being purchased for the highway or right-of-way, and thus dividing or engulfing their longtime property.²⁷² Other Texans do not like the concept of a Texas highway being leased to the private

²⁶⁸ Ibid.

²⁶⁹ Testimony of Amadeo Saenz, Executive Director, Texas Department of Transportation, before the House Appropriations Committee, Subcommittee on Transportation, June 16, 2008.

²⁷⁰ Ibid.

²⁷¹ Testimony of David Stall, Co-founder, Corridorwatch.org, before the Senate Committee on Transportation and Homeland Security on August 7, 2007.

²⁷² Public Testimony, Senate Committee on Transportation and Homeland Security, March 1, 2007.

sector, particularly a foreign company for 50+ years.²⁷³ Additionally, some take issue with the connection of the highway to Mexico, with its potential to someday span the nation to Canada.²⁷⁴

Current Methods of Public Input for Trans-Texas Corridor Development

Regardless of the reason for disliking the corridor - all of these people have one thing in common in that they feel that TxDOT has ignored their concerns.²⁷⁵ As a result, organizations such as CorridorWatch.org and Texans United for Reform and Freedom have emerged as forums for Texans to voice their displeasure and organize against the corridor and privatization concept. In an expanded effort to get public input, TxDOT held 117 public meetings and 54 public hearings to discuss the 10 mile wide narrowed path for TTC 35.²⁷⁶ For TTC 69, part of the Tier One DEIS included 12 town hall meetings, and nearly 50 public hearings.²⁷⁷ Opponents of the Corridor have stated that they feel these meetings and hearings were merely choreographed exercises and that the intent of the TxDOT was not to seek feedback, but merely to announce that the road was coming.²⁷⁸

In March of 2005, TxDOT formed a 22-member Citizen Advisory Council, made up of local citizens and elected officials. The advisory panel was charged with examining key issues that should be advised in planning the corridor.²⁷⁹ In March of 2008, the Texas Department of Transportation Commission approved the selection of members to serve on two Corridor Advisory Committees which are charged with studying the impact of the development of both TTC 35 and 69 corridor projects.²⁸⁰

FINDINGS AND RECOMMENDATIONS

The Senate Committee on Transportation and Homeland Security commends TxDOT for listening to the public as evidenced by changes to TTC 69.

Over the last few years, TxDOT has increased the capacity and varied the type of public hearings, therefore allowing more people to voice their concerns in better forums.

The committee recommends that TxDOT continue to work with Texans and listen to those whose lives will be greatly impacted by the TTC and commends the Department for its recent work in this area.

²⁷³ Testimony of Amadeo Saenz, Executive Director, Texas Department of Transportation, before the House Appropriations Committee, Subcommittee on Transportation, June 16, 2008.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ Testimony of Phillip Russell, Assistant Executive Director for Innovative Project Development, Texas Department of Transportation, before the Senate Committee on Transportation and Homeland Security on April 23, 2008.

²⁷⁷ Ibid.

²⁷⁸ Public Testimony, Senate Committee on Transportation and Homeland Security, March 1, 2007.

²⁷⁹ Texas Department of Transportation, Trans-Texas Corridor - Citizen's Advisory Committee. (2008), at http://ttc.keeptexasmoving.com/get_involved/adv_overview.aspx.

²⁸⁰ Ibid.

Study the impact of prohibitions in Section 2301.476 (Manufacturer or Distributor Ownership, Operation, or Control of Dealership), Occupations Code, on the sale of buses in Texas and make recommendations. Gather information and monitor the methods of sale of buses in other states and the dealership network, if any. Evaluate the need and possible benefits or detriments caused to public and private sector in application of this law and rule to the bus industry.

Due to changes in the economy and other factors, the committee took no action on this charge.

Study the issue and amount of state agency expenditures on media activities and the legal authority for such expenditures. Develop recommendations for guidelines to ensure appropriate use of state funds to provide legitimate public education.

BACKGROUND

Media activities can prove to be useful tools for state agencies to educate the public about state programs. However, there are currently no standard guidelines to ensure appropriate use of the state funds for legitimate public education. This lack of guidelines has caused some controversy in the case of the Texas Department of Transportation who has made headlines by using state funds to seemingly promote the much debated Trans Texas Corridor. For example, critics point to transportation officials being trained by experts from ViaNovo as part of a \$20,000 consulting contract included in the agency's multimillion-dollar Keep Texas Moving ad campaign.²⁸¹ Another example is that \$52,000 of a \$628,000 invoice that was charged to engineering was actually for PR expenses. A committee staffer attended a public involvement hearing at TxDOT on Friday, August 29, 2008. Only three people showed up at the 11:00 am hearing to voice their opinion, suggesting inadequate notice or timing of the meeting (at 11 am on a Friday before Labor Day weekend) may have played a factor in the low attendance.

The Texas Department of Transportation spends the second highest amount on advertising and media of all the state agencies. The Lottery Commission comes in first and the Office of the Governor comes in third. This report examines various state agencies publicity expenditures, their legal authority for such expenditures, and internal guidelines set by each agency on how these funds should be spent. The agencies featured in the report are those that responded to a agency survey the Committee sent out.

Texas Lottery Commission

The Texas Lottery Commission's FY 2008 advertising budget is \$31 million. Their budget for FY 2009 related to advertising is projected to be \$30 million. The Commission operates under statutory language in the State Lottery Act (Government Code, Chapter 466) and is appropriated funding in the General Appropriations Act for Mass Media Advertising. Mass media advertising is defined to provide for the production of radio, television, Internet, newspaper, magazine and print advertising, as well as the planning, buying and placement of electronic and print media across the State of Texas.

Chapter 466, Government Code says that the Commission may adopt rules governing the establishment and operation of the lottery, including rules governing the means of advertising to be used for the lottery. If the total amount of lottery prizes awarded by the commission in any state fiscal year after the fiscal year ending August 31, 2000, exceeds an amount equal to 52% of the gross revenue from the sale of tickets in that fiscal year as determined by the Comptroller, the advertising budget for the lottery in the next state fiscal year may not exceed an amount equal to \$40 million less \$1 million for each full percent by which the total amount of lottery prizes awarded by the commission in the preceding fiscal year exceeds an amount equal to 52% of the

²⁸¹ Fikac, Peggy. "TxDOT readies its 2 cents on tolls." San Antonio Express News, September 7, 2007.

gross revenue from the sale of tickets in that preceding fiscal year as determined by the Comptroller.²⁸²

The agency has both statutory requirements and its own internal advertising standards to determine how these funds are used. The Government Code, Chapter 466.110 prohibits advertisements or promotions sponsored by the commission or the division for the lottery from being of a nature that unduly influences any person to purchase a lottery ticket or number. The agency's mission statement also provides guidance: "The Texas Lottery is committed to generating revenue for the State of Texas through the responsible management and sale of entertaining lottery products." Furthermore, the agency has formalized a "Core Value of Fiscal Responsibility" in this regard including: "We recognize our responsibility in generating revenue for the State of Texas without unduly influencing players to participate in our games." The agency has also developed a set of standards for all of its advertising efforts, referred to as Advertising Sensitivity Standards. These standards have been made a part of the agency's contracts with its advertising vendors.

The Commission's advertising efforts in recent years can be largely broken into three types of advertising initiatives: 1. specific product support advertising for the Commission's scratch-off, instant ticket games and its online games, such as Lotto Texas and Mega Millions, 2. general brand advertising emphasizing the fun and entertainment value of Lottery products, and 3. beneficiary advertising efforts focused on educating the public that Lottery proceeds are contributed to the Foundation School Fund.²⁸³

Texas Department of Family and Protective Services

The Texas Department of Family and Protective Services (DFPS) has very limited funding for advertising and public education. Total expenditure on marketing and advertising between FY 2007-2009 will be approximately \$498,500. DFPS has five state wide public awareness campaigns each year:

1. "Why Not Me" campaign used \$415,000. This campaign is aimed to increase adoption of children in state custody. (42 U.S.C. Section 673b)
2. Child Abuse Prevention Month (U.S.C. 5106a, 42 U.S.C. Sections 621(2) and 625, 42 U.S.C. Section 674(a)(3), 42 U.S.C. Section 601; 42 U.S.C. Section 1396a, Texas Human Resource Code Sections 40.102(a)(1), 40.106 and 40.0522)
3. It's Everyone's Business (adult abuse prevention) (Texas Human Resource Code Section 40.0527)
4. See & Save (drowning prevention and hot car safety) (Texas Human Resource Code Section 40.102(a)(1) and 40.106; 40.0522)
5. Don't be in the Dark about Child Care (encourages parents to choose legal child care) 42 U.S.C. Section 618, 40 Texas Human Resource Code Section 40.0522)

In the same time period DFPS has public awareness campaigns that are run through community engagement activities and free news media coverage. The only expenses were for the cost of producing supporting brochures and other educational print material. DFPS also operates two

²⁸² Government Code, Chapter 466 (d)

²⁸³ Survey returned from the Texas Lottery Commission to the Senate Committee on Transportation and Homeland Security.

hotlines aimed at helping runaway youth and youth at risk of abuse or neglect. While not full fledged public awareness campaigns, DFPS spent about \$83,500 dollars on TV ads in these two years to make teens aware of this service.

