



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

Surface Transportation Project Delivery Program; TxDOT Audit Report #3

[FHWA Docket No. FHWA-2016-0025]

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The Surface Transportation Project Delivery Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal-aid highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of FHWA. Prior to the Fixing America's Surface Transportation (FAST) Act of 2015, the program required semiannual audits during each of the first 2 years of State participation to ensure compliance by each State participating in the program. This notice finalizes the findings of the third audit report for the Texas Department of Transportation's (TxDOT) participation in accordance to these pre-FAST Act requirements.

FOR FURTHER INFORMATION CONTACT: Dr. Owen Lindauer, Office of Project Development and Environmental Review, (202) 366-2655, Owen.Lindauer@dot.gov, or Mr. Jomar Maldonado, Office of the Chief Counsel, (202) 366-1373, Jomar.Maldonado@dot.gov, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue, S.E., Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the specific docket page at www.regulations.gov.

Background

The Surface Transportation Project Delivery Program (or NEPA Assignment Program) allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal-aid highway projects (23 U.S.C. 327). When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of FHWA. The TxDOT published its application for assumption under the National Environmental Policy Act (NEPA) Assignment Program on March 14, 2014, at Texas Register 39(11): 1992, and made it available for public comment for 30 days. After considering public comments, TxDOT submitted its application to FHWA on May 29, 2014. The application served as the basis for developing the Memorandum of Understanding (MOU) that identifies the responsibilities and obligations TxDOT would assume. The FHWA published a notice of the draft of the MOU in the Federal Register on October 10, 2014, at 79 FR 61370 with a 30-day comment period to solicit the views of the public and Federal agencies. After the close of the comment period FHWA and TxDOT considered comments and proceeded to execute the MOU. Since December 16, 2014, TxDOT has assumed FHWA's responsibilities under NEPA, and the responsibilities for the NEPA-related Federal environmental laws.

Prior to December 4, 2015, 23 U.S.C. 327(g) required the Secretary to conduct semiannual audits during each of the first 2 years of State participation, and annual audits during each subsequent year of State participation to ensure compliance by each State participating in the program. The results of each audit were required to be presented in the form of an audit report and be made available for public comment. On December 4, 2015, the President signed into law the FAST Act (Pub. L. 114-94, 129 Stat. 1312 (2015)). Section 1308 of the FAST Act amended the audit provisions by limiting the number of audits to one audit each year during the first 4 years of a State's participation. This third audit represents the annual review of TxDOT's performance in the 2nd year of the State's participation. A draft version of this report was published in the Federal Register on November 26, 2016, at 81 FR 85303 and was available for public review and comment. The FHWA received two responses; one