As an outgrowth of DFPS reform, the agency created operating policy called the Communications Policy Handbook. Among other topics it governs communications including media relations, website content, publications, and all media. While it does not specifically address for what purposes agencies may spend money on media and public awareness, it puts all such activities under the oversight of the Office of Communications within the Center for Consumer and External Affairs. All media is used for educational purposes related to the agency's core mission. The agency does not purchase or employ media of any kind for promotional or political purposes.²⁸⁴

Texas Commission on Environmental Quality

The Texas Commission on Environmental Quality (TCEQ) spends \$1,009,435 on publicity and public education expenditures. The agency has a wide range of programs that require marketing and public education including the Low Income Vehicle Repair, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP). Another program is the Texas Emission Reduction Program (TERP), which provides grants to improve air quality in certain counties. The agency's Small Business and Environmental Assistance Division also advertises such programs, such as Take Care of Texas and Drive Clean Across Texas, which are primarily funded through federal grants. The statutory requirement that governs TCEQ spending is found in the General Appropriations Act, under General Limitations and Expenditures, Section 6.25. Other programs, such as TERP and LIRAP have their own statutory guidance for expenditures in the Texas Health and Safety Code, Sections 386.116(c) and 382.209(b) respectively.²⁸⁵ The TCEQ does not have specific operating policies and procedures in place with regard to the use of public dollars for the purpose of advertising. Generally the materials are submitted for appropriate review by staff in the TCEQ Communications Division and/or the executive division.²⁸⁶

Public Utility Commission of Texas

The PUC is appropriated money specifically for customer education under two strategies. Strategy B.1.1. says that they must provide information about changes in electric and telecom industries and Strategy C.1.2 for customer education. This money is non-transferable.

The Public Utility Regulatory Act (PURA) Section 17.003 requires the PUC to promote awareness of changes in electric and telecom markets, provide customers with information necessary to make informed choices, and ensure that customers have an adequate understanding of their rights. These customer awareness efforts must be conducted in English and Spanish and any other language as necessary. PURA Section 39.902 requires an ongoing education program

²⁸⁴ Survey returned from the Texas Department of Family and Protective Services to the Senate Committee on Transportation and Homeland Security.

²⁸⁵ TERP--"The Commission shall publicize and promote the availability of grants under this section to encourage the use of vehicles that produce fewer emissions." LIRAP--"The Commission shall provide funding for local low-income vehicle repair assistance, retrofit, and accelerated vehicle retirement program. Program costs may include call center management, application oversight, invoice analysis, education, outreach, and advertising."

²⁸⁶ Survey returned from the Texas Commission on Environmental Quality to the Senate Committee on Transportation and Homeland Security.

to help customers make informed choices of electric service and retail electric providers. As part of ongoing education, the PUC may provide customers information concerning specific retail providers, including instances of complaints against them and records relating to quality customer service.²⁸⁷

Texas Department of State Health Services

The Department of State Health Services (DSHS) expends General Revenue, General Revenue-Dedicated (tobacco settlement earnings) and federal funds for advertising, marketing, or public education. The amount spent for Fiscal Year (FY) 2008 through July 31 is \$7,405,375. The mission for the Department of State Health Services is to improve health and well being in Texas. DSHS has broad authority under its enabling legislation to promote health and to prevent certain diseases and conditions. Specifically, the Texas Health and Safety Code Section 11.004(b)(2) states that the department has "primary responsibility for providing health services," including "disease prevention" and "health promotion."

Programs follow guidelines established by statute or by funders (federal or other). The DSHS Communications Unit provides technical assistance to all programs seeking to use advertisement or public service announcements regarding compliance with state procurement procedures and the appropriate use of media. In addition DSHS Policy AA-5036 governs interaction between the news media and employees of the agency. Under this policy, inquiries from the media are referred to the press office. DSHS focuses on public education and does not promote policy changes.²⁸⁸

The Texas Department of Transportation

The Texas Department of Transportation (TxDOT) utilizes public awareness and advertising efforts primarily for public information. TxDOT has many advertising and public awareness initiatives.²⁸⁹

The "Don't Mess with Texas" initiative was launched in January of 1986 in response to an increased rate of litter on the roads. The initiative includes the creation and placement of advertising messages (television, radio, print, and billboard), distribution of litterbags and bumper stickers, and other experimental marketing activities, such as Don't Mess with Texas Road Tour, the Campus Cleanup, the Don't Mess with Texas Scholarship, driver's education curriculum, and the Litter Force, all designed to change public behavior about litter. The Don't Mess with Texas initiative budget increased to \$2.1 million in 2002 and has remained at that level through Fiscal Year 2007. The litter prevention program is funded out of Fund 6, Contracted Routine Maintenance, Strategy 144.

²⁸⁷ Survey returned from the Public Utility Commission of Texas to the Senate Committee on Transportation and Homeland Security.

²⁸⁸ Survey returned from the Texas Department of State Health Services to the Senate Committee on Transportation and Homeland Security.

²⁸⁹ Testimony by Coby Chase, Director, Government and Public Affairs Division, Texas Department of Transportation to the Senate Committee on Transportation and Homeland Security on May 20, 2008 in McAllen, Texas.

The medium for accomplishing the initiatives objective has changed over the years in an attempt to capture the target audience. The radio and television commercials have featured Texas celebrities including Stevie Ray Vaughan, George Foreman, Willie Nelson, Lyle Lovett, former Houston Oiler Warren Moon, Marcia Ball, the Fabulous Thunderbirds, Johnny Dee and the Rocket 88s, and LeeAnn Rimes in the earlier days, to today's celebrity bench that includes Matthew McConaughey, Lance Armstrong, Erykah Badu, Owen Wilson, Ray Benson, Jennifer Love Hewitt, Le Ann Womack, and Los Lonely Boys. To date these high-visibility public service announcements have netted TxDOT \$124,887,969 in free commercial air time. A Visible Litter Study conducted in 2001 concluded that there had been a fifty-two percent reduction in litter on the state-maintained highway system since 1995. Another study done in 2005 concluded that litter accumulation decreased 33% on Texas Roadways since the 2001 study. The Don't Mess with Texas Program has also leveraged partners. Some examples include 5 billion free impressions by printing the campaign brand on H-E-B plastic grocery sacks, free advertising and restaurant signage from Dairy Queen and Sonic, and 19 million free impressions of the Don't Mess with Texas Logo on drink cups, radio tags, and coupons from McDonald's Corporation.²⁹⁰

The Department also has various traffic safety initiatives. The federal Traffic Safety Program enabled by the Federal Highway Safety Act of 1966, is implemented by the National Highway Traffic Safety Administration (NHTSA) of the U.S. Department of Transportation (US DOT). Current initiatives fall under three main categories: Drunk Driving Prevention Programs, Occupant Protection Programs, and Ongoing and General Traffic Safety Programs. The public information is primarily directed on drunk driving prevention and encouraging the use of seat belts/child safety seats. Drunk driving programs vary by their target audience and the timeframe in which they are active. Funding for the program averaged \$720,000 annually over the last three fiscal years and represents a roughly 60/40 percent state/federal funding for drunk driving prevention. The Spring Break Media Campaign targets college-age population and encourage them to find an alternate way home or a designated driver if they have been drinking. An average of \$266,000 has been spent annually on this effort over the last three fiscal years. In regard to Occupant Protection Programs, the two primary programs designed to encourage and increase vehicle passenger safety are Buckle Up and Click it or Ticket. Click it or Ticket's average expenditures are roughly \$3.3 million annually over the last three fiscal years. I comprises one of the more large-scale public education programs TxDOT engages. The Save a Life project uses multi-modal advertising services to engage drivers and affect driver behavior to "save-a-life." The majority of the state funds in this effort have been for educational and promotional items, and public relations activities. An average of \$1.1 million has been spent annually on this effort over the last three fiscal years.²⁹¹

TxDOT also has public information and education programs through their Vehicle Titles and Registration Division. These are intended to increase revenue for the state and ensure the accuracy of the state's vehicle title records. TxDOT has a two year contract estimated at \$1.5 million for the TexasSure program, a collaborative effort with The Texas Department of Insurance, the Texas Department of Public Safety, and the Texas Department of Information Resources. The program aims to reduce the number of uninsured drivers on Texas' roads by making them aware of a program that automatically verifies whether they have the required liability insurance coverage. The Put Texas in Your Corner public awareness and media

²⁹⁰ Ibid.

²⁹¹ Ibid.

campaign was established to educate those drivers that inadvertently fail to register their vehicles on time and to capture the lost revenue from registrations. The agency spent \$5 million to implement the effort between March 2005 and February 2008. It also educates new Texas residents who are estimated to be responsible for approximately 50 percent of the uncollected registration revenue. An estimated increase in on time registrations has equaled \$7.7 million since the marketing effort was implemented.²⁹²

The Texas Automobile Theft and Burglary Prevention Authority (ATBPA) division at TxDOT began a 2007 initiative called You Hold the Key to warn people of the consequences of leaving one's key in the ignition. The budget for this program is \$475,000 for FY 2008 and \$425,000 for FY 2009. TxDOT also works with TCEQ on Drive Across Texas. TxDOT's budgeted about \$2 million annually for the program.²⁹³

Perhaps a bigger source of controversy is TxDOT's advertising and publicity campaigns for TxTag and toll roads. When the first segment of the new toll roads opened in the Austin area TxDOT undertook marketing efforts to advertise new road segments, toll road locations, incentive periods, and the benefits of paying with an electronic tag. The campaigns were funded using bond funds, and marketing is required as part of the bond indenture.

SH 121 was the first all-electronic toll road in the Dallas region. TxDOT marketed in the Dallas/Forth Worth region to inform drivers about the new electronic road focusing on the benefits of paying with an electronic tag. These efforts were funded through the State Highway Fund. Similar efforts were made in Northeast Texas with the opening of Loop 49. Overall, TxDOT spent \$5.1 million on the TxTag and toll road marketing initiative as of January 2008.²⁹⁴

TxDOT also created the "Keep Texas Moving" campaign in response to criticism that the department was not engaging the public in a dialogue on tolling and transportation. It was launched in phases. Phase 1 of the initiative included the development of a dedicated Trans-Texas Corridor website (KeepTexasMoving.com), as well as the placement of television advertisements, radio advertisements, billboards, internet banner placements, pump toppers, and print ads publicizing their effort. TxDOT spent approximately \$2.5 million on Phase 1.²⁹⁵

Phases 2 and 3 focused on public involvement. Town hall meetings were held in four weeks to provide a forum for citizens and officials to have their questions answered regarding I 69/TTC or any transportation issue. As part of the formal involvement advertising was created and media buys were made to encourage the public to attend the town halls and public hearings, primarily through newspapers, radio, and television. The anticipated approximate cost is \$2 million. In testimony to the Committee TxDOT claims that all campaigns are directed at education and in getting the public involved.²⁹⁶

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

Effective Ways to Involve the Public

Current Federal statutes and regulations derived largely from the Intermodal Surface Transportation Efficiency Act (ISTEA) and the National Environmental Policy Act (NEPA) provide general guidelines for locally developed public involvement processes and procedures. There are five basic guidelines:²⁹⁷

1. Act in accord with basic democratic principles. Public agencies are public servants, thus people need to debate issues and frame alternative solutions before a final decision is made. When applied to the much debated "Keep Texas Moving" campaign, did TxDOT act after the fact? Was there a real chance for the public to get involved?
2. Maintain continuous contact between agency and non-agency people throughout decision-making process.
3. Use a variety of public involvement techniques that target different groups or individuals in different ways or target the same groups or individuals in different ways. A single, one-size-fits-all approach usually results in missing many people.
4. There should be active outreach to the public, and if certain methods do not work, other methods should be tried. It is true that resources are limited, and agencies cannot make anyone participate. However, transportation agencies have repeatedly found that going after the public and changing unsuccessful approaches brings greater results.
5. Participation should focus on decisions rather than on conducting participation activities because they are required. Decisions should include both the continuous stream of informal decisions made by agency staff and lower-level management and the less frequent formal decisions made by decision-makers. Timely agency response to ideas from the public and integration of ideas from the public into decisions shows the public the participation is worthwhile. A focus on the wide range of possible decisions gets agencies past simply offering the public passive opportunities to comment on proposals just before formal decision-making.

RECOMMENDATIONS

State agencies should follow guidelines for public involvement. TxDOT should be required to keep a sign in sheet to track attendance and alter their strategy for getting more people to attend hearings and meetings. Media strategies should be used in combination with meetings. For example a meeting can be televised to give it a wider audience and encourage people to attend future meetings. News stories about the meeting can also further promote participation. TxDOT has shown to be resourceful and creative with other media campaigns and they should use those tools to encourage public involvement as well. The internet should be utilized with feedback/response mechanisms.

²⁹⁷ Preusser, David. "Public Information and Education in the Promotion of Highway Safety". Research Results Digest 322.

Section 228.004, Transportation Code can be amended to narrow what TxDOT can or cannot do in relation to advertising toll projects. The statute currently reads:

Section 228.004. Promotion of Toll Project. The department may, notwithstanding Chapter 2113, Government Code, engage in marketing, advertising, and other activities, to promote the development and use of toll projects and may enter into contract agreements necessary to procure marketing, advertising, or other promotional services from outside service providers.

Most agencies responding to the committee's survey require all potential programs or media campaigns to be reviewed by a single department. A more formal, impartial review method can prove beneficial to TxDOT and other agencies as well.

The committee further recommends amending Section 2113.011 of the Government Code to require agencies to report publicity expenditures to the substantive legislative committee with jurisdiction over that agency.

Monitor urban crime laboratories and their compliance with state laws regulating their functions and make recommendations to restore public trust in their functions and to ensure full compliance with federal Homeland Security reporting requirements. Specifically, review the report issued by the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room, the independent panel review of certain criminal convictions prompted by the conclusions of this report, and the implementation by the City of Houston of any reforms recommended in this report.

BACKGROUND

On November 11, 2002, a local television station in Houston, KHOU- Channel 11, began airing the first in a series of investigative news reports on the Houston Police Department's (HPD) crime laboratory. KHOU, in consultation with independent forensic scientists, conducted a three month investigation which severely criticized HPD's DNA/Serology division within the crime lab. Reports revealed possibly erroneous DNA and forensic analysis, as well as improper evidence retention methods. Acting Chief of Police Timothy Oettmeier immediately commissioned an outside review of the Crime Lab's DNA/Serology Section conducted by the Department of Public Safety Crime Lab Headquarters and the Tarrant County Medical Examiner's Office. Based on findings and results of the two day audit in December, HPD suspended all DNA analysis; this suspension currently remains.²⁹⁸

In 2003, Donald Krueger, the director of the Crime Lab, retired after approximately eight years in the position. By October 2003, Irma Rios was hired as director of HPD's crime lab and currently holds this position. Under her tenure, the City of Houston, in conjunction with the National Forensic Science Technology Center, a non-profit entity whose mission is "to provide quality systems support, training and education to the forensic science community in the United States," performed an evaluation. During this evaluation, questions arose related to the performance of the Toxicology Section, which led to the suspension of toxicological analysis by the Crime Lab in October 2003.²⁹⁹

In September 2004, Chief of Police Harold Hurtt announced the Department's request of an independent review of the Crime Lab. In addition, a Stakeholders' Committee formed to supervise the selection and progress of the independent investigator. The Committee consisted of Houston-area public officials, civil rights advocates, academics, attorneys, and scientists. By February 2005, the Committee selected an independent investigation team of lawyers and forensic scientists under the leadership of Michael Bromwich to conduct a review of HPD's Crime Lab and Property Room. Through a series of five reports, the independent investigation issued its final summary of recommendations regarding HPD's crime lab and property room in August 2007.³⁰⁰

²⁹⁸ <http://www.hpdlabinvestigation.org/about.htm#From%20Home>, The Office of Independent Investigator for the Houston Police Department Crime Laboratory and Property Room website.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

Organization

Counties in the State of Texas rely on independent, local government-run or Texas Department of Public Safety (DPS) authorized laboratories to process forensic and DNA collection and analysis. Texas DPS operates thirteen crime laboratories composed of twelve regional labs and a headquarter lab in Austin. In addition, DPS supervises forty-three accredited labs and seventeen urban accredited labs in Texas.³⁰¹

Accreditation

The Crime Laboratory of the Houston Police Department is a DPS accredited lab, and subject to the accreditation standards as stated by TAC Title 37, Part 1, Chapter 28, Subchapter H. Under this code, the Director of DPS recognizes certain accrediting bodies from which applicant laboratories must obtain accreditation in order to be accredited by DPS. DPS accreditation is awarded to an applicant laboratory for the period it is accredited by the recognized body.³⁰²

According to TAC Title 37, Part 1, Chapter 28, Subchapter H, Rule 28.133: "The director of DPS shall recognize an accrediting body under this section if the director determines that the accrediting body:

- (1) issues an accreditation that is accepted throughout the relevant scientific community and appropriated or available to a laboratory;
- (2) has established adequate accreditation criteria reasonably likely to ensure trustworthy forensic analysis;
- (3) requires a periodic competency audit or review of the personnel, facilities, and procedures employed by a laboratory to conduct a forensic analysis; and
- (4) withholds, grants, or withdraws its accreditation of a laboratory based on its own determination of a reasonable likelihood of meaningful corrective action for each deficiency noted during the periodic audit or review.

The following is a list of national accreditation bodies that meet such standards:

- (1) American Board of Forensic Toxicology (ABFT)--recognized for accreditation of toxicology discipline only.
- (2) American Society of Crime Laboratory Directors, Laboratory Accreditation Board (ASCLD/LAB)--recognized for accreditation of all disciplines which are eligible for accreditation under this subchapter.
- (3) Forensic Quality Services (FQS and FQS-I); formerly known as the National Forensic Science Technology Center (NFSTC)--recognized for accreditation of all disciplines which are eligible for accreditation under this subchapter.
- (4) Substance Abuse and Mental Health Services Administration of the Department of Health and Human Services (HHS/SAMHA), formerly known as the National Institute on Drug Abuse of the Department of Health and Human Services (HHS/NIDA)--recognized for accreditation of toxicology discipline in the subdiscipline of Urine Drug Testing for all classes of drugs approved by the accrediting body;

³⁰¹ Data submitted to Senate Committee on Transportation and Homeland Security by Dennis Pat Johnson, Chief, Crime Laboratory Services, Texas Department of Public Safety

³⁰² Ibid.

- (5) College of American Pathologists (CAP)--recognized for accreditation of toxicology discipline only in the subdiscipline of Urine Drug Testing for all classes of drugs approved by the accrediting body.

If an accrediting body is recognized under subsection (a) of this section and the recognized body approves a new discipline, subdiscipline, or procedure, the director may temporarily recognize the new discipline, subdiscipline, or procedure. A temporary approval shall be effective for 120 days.³⁰³ For a listing of disciplines and subdisciplines subject to, exempt and excluded from DPS accreditation, please reference TAC Title 37, Part 1, Chapter 28, Subchapter H.

In 2005, the HPD crime lab was ASCLD/LAB and DPS accredited, with the exception of DNA analysis, which was accredited in 2006. By 2007, the crime lab as fully accredited for a 5 year term.

Quality Assurance and Public Trust

In order to assure quality and public trust of the accredited lab, ASCLD/LAB has compiled the following measures, which are accepted and supported by DPS:

- formal education and college degree requirement of forensic analysts
- written training plan in the lab for each forensic discipline
- records of training completion and competency test for each forensic analyst
- written procedures for analyzing evidence
- proficiency testing of forensic analysts
- quality testing of reagents and chemicals
- validation of all equipment utilized in testing and all forensic examination procedures
- adequate security of evidence and preservation of evidence
- monitor testimony of forensic analysts.

A full listing of requirements are available in the ASCLD laboratory accreditation manual.³⁰⁴

Under Director Rios's tenure, the HPD crime lab has taken steps to ensure quality and public trust including the acquisition of a quality assurance manager to monitor that the previously listed controls are carried out in the lab. Director Rios has highlighted specific controls the lab focused on to gain accreditation including competency testing, comprehensive external and internal training, review of court transcripts, technical and quality review of case files, attorney polls (both prosecutorial and defense), court observation of analysts, and random blind proficiency analysts testing.³⁰⁵

³⁰³ TAC Title 37, Part 1, Chapter 28, Subchapter H, Rule 28.134

³⁰⁴ Data submitted to Senate Committee on Transportation and Homeland Security upon request, Dennis Pat Johnson, Chief, Crime Laboratory Services, Texas Department of Public Safety

³⁰⁵ Testimony of Irma Rios, Crime Lab Director, Houston Police Department, City of Houston, Before the Senate Committee on Transportation and Homeland Security, May 20, 2008.

The Crime Lab also hired consultants and experts including Dr. Robin W. Cotton and Dr. Charlotte J. Word as DNA experts. Other notable consultants include trace evidence expert Skip Palenik of Microtrace and firearm expert Dr. Jim Hamby of International Forensic Science Laboratories. The HPD Crime Lab has undergone four external audits, one conducted by ASCLD and another conducted by DPS.³⁰⁶

To ensure management and human resource improvements within the HPD Crime Lab, Director Rios hired a stronger, more experienced team including herself with nineteen years of DPS experience, and Assistant Lab Director William Basil Arnold with six years experience with the Phoenix Police Department. Remaining staff have credentialed experience with independent labs. Over fifty percent of current staff were recruited nationally and statewide including hires from the Baylor College of Medicine and the New York Medical Examiner's Lab. Furthermore, Director Rios has worked to maintain a working relationship with Chief Hurtt as they meet on a monthly basis.³⁰⁷

Independent Investigator for the HPD Crime Lab and Property Room

In August 2007, under the leadership of Michael R. Bromwich, the independent investigation of the HPD Crime Lab and Property Room issued its final summary of recommendations. Recommendations for improvement of the HPD Crime Lab were dispensed for the Crime Lab and Property Room separately.

The report for the Crime Lab included recommendations for management of different sections of the lab including biology, trace evidence, controlled substances, firearms, toxicology and questioned documents.

- *Management* - Increase funding and staffing for inflation, vacancies, caseload, quality assurance, additional training, and technology improvements.
- *Biology* - Acquire external consultants for technical reviews; revise case manager duties; more extensive validation exams; revised training including statistical training; reform standards of procedures.
- *Trace Evidence* - Conduct investigation follow up with crime scene investigators to ensure full evidence is collected; expand forensic services available; reconsider technical review plans; reform standards of procedures; restore firearms related section of trace evidence to firearms section.
- *Controlled Substance* - Administer peer-review technical reviews; limit supervision workload of case manager; develop consistent item designation system for documentation; reform standards of procedures; institute random evidence and analyst tests for controlled substance security; establish evidence and standards retention; establish yearly case expectation number.
- *Firearms* - Establish technical and administrative review checklist; contract with retired examiners and other external entities like FBI for case backlog and new hire training; improve facilities to allow for weapons acquisition for case reference, better storage and safety; refine current standards of procedures.

³⁰⁶ Ibid.

³⁰⁷ Ibid.

- *Toxicology* - resume participation in an external forensic alcohol and proficiency testing program.
- *Questioned Documents* - Require all potential questioned document evidence be submitted to the Questioned Documents Section for examination; provide training in-house; and consult other forensic document units and examiners to determine how they disseminate information about unit capabilities.³⁰⁸

The report for the Property Room included recommendations for global evidence-related and central evidence receiving, as well as the Property Room and Crime Lab.

- *Global Evidence* - Develop standard evidence procedures for evidence submission and storage; new evidence tracking system; increased safety and security storage methods.
- *Central Evidence* - Create methods and workspace for central evidence received processing; create intra-section organization/career ladder; increase staff; conduct an evidence inventory and reconciliation and periodic audits; increase security.
- *Property Room* - Conduct inventory and reconciliation annually with periodic audits; increase staff to include evidence destruction; develop comprehensive standards of procedures; periodic evidence handling courses; build new property room storage facility.
- *Crime Lab* - Interact with investigators for evidence collections methods; develop evidence submission procedures for firearms.³⁰⁹

Funding

The report also addressed concerns that current increases in Crime Lab funding will be "transitory." The independent investigation report states, "Our most significant concern is that the increased funding and attention that the City and HPD must sustain the effort and monitoring that are necessary to ensure that the Crime Lab remains able to perform consistently competent and reliable forensic science analysis."³¹⁰

To see a full report of the Independent Investigator for the HPD Crime Lab and Property Room Summary of Recommendations and five installation reports, please reference: <http://www.hpdlabinvestigation.org/>.

HPD Crime Lab Reform Efforts

As previously mentioned, HPD has made efforts to reform management, staff competency and expertise, and funding. In addition, the City of Houston and the Houston Police Department increased funding for the Lab by twenty-five percent, from \$3.2 million in FY '03 to \$4.2 million in FY '08. More specifically, the Crime Lab received \$3.4 million in grant funding. Furthermore, HPD has given the Crime Lab its own budget, separate from that of the Department, to ensure council review and assessment of funding.³¹¹

³⁰⁸ Summary of Recommendations, Independent Investigator for the HPD Crime Lab and Property Room, August 8, 2007.

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ Testimony of Irma Rios, Crime Lab Director, Houston Police Department, City of Houston, Before the Senate Committee on Transportation and Homeland Security, May 20, 2008.

The independent investigation issued 135 recommendations, over ninety percent of which have been implemented or are in process of implementation. Notably, five of the report's recommendations have been entirely excluded for purposes of greater flexibility in procedures' effectiveness and alternative solution implementation. Excluded recommendations are as follows:

- HPD implemented its own Serology investigation panel appointed to review 180 cases identified as having major issues with serological testing.
- The report recommended specific target for DNA collection amounts but was not implemented in order to grant the lab more variability with evidence procedure to increase likelihood for results;
- The report recommended shortening outer time limits for reference hair sample collection but longer DPS-recommended time limit allows for variability;
- The report recommending moving microscopes to cubicles, but HPD Crime Lab did not move microscopes because the Lab found alternative space for firearms;
- The report recommended transferring distant determination cases from the Firearms section to the Trace Evidence cases but this was not implemented because it affected a minimal amount of cases.³¹²

FINDINGS AND RECOMMENDATIONS

Some of the errors experienced by the HPD Crime Lab could be traced back to evidence collection. **This Committee recommends that DPS is given authority to create statewide standards and training for crime scene collection governing entities who collect evidence for the State.** Since much of crime scene collection is not done by DPS, but instead done by local law enforcement, **the Committee recommends these standards of training be implemented in the criminal investigation schools of local law enforcement.**

Currently, applicant laboratories can seek accreditation from five DPS-approved accrediting bodies. **This Committee recommends DPS choose only one accrediting body to maintain consistent accreditation criteria and requirements.**

The Innocence Project of Texas has revealed the tragic results of erroneous or faulty forensic and DNA analysis used from criminal procedures. To ensure justice, **this Committee recommends a two-system monitor technique.** For example, results submitted as evidence in trial must be verified by a second lab. **This Committee also recognizes the need for equal access to post conviction evidence and recommends such practices.** Currently, DPS routinely provides post conviction evidence results to prosecutors, but not to the defense. To compensate for administrative costs, this service may be provided at a fee.³¹³

To ensure public trust, **this Committee recommends quality assurance measurements such as staff credentials be made public,** so as to provide confidence in staff competency for the public in which the Crime lab serves.

³¹² Ibid.

³¹³ Testimony of Pat Johnson, Chief, Crime Laboratory Services, Before the Senate Committee on Transportation and Homeland Security, May 20, 2008

Lastly, some have accused the current urban crime lab institution of falling prey to results bias. Due to the interconnected nature of law enforcement and crime lab analysis, conviction may be sought independent of analysis results. As a remedy to prevent law enforcement bias, **this Committee recommends further research into private urban lab outsourcing experiences in other states to evaluate potential costs and benefits of requiring DPS to outsource crime laboratory responsibilities to private, independent laboratories.**

Study and review state and local options for expanding transportation funding and explore options to reduce diversions of Fund 6 revenue.(Joint charge with Senate Finance Committee)

BACKGROUND

During the 80th Legislative Session, the future of transportation financing was one of the most contentious issues faced by legislators. The Texas Department of Transportation receives funds through direct legislative appropriation to the State Highway Fund (Fund 006), including the motor fuels tax, which has not been adjusted for inflation since 1991.

As a result of diversions for non-transportation purposes from Fund 006, federal rescissions and inflation, the Department finds itself with a funding gap previously estimated at \$86 billion by the Department.³¹⁴

On August 28, 2008, the Texas Transportation Commission approved the Department's Legislative Appropriations Request (LAR) for 2010-2011 which was structured to convey the transportation needs of the state and the Department's ability to deliver them.³¹⁵ According to Department administration, the LAR request is derived from the needs that Metropolitan Planning Organizations (MPOs) and other local entities have expressed.³¹⁶ The LAR states the needs for the state's transportation infrastructure that can be accomplished in 2010-2011 and the funds required to accomplish them.³¹⁷ The Department's 2010 LAR asks for a \$4.887 billion special exception out of General Revenue (GR) for 2010, and an additional \$8.420 billion of GR for 2011.³¹⁸ In previous sessions, the Department has not made such a sizeable request from GR and is doing so this session with the intention of displaying its capabilities to the legislature.

³¹⁴ Hope Andrade, Chair, Texas Transportation Commission, "Expanding Transportation Funding," testimony before the Senate Committee on Transportation and Homeland Security, April 23, 2008.

³¹⁵ Texas Department of Transportation, Administrator's Statement, 81st Regular Session, Agency Submission, August 25, 2008.

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Ibid.

Diversions

In 2007, over \$1.5 billion dollars was diverted from Fund 006 for non-transportation purposes. Additionally, there are several revenue generating programs whose receipts are deposited to the General Revenue Fund, while the expenses of the program are processed from the State Highway Fund (see below).³¹⁹

Revenue Generating Diversions	Amount Diverted
Public Transportation	\$17.6 million
Oversize/Overweight Tolerance Permits	\$10.8 million
Commercial Carrier Operations	\$2.4 million
<u>Automobile Theft Prevention</u>	<u>\$23.2 million</u>
TOTAL ³²⁰	\$54 million

Over the next biennium, the Department estimates that these diversions will cost the State Highway Fund the following amounts:

80th Legislative Session	
2007 Diversions ³²¹	
Agency	Amount
Department of Public Safety	\$ 1,245,108,574.00
Texas Education Agency	\$ 100,000,000.00
Medical Trans - Medicaid Match	\$ 85,381,725.00
Auto Theft Prevention	\$ 27,558,755.00
Salary Increase for Schedule C	\$ 22,291,710.00
Client Transportation Services	\$ 22,363,606.00
Health and Human Services Commission	\$ 20,000,000.00
Texas Transportation Institute	\$ 14,317,605.00
Texas Workforce Commission - Client Transportation	\$ 13,658,704.00
Gross Weight Axle Fees	\$ 10,800,000.00
State Office of Administrative Hearings	\$ 6,736,396.00
Commission on the Arts	\$ 1,340,000.00
Attorney General - Mineral Rights Litigation	\$ 1,700,000.00
Historical Commission	\$ 1,000,000.00
Regulation of Controlled Substances	\$ 804,972.00
Silver Alert for Missing Senior Citizens	\$ 224,990.00
Lufkin Tourist Information Center	\$ 150,000.00
TOTAL	\$ 1,573,437,037.00

³¹⁹ Michael W. Behrens, Executive Director, Texas Department of Transportation, testimony before the Senate Committee on Finance, February 5, 2007.

³²⁰ Ibid.

³²¹ Pat Driscoll, "Highway shortfall is worsening", San Antonio Express-News, July 9, 2007.

Motor Fuels Tax

The Texas Constitution requires legislation involving taxes, including indexing, to begin in the House of Representatives. Therefore, while Senator John Carona filed Senate Bill 165 which called for an indexing of the motor fuels tax to the highway cost index, it was unable to be heard due to the rule requiring legislation of this nature to begin in the House of Representatives.³²²

Representative Mike Krusee filed House Bill 962 which would have indexed the motor fuels tax to the consumer price index.³²³ This legislation was left pending in the House Ways and Means Committee.

Additionally, the House of Representatives as a whole was not supportive of any sort of increase in the motor fuels tax, as evidenced by a summer "gas tax holiday" amendment placed on Senate Bill 1886 in the House.³²⁴ This amendment passed 118-16.³²⁵ The Senate removed the amendment in when the bill was in conference committee.

The Texas State Comptroller of Public Accounts estimates that any increase in the motor fuels tax, whether it is a flat-rate increase or an indexing will create increase transportation funding by hundreds of millions of dollars.³²⁶

Five cent increase in motor fuels taxes		
Fiscal Year	Gain/(Loss) to General Revenue Fund 001 and the Available School Fund 002	Gain/(Loss) to the State Highway Fund 006
2010	\$ 173,376,000.00	\$ 482,991,000.00
2011	\$ 191,303,000.00	\$ 533,036,000.00

Ten cent increase in motor fuels taxes		
Fiscal Year	Gain/(Loss) to General Revenue Fund 001 and the Available School Fund 002	Gain/(Loss) to the State Highway Fund 006
2010	\$ 326,013,000.00	\$ 908,210,000.00
2011	\$ 359,721,000.00	\$ 1,002,309,000.00

³²² Tex. S.B. 165, 80th R.S. (2007).

³²³ Tex. H.B. 962, 80th R.S. (2007).

³²⁴ H.J. of Tex., 80th Leg., R.S. 3420, (2007).

³²⁵ Ibid.

³²⁶ Email correspondence from Doug Freer, Texas Comptroller of Public Accounts Office, April 1, 2008.

Motor fuels tax indexed to the Producer Price Index for highway and street construction		
Fiscal Year	Gain/(Loss) to General Revenue Fund 001 and the Available School Fund 002	Gain/(Loss) to the State Highway Fund 006
2010	\$ 49,116,000.00	\$ 136,996,000.00
2011	\$ 68,996,000.00	\$ 192,491,000.00

Motor fuels tax indexed to the Consumer Price Index		
Fiscal Year	Gain/(Loss) to General Revenue Fund 001 and the Available School Fund 002	Gain/(Loss) to the State Highway Fund 006
2010	\$ 34,466,000.00	\$ 96,134,000.00
2011	\$ 61,800,000.00	\$ 172,415,000.00

Additionally, the Comptroller's office prepared comparisons of both flat rate increases and indexing. These charts allows the reader to see the difference in the effect of these revenue streams.

Flat Rate Increase Comparison			
Fiscal Year	Total Motor Fuels Tax Revenues in Current Certification Estimate	Total Motor Fuels Tax Revenues at \$.05 Increase	Total Motor Fuels Tax Revenues at \$.10 Increase
2010	\$3,184,694,000.00	\$ 3,841,061,000.00	\$4,418,917,000.00
2011	\$3,225,148,000.00	\$ 3,949,486,000.00	\$4,587,177,000.00

Indexing Comparison		
Fiscal Year	Total Motor Fuels Tax Revenue With Tax Rates Indexed to Producer Price Index	Total Motor Fuels Tax Revenue With Tax Rates Indexed to Consumer Price Index
2010	\$3,370,806,000.00	\$ 3,315,294,000.00
2011	\$3,486,634,000.00	\$ 3,459,362,000.00

According to these figures, even the lowest level of indexing, the Consumer Price Index, would create over \$100 million annually of additional transportation funding. The greatest increase in funding would come from a ten cent increase.

The Comptroller's assumptions did not include an estimate on the effect of higher motor fuels prices on the driving public, and if the higher rate would cause a decrease in travel, and thus a decrease in fuel consumption.

Additionally, these estimates are based on an implementation date of September 1, 2009 and apply the annual percentage change in the index to the combined state and federal tax rates on each subject motor fuel.³²⁷

Local Options

DFW Regional Rail Funding Project

Every region of the state has specific needs for additional funding for transportation. One of the regions last session that encouraged a locally financed method of increasing transportation funding was the Dallas-Fort Worth metroplex (DFW). This additional funding is necessary to increase and improve the regional rail system operated by the Dallas Area Rapid Transit (DART) and partners. To fund that expansion, the region needs at least \$260 million in additional revenue per year.³²⁸

Several legislators filed legislation to help North Texas fund regional rail. Senator Florence Shapiro filed Senate Bill 1089 which was sponsored by Representative Fred Hill in the House.³²⁹ This bill authorized economic development corporations under Section 4A or 4B of the Development Corporation Act of 1979 to use collected revenue for transit purposes and was signed into law on May 17, 2007.³³⁰

Additionally, Senator John Carona along with Representative Hill filed legislation that would have created an option for local governments, by election, to increase the sales tax up to one percent for transit purposes. This legislation had several iterations, but in the end, it did not pass in both houses.³³¹ The Houston-Galveston Area Council has expressed support for local option tax increases to be used for similar purposes as the DFW region.³³²

Since the conclusion of the 2007 session, entities in the DFW region have expressed interest in several different approaches to the North Texas transit funding initiative. Some of these approaches include a higher vehicle registration fee in order to offset the cost of a commuter rail system.³³³

³²⁷ Email correspondence from Doug Freer, Texas Comptroller of Public Accounts Office, April 1, 2008.

³²⁸ Walt Humann, testimony before the Senate Committee on Transportation and Homeland Security, August 12, 2008.

³²⁹ Tex. S.B. 1089, 80th Leg., R.S. (2007).

³³⁰ SENATE BUSINESS AND COMMERCE COMMITTEE, BILL ANALYSIS, Tex. S.B. 1089, 80th Leg., R.S. (2007).

³³¹ Tex. S.B. 257, 80th Leg., R.S. (2007).

³³² Alan Clark, MPO Director, Houston-Galveston Area Council, testimony before the Legislative Study Committee on Private Participation in Toll Projects, April 29, 2008.

³³³ Walt Humann, testimony before the Senate Committee on Transportation and Homeland Security, August 12, 2008.

Tax Increment Redevelopment Zones

Tax Increment Redevelopment Zones (TIRZs) are special districts created by city councils to attract new investments to an area.³³⁴ TIRZs help finance the cost of redeveloping or encouraging development in an area that would not otherwise attract significant market development in a timely manner.³³⁵ Taxes attributable to new improvements are set aside in a fund to finance public improvements in the zone.³³⁶

According to the City of Houston, TIRZs are most successful when the area's tax base is at a low point of its valuation and there is a large property owner/developer who can expeditiously carry out the area's redevelopment. The term TIF, or tax increment financing, is used interchangeably with TIRZs.³³⁷

As new construction in the zone occurs, the resulting annual incremental increase in tax revenue above the base amount is returned to the zone for the duration of the zone.³³⁸ TIRZs have no taxing or assessment powers and property owners pay a normally increasing tax bill.³³⁹ The cost to the city is that the increment that is captured is preempted for use in the zone rather than for the city's general fund.³⁴⁰

Eligible project costs are associated with public improvements.³⁴¹ These improvements can include capital costs; financing costs; real property assembly; relocation costs; professional services; and creation, organization and administrative costs.³⁴² Projects that are implemented prior to an increment being realized are often financed by a developer and are later reimbursed as an increment is realized, or through the issuance of bonds. Projects can also be financed on a pay-as-you-go basis.³⁴³

Pass-Through Financing

Pass-Through financing is a way for project developers to fund and be reimbursed for the upfront costs of constructing or expanding a highway project.³⁴⁴ The public or private entity developing the project will finance, construct, maintain, and/or operate the project.³⁴⁵ TxDOT will then reimburse a portion of the project costs by making periodic payments to the developer for each vehicle that travels on the highway.³⁴⁶ A new highway project can be tolled or not tolled.³⁴⁷

³³⁴ The City of Houston, Tax Increment Redevelopment Zones. (2008). At http://www.houstontx.gov/planning/economic_dev/tirz.htm

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ The City of Houston, Tax Increment Redevelopment Zones. (2008). At http://www.houstontx.gov/planning/economic_dev/tirz.htm

³⁴⁰ Ibid.

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ The Texas Department of Transportation, TxDOT: Open For Business, Pass-Through Financing, 2007.

³⁴⁵ Ibid.

³⁴⁶ Ibid.

³⁴⁷ Ibid.

Pass-Through financing agreements are executed by TxDOT with regional mobility authorities, regional tollway authorities, cities, counties, public or private developers.³⁴⁸

Other Options

Various approaches for transportation funding were explored this interim through both the Senate Committee on Transportation and Homeland Security and the Legislative Study Committee on Private Participation in Toll Projects. One of the approaches includes the investment of Texas state employee pension funds in transportation infrastructure. While the use of employee pension funds from other states would be appropriate and even encouraged, there is public sentiment that investing Texas funds could cause conflicts of interest or invite political pressure.

The other significant approach involves the creation of a corporation, owned by the State of Texas, which would acquire, develop, and operate existing and new toll projects. This corporation could use pension funds along with other investments to promote Texas ownership of public infrastructure. While this concept has merit, it is not developed enough for the committee to proceed in recommending it at this time.

RECOMMENDATIONS

The Senate Committee on Transportation and Homeland Security recognizes the need for additional funding for transportation purposes.

As a result, the committee recommends both reducing diversions and indexing the motor fuels tax as a means to address the funding shortfall. More specifically, the committee recommends eliminating all diversions, except for the amount constitutionally allocated to public education from the motor fuels tax, as necessary for the future of transportation infrastructure. Priority should be placed on restoring to the State Highway Fund the amount currently appropriated to the Department of Public Safety.

Additionally, the committee recommends indexing the motor fuels tax to the producer price index as a way of keeping even with inflation, however this index should be capped at an annual percentage as deemed appropriate by the legislature. Both of these statewide funding sources are necessary for the continued maintenance and development of the Texas highway system.

The committee recommends that on a local level, legislators remain open to considering various ideas that are presented by the Metropolitan Planning Organizations and Regional Mobility Authorities to fund necessary improvements to local transit. The committees also recommend the restoration of funding for the Pass-Through program, and the expansion of Tax Increment Redevelopment Zones.

The Legislature should fund the Rail Relocation and Improvement Fund.

³⁴⁸ Ibid.

Study and make recommendations relating to whether the Texas Department of Transportation is in compliance with Transportation Code §201.109, Revenue Enhancement, and whether the Texas Department of Transportation is using the funding sources provided by the Legislature, including, but not limited to, General Obligation, Fund 6 and Mobility Fund bonds, to build new roads. (Joint charge with Senate Finance Committee)

BACKGROUND

In 1991, the Sunset Commission recommended that the current Texas Department of Transportation (TxDOT) enhance existing sources of revenue and create a plan for alternate sources of revenue.³⁴⁹ This "revenue enhancement" statute was codified in Transportation Code §201.109.³⁵⁰ This code does not give TxDOT the authority to create new revenue but instead requires the agency to make productive use of their existing revenue opportunities.³⁵¹ This report examines the Department's compliance with this statute.

Maximizing Generation of Existing Assets

1) Sale of Real Estate and Right of Way

Since 2005, surplus right of way sales have totaled over \$11 million.³⁵² TxDOT currently owns right of way throughout the state, and at times, this right of way may become surplus.³⁵³ The current practice is for TxDOT to offer surplus land to the appropriate local governmental entity with the power of eminent domain.³⁵⁴ While TxDOT cannot gift the land to the local governmental entity, it is provided to them at little cost depending on the specific situation.³⁵⁵ If the governmental entity does not wish to acquire the land, it then is offered to adjacent landowners at fair market value.³⁵⁶ If there is not interest amongst adjacent landowners then the property can be sold on the open market.³⁵⁷

³⁴⁹ Amadeo Saenz, Executive Director, Texas Department of Transportation, testimony before the Senate Committee on Transportation and Homeland Security on April 23, 2008.

³⁵⁰ TEX. TRANSP. CODE ANN. §201.109 (2008).

³⁵¹ Ibid.

³⁵² Amadeo Saenz, Executive Director, Texas Department of Transportation, testimony before the Senate Committee on Transportation and Homeland Security on April 23, 2008.

³⁵³ Ibid.

³⁵⁴ Ibid.

³⁵⁵ Ibid.

³⁵⁶ Amadeo Saenz, Executive Director, Texas Department of Transportation, testimony before the Senate Committee on Transportation and Homeland Security on April 23, 2008.

³⁵⁷ Ibid.

The sale of surplus real estate is procedurally similar to the sale of surplus right of way, except that the General Land Office (GLO) also reviews all state-owned property and makes recommendations to state agencies on what land is underutilized.³⁵⁸ The GLO then takes these recommendations to the Governor, Legislature, Legislative Budget Board, and other state agencies.³⁵⁹ Since 2005, seven properties have been sold through surplus real estate totaling revenue of over \$2 million for the Department.³⁶⁰

2) Increasing the Role of the Private Sector in Transportation Financing

Led by Governor Perry and the late TxDOT Commission Chairman Ric Williamson, TxDOT has aggressively sought to maximize the use of existing statutes involving comprehensive development agreements and public-private partnerships. However as a result of opposition from both the public and the Legislature, TxDOT has pursued this approach less aggressively since facing backlash during the 80th legislative session. The session produced Senate Bill 792, which included a two-year moratorium, Sunset date, and legislative study committee on comprehensive development agreements.³⁶¹ The Commission however, still believes that CDAs are "a valuable tool to fill the gap between the level of funding available and the level of funding needed to meet our goals for transportation."³⁶²

3) Setting and Attempting to Meet Annual Revenue Enhancement Goals

The Texas Department of Transportation does not feel that they can accurately state revenue enhancement goals since the sale of state surplus property is often determined by the GLO.³⁶³ Additionally, the need for public-private partnerships is determined on a needs basis, and as a result, the department does not feel they can adequately project a number as the statute requires.

In 2007, TxDOT hired an independent auditor to evaluate the department's management and business operations in order to prepare for 2009 Sunset Review. This auditor determined that TxDOT's revenue enhancement practices made Texas a "national leader."³⁶⁴

³⁵⁸ Ibid.

³⁵⁹ Ibid.

³⁶⁰ Ibid.

³⁶¹ Tex. S.B. 792, 80th R.S. (2007).

³⁶² Amadeo Saenz, Executive Director, Texas Department of Transportation, testimony before the Senate Committee on Transportation and Homeland Security on April 23, 2008.

³⁶³ Ibid.

³⁶⁴ Texas Department of Transportation, "TxDOT Undergoes Sunset Review" (2007), available at http://www.txdot.gov/services/government_and_public_affairs/sunset.htm.

4) Transportation Infrastructure

Transportation Code §201.109 also requires TxDOT to increase the amount of private infrastructure in bridges, tunnels and turnpikes throughout South Texas, particularly the counties bordering Mexico.³⁶⁵ Both of the Trans-Texas Corridor projects are set to bring private turnpikes to this region.³⁶⁶

Additionally, in El Paso County, a pass-through financing agreement with a private developer is currently under construction. This \$367 million project will be financed by the private developer, and then reimbursed by the state based on the number of people who use the highway.³⁶⁷

FINDINGS AND RECOMMENDATIONS

The Texas Department of Transportation appears to be complying with the statutory requirements with the exception of projecting future revenues. In any area of the statute that the department is deficient in, they appear to be making a reasonable attempt to correct the issue.

The Senate Committee on Transportation and Homeland recommends that TxDOT continue to enhance revenue by selling land interests that are no longer needed or used by the department.

Additionally, the committee recommends that TxDOT continue to come up with innovative financing methods in order to enhance the department's revenue. These methods should be discussed thoroughly with the legislature and enacted in statute prior to administration.

Finally, the committee recommends that the portion of the statute requiring TxDOT to provide a revenue projection be eliminated as their projection would be greatly dependent on other parties, such as the General Land Office.

³⁶⁵ The statute specifies the following counties: Atascosa, Bandera, Bexar, Brewster, Brooks, Cameron, Crockett, Culberson, Dimmitt, Duval, Edwards, El Paso, Frio, Hidalgo, Hudspeth, Jeff Davis, Jim Hogg, Jim Wells, Kenedy, Kerr, Kimble, Kinney, Kleberg, La Salle, Live Oak, Maverick, McMullen, Medina, Nueces, Pecos, Presidio, Real, Reeves, San Patricio, Starr, Sutton, Terrell, Uvalde, Val Verde, Webb, Willacy, Zapata, and Zavala.

³⁶⁶ Amadeo Saenz, Executive Director, Texas Department of Transportation, testimony before the Senate Committee on Transportation and Homeland Security on April 23, 2008.

³⁶⁷ Amadeo Saenz, Executive Director, Texas Department of Transportation, testimony before the Senate Committee on Transportation and Homeland Security on April 23, 2008.

Study and make recommendations to stem the tide of illegal immigration, drug trafficking, and human smuggling, and to reduce the criminal activities within the Border region. (Joint charge with Senate Committee on International Relations and Trade)

BACKGROUND

The latest census data indicates that one of every eight people living in the United States is an immigrant. An estimated one third of those are undocumented. Texas is fourth in the nation, behind California, New York, and Florida, in immigrant population. It is estimated to have about 4% of all undocumented immigrants in the United States.³⁶⁸ Texas' proximity to the border puts illegal immigration, drug trafficking, and border crime policy in the forefront. Immigration and border control has long been a federal issue, with states being limited in what they can do. However, increased crime and drug trafficking on the Texas-Mexico border combined with the tide of illegal immigration calls into question the line between federal and state responsibility when it comes to these issues. Over one thousand pieces of immigration related legislation were proposed by state governments throughout the country in 2007. Texas lawmakers must look at the problems that are arising along the border and how the federal and local governments are responding to these problems in order to determine policies that will supplement the federal effort.

A Background on Immigration Policy

Federal

In 1996 Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). This Act did several things to change the relationship of state and federal government when it comes to immigration. Prior to this Act immediate deportation was only allowed for offenses that could result in five or more years in jail. Under IIRIRA, minor offenses became possible reasons for an illegal individual's deportation. It also established pilot programs for employers to electronically verify an employee's eligibility to work, and set other provisions regarding employer sanctions. The Act's 287(g) clause permits local and state law enforcement departments to enter into agreements with Immigration and Customs Enforcement (ICE) and carry out federal immigration responsibilities.³⁶⁹

Texas

HB 1121 of the 80th Legislature addressed the human smuggling issue that was becoming prevalent in Texas. The bill clarified the definition of "traffic" in the Penal Code as the ability to transport, entice, recruit, harbor, provide, or otherwise obtain another person by any means. The bill also required the Health and Human Services Commission (HHSC) to prepare and issue a report, by no later than September 1, 2008, to address the needs of victims of human trafficking.

³⁶⁸ Kramsky, Magen. "Reaching a Critical Mass- Illegal Immigration in the United States and Legislative Efforts to Curtail it," A Report for the Senate Committee on Transportation and Homeland Security, here citing a 2008 report by The Perryman Group. July 2008.

³⁶⁹ Ibid.

SB 11 passed during the 80th Legislative Session included a provision that authorized the Department of Public Safety (DPS) to issue enhanced driver's licenses or personal ID certificates for the purpose of crossing the Texas-Mexico border. SB 11 also required the development and maintenance of secure, real-time databases of information on temporary cardboard tags affixed to recently sold vehicles. It also established criminal penalties for the unauthorized production, purchasing, selling, or displaying of a temporary tag. SB 11 addressed human trafficking by amending the Penal Code to refine the definitions of "forced labor or services" and "trafficking." It makes it a criminal offense for an individual who has the knowledge that any other will engage in forced labor or services to intentionally or knowingly benefit from participating in a venture that involves the activity of receiving labor or services the person knows are forced. The bill also mandated the Attorney General to work with the Health and Human Services Commission to issue a report outlining how existing laws and rules concerning victims and witnesses address or fail to address the needs of victims of human trafficking; includes recommendations for areas of improvement in existing laws and rules. This report has since been issued.³⁷⁰ The report's findings include:³⁷¹

- that funding is needed for local law enforcement agencies to continue fighting human trafficking;
- that stronger anti-smuggling efforts reduce the likelihood of persons becoming human trafficking victims and increase the possibility of human trafficking detection;
- that Texas lacks a coordinated state level grant program for human trafficking prevention projects.

Impact of Illegal Immigration in Texas

In 2006, then-Texas Comptroller Carole Keeton Strayhorn conducted a fiscal analysis of undocumented residents' economic contribution to the state. The report concluded that while undocumented immigrants produced more state revenue (\$1.58 billion) than the \$1.16 billion in state services they received, local governments bore the burden of \$1.44 billion in uncompensated health care costs and local law enforcement costs not paid for by the state.³⁷²

In 2001 Texas ranked second in the nation regarding the percentage of illegal immigrants living at or below the poverty line. Texas policy regarding education is dictated by federal law which requires a state to provide an education for a child regardless of legal status. The Comptroller's office estimated 35,000 undocumented children in Texas public schools (3% of total enrollment), with a total of \$957 million for the education of non-resident children incurred by the state for school year 2004-2005.

³⁷⁰ Ibid.

³⁷¹ "The Texas Response to Human Trafficking". The Office of the Attorney General Report to the 81st Legislature.

³⁷² Strayhorn, Carole Keeton, Comptroller. "Special Report: Undocumented Immigrants in Texas". December 2006.

Public Safety and Law Enforcement

287(g)

Federal legislation established the 287(g) program where ICE, state and local patrol officers, detectives, investigators, and correctional officers can work in conjunction with each other. This program allows local and state officers more resources and permission to pursue investigations relating to violent crimes, human smuggling, gang or other organized crime activity, sex-related offenses, narcotics smuggling, and money laundering. It also provides increased resources and support in more remote geographical locations. Under this program a law enforcement department and ICE must enter into a memorandum of agreement (MOA) to be signed between the state or locality and the Justice Department before any enforcement powers can be exercised. Each contract specifically states what can and cannot be enforced by the local or state officers, and these details are discussed in the signing of the MOA. The program is credited for identifying more than 65,000 individuals since fiscal year 2006 (mostly in jails who are suspected of being in the country illegally). There are currently 62 active 287(g) MOA's. More than 840 officers have been trained and certified through the initiative. There are three places in Texas with 287(g) agreements: Farmers Branch, Carrollton, and most recently Harris County Sheriff's Office.³⁷³ The implementing agency incurs costs for training and for other duties not performed while performing the functions of 287(g).

ICE is running out of money needed to enhance and expand the program. There has been a heightened interest in the enforcement program and agency officials are becoming more particular over the local plans they choose to support. They are also suggesting that police departments think of other solutions in their law enforcement endeavors, such as focusing on document fraud and criminal gangs. ICE now offers two alternatives for the 287(g) program. Police departments may apply to train jail guards or other correction officers to screen inmates for validation of their legal status. Another alternative is that police departments may establish task forces to deal with particular kinds of crime with high proportion of undocumented immigrants.³⁷⁴

There has been controversy over 287(g). The controversy stems from questions as to whether state and local law enforcement have inherent authority to enforce civil and criminal immigration laws. The Department of Justice Office of Legal Counsel Opinion stated in 2002 that state and local jurisdictions do have the inherent authority to arrest and imprison violators of immigration laws. This is a contradiction to previous judgments by the Office of Legal Council, yet remains the official judgment on the issue today. In 2003 Attorney General John Ashcroft wrote to William Casey of the Boston Police Department: "State and local police officers possess the authority to arrest such aliens based solely upon their listing in the NCIC and the underlying criminal or civil immigration violations.... The only barriers to executing such arrests are statutes or policies that states or municipalities may have imposed on themselves."³⁷⁵

³⁷³ "Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act." U.S. Immigration and Customs Enforcement. http://www.ice.gov/partners/287g/Section287_g.htm. August 18, 2008.

³⁷⁴ Kramsky, Magen. "Reaching a Critical Mass- Illegal Immigration in the United States and Legislative Efforts to Curtail it," A Report for the Senate Committee on Transportation and Homeland Security. July 2008.

³⁷⁵ Ibid.

Non 287(g) Programs in Texas

Houston signed a memorandum of understanding authorizing Houston police officers to arrest and detain persons who are noted on the NCIC system to have an administrative warrant of removal or a deportable felon detainer or both. Officers confirm the identity of the person who is subject to the warrant or detainer by calling, or having the dispatcher call, the appropriate federal agency at telephone numbers provided in the NCIC. Once an officer confirms the identity of the person and confirms the warrant or detainers the officer then asks ICE for acceptance of a criminal hold on the suspect. The arrested suspect is then transported to the city's jail and held for up to 24 hours. ICE agents take custody of the suspect within 12 hours in most cases. ICE then makes a criminal case presentation to the U.S. attorney for anyone whose immigration detainers were placed based on the NCIC hit confirmation. If the suspect has not been picked up by ICE within 24 hours, the suspect will either be released or processed on any other local charges that may have been filed simultaneously with the arrest. The Houston Police Department feels this solution solves the major obstacle that they (local police) have when helping the federal government locate, apprehend, charge, or remove previously deported felons who reenter the country and suspects who illegally enter and are given a court date but do not appear for their hearings.³⁷⁶

Another alternative to 287(g) is the Criminal Alien Program (CAP), also run by ICE. The program also requires a MOA. The program screens every individual who comes into the system to ensure that criminals who are here illegally and are imprisoned are not allowed back into the community once their jail time has finished. The screening determines the legal status of the individual to determine whether they need to be reported to ICE.³⁷⁷

The City of Irving entered into the Criminal Alien Program (CAP) with the intent to stem the flow of criminal misconduct on behalf of unauthorized residents in the area. Once a prisoner is processed, if there is no Texas identification card or fingerprints to identify them, the jailer runs a query through ICE's Law Enforcement Support Center (LESC). LESC conducts its own search and sends back results with one of the following possible options: the person is legal, the person is illegal, the system is unable to determine legal status (if this happens the individual must speak by phone with an ICE agent who will determine his status). If the individual turns out to be illegal they are turned over to ICE after they serve their prison sentence if convicted of a Class C misdemeanor. If the count is a Class B or higher, the offender is transferred to a Dallas jail to serve time and is picked up by ICE at the end of their sentence. Irving's program has effectively enforced Texas law and city ordinances while assisting ICE in the carrying out of federal immigration duties. It has also not encountered any legal complications.³⁷⁸

³⁷⁶ Ferrel, Craig, Deputy Director and General Counsel. "Houston--We Have a Solution." Houston Police Department. December 2006

³⁷⁷ Kramsky, Magen. "Reaching a Critical Mass- Illegal Immigration in the United States and Legislative Efforts to Curtail it", A Report for the Senate Committee on Transportation and Homeland Security. July 2008.

³⁷⁸ Ibid.

Irving has already noticed a dramatic difference in the number of deportations. In 2006 there were 262 deportations of unauthorized criminals. After the implementation of CAP, there were 1,338 criminals who faced deportation in the first three quarters of 2007 alone.³⁷⁹ Because of this partnership with ICE, the program has identified more than 2,700 illegal immigrants since its inception. These illegal immigrants, who were originally arrested because of violating the laws of the state were effectively removed from the city at a minimal cost to tax payers.³⁸⁰

There are a number of concerns regarding local involvement in immigration issues within the law enforcement communities themselves. Some worry that local and state authorities abilities to implement federal initiatives in the effort to control illegal immigration will make it more difficult for these officers to carry out their own local missions. Reports in Arizona indicate people are less likely to call in crimes when they feel a loved one who is here illegally is threatened. This effect could have major implications. A report issued by Major Cities' Chiefs, an association of over 50 large-city chiefs of police, states that "immigration enforcement by local police would likely negatively affect and undermine the level of trust and cooperation between local police and immigrant communities."³⁸¹

What Other States Are Doing

Just as Texas has passed laws regarding human trafficking other states are also toughening their penalties. An individual in Utah convicted of trafficking, harboring, or forcing into labor any unauthorized immigrants beginning in July 2009, will receive a Class A misdemeanor. Oklahoma has declared it unlawful for any individual to transport, move, or attempt to transport any unauthorized person knowing, or in reckless disregard of, the fact that the person came to or has remained in the United States illegally. Anyone who violates this will be convicted of a felony, punishable by incarceration for a minimum of one year or a fine of at least \$1,000 or both. Florida establishes that a sworn statement from the victim of human trafficking is sufficient evidence in receiving these services. The states legislation also provides for the creation of a public awareness program, a proactive way to include and teach all Floridians about the heinous crime of human smuggling.³⁸²

Arizona has been active in enacting legislation to address immigration problems. The state passed the Legal Arizona Workers Act which gave the power to suspend or revoke a business license of employees who knowingly hire illegal immigrants. The state also passed human smuggling legislation that law enforcement can use to arrest coyotes and illegal immigrants who paid them.³⁸³

³⁷⁹ Ibid.

³⁸⁰ Testimony of Chief Larry Boyd, Irving Police Department presented to the Senate Committee on Transportation and Homeland Security on July 9, 2008.

³⁸¹ "Police Chiefs Guide to Immigration Issues." The International Association of Chiefs of Police. July 2007.

³⁸² Kramsky, Magen. "Reaching a Critical Mass- Illegal Immigration in the United States and Legislative Efforts to Curtail it," A Report for the Senate Committee on Transportation and Homeland Security. July 2008.

³⁸³ Testimony by Matt Mayer, Heritage Foundation Fellow to the Senate Committee on Transportation and Homeland Security Committee on July 9, 2008.

State and Federal Interaction

There has long been controversy as to what states can or cannot do in regards to immigration policy. The task of apprehending, detaining, and removing an illegal immigrant who overstays his visit has long been the responsibility of DHS' Immigration and Customs Enforcement Office (ICE). After September 11th this job description was greatly affected because most of their resources have been directed at stemming terrorist activities. There are under 5,000 ICE agents (about one agent for every 2,400 illegal immigrant according to the Heritage Foundation) focused on detention and removal activities in the United States. Such little manpower makes it reasonable to try and bring state and local law enforcement personnel to their interior enforcement actions. Texas has done such things through various operations developed by the Governor's office.

State and federal collaboration can better protect the citizens of our country. Four of the nineteen 9/11 hijackers had law enforcement encounters with local police in the six months preceding September 11, 2001. Each one had violated civil provisions of federal immigration law. However, from a funding stand point local law enforcement are having to use their resources to contain illegal immigration activities when they should be used for crime fighting activities. In this sense it is almost an unfunded mandate.³⁸⁴

The US government has taken a firm stance against human trafficking both within its borders and beyond. Domestically, human trafficking is a federal crime under Title 18. Section 1584 makes it a crime to force a person to work against his will, whether the compulsion is effected by use of force, threat of force, threat of legal coercion or by "a climate of fear" (an environment wherein individuals believe they may be harmed by leaving or refusing to work). Section 1581 similarly makes it illegal to force a person to work through "debt servitude." Human trafficking as it relates to involuntary servitude and slavery is prohibited by the 13th Amendment.

Human trafficking and smuggling are NOT the same thing.

- Smuggling: people pay for the services of being transported illegally to a new country and are free from their smugglers upon arrival.
- Human Trafficking: whether they expect it or not, trafficked persons are enslaved and exploited by their traffickers.

What sometimes begins as smuggling can end up as exploitation and trafficking, but not all trafficking involves crossing borders.

³⁸⁴ Ibid.

FINDINGS AND RECOMMENDATIONS

Agreements such as 287(g) have proved to be effective. Local and state law enforcement should collaborate to ensure that our borders are secure. Local police agencies must balance any decision to enforce federal immigration laws with their daily mission of protecting and serving diverse communities, while taking into account limited resources, the complexity of immigration laws, the limitations on authority to enforce, and the risk of immigration enforcement activities, and the clear need to foster the trust and cooperation from the public including members of the immigrant community. Any initiative to involve local police agencies in the enforcement of immigration laws should be a local decision.³⁸⁵

Efforts to increase federal funding for local and state law enforcement who patrol the border region should continue. State and federal grant resources should include a focus on undermining the long-term capacity of the criminal cartels to operate and therefore should be used for operations capable of collecting information about how the cartels operate and the leadership in the cartels, among other uses. Privacy protections such as data minimization, purpose specification, and limited use should be applied to information collected regarding individuals.

To address concerns regarding rogue law enforcement agents, the Legislature should consider the creation of an office of law enforcement or the funding of officers and resources for internal affairs divisions at border law enforcement agencies. Further, the Legislature should strengthen penalties for law enforcement officers found to work or collaborate with cartels.

The Legislature should also:

- Provide education and training to first line law enforcement through continuing education that would enhance the ability to recognize and respond to the ever-changing and adapting enemy they will confront.
- Identify a potential revenue stream that could be used to specifically fund this education program.
- Review the potential for shifting or augmenting state law enforcement personnel to the border region on a permanent basis to better address smuggling and human trafficking.
- Review the Texas Department of Human Services, Office of Immigrant and Refugee Affairs statutory authority to determine if it should be modified to better address and respond to smuggling and human trafficking.

The Legislature should adopt a multi-pronged approach to address transnational gangs, including enhancing penalties for participation in gang activities.

³⁸⁵ Letter to Chairman John Carona of the Senate Committee on Transportation and Homeland Security from Houston Police Department Chief Harold L. Hurtt on July 1, 2008.

Monitor the implementation of legislation addressed by the Transportation & Homeland Security Committee, 80th Legislature, Regular Session, and make recommendations for any legislation needed to improve, enhance, and/or complete implementation. Specifically, report on implementation of SB 792 and SB 1723, 80th Legislature, Regular Session, to improve the overall collection rate and compliance rate with the Driver Responsibility Program.

BACKGROUND

The Senate Committee on Transportation and Homeland Security Committee addressed many issues and legislation during the 80th Regular Session. Two significant pieces of legislation passed during the session were SB 792 and SB 1723. This section of the interim report specifically addresses the implementation of SB 1723. The reader is referred elsewhere within this report for information regarding implementation of SB 792, and to the findings of the Legislative Study Committee on Private Participation in Toll Projects, which is not yet available as of this writing.

The Driver Responsibility Program established a system whereby points are assigned to moving violations classified as Class C misdemeanors and surcharges are applied based on the type of offense and the time period in which the offense occurred. Since the inception of the program in September 2004, the Department of Public Safety (DPS) has sent notices billing \$478.7 million in potential surcharges, but has only collected \$132.8 million. SB 1723 provided DPS with tools to increase collections and payment options for those persons assessed surcharges. The bill authorized DPS to negotiate additional collection contracts including more extensive collection techniques, makes payments of certain surcharges more feasible for low-income drivers through use of installment plans and periodic amnesty programs, provided for additional consequences for the nonpayment of certain surcharges, and provided incentives for bad drivers to change their behavior through a reduction in surcharges or the number of years a surcharge is collected.

Issues with the Driver Responsibility Program

SB 1723 was a response to the issues raised with the program. One issue raised was that the program unfairly targets those with a lower income. Lower income Texans have a harder time keeping up with insurance costs and in general cannot afford the fines that the program enforces. Another issue was that the notification process is not always reliable because of address issues. Texans who do not change their address on their Texas Driver's License are not being notified of their outstanding fines. Compliance and collection rates are lower than projected, due to Texans not paying their fines which were higher than the driver may have anticipated or been aware of. Another concern is deliberate noncompliance.³⁸⁶

Figures compiled by the Department of Public Safety indicated that the state had only collected 32% of the surcharges assessed against drivers for offenses such as driving while intoxicated, failure to have insurance and driving without a license.³⁸⁷

³⁸⁶ Letter from Senator Shapleigh to Chairman Carona on July 19, 2007.

³⁸⁷ Stutz, Terrance. "Drivers owe state \$620 million in traffic fine surcharges." Dallas Morning News. October 13, 2007.

FINDINGS AND RECOMMENDATIONS

Those who have no driver's license have the lowest rate of compliance with the DRP program.

The Committee recommends legislation that would require the court to notify DPS if a person is indigent when they go through the process. If this occurs an Indigence Program can be established to pinpoint those people who have a harder time paying their surcharge.

When sufficient information is available regarding results under SB 1723, 80th Texas Legislature, that information should be evaluated. If compliance levels have not improved, the Committee recommends eliminating the Driver Responsibility Program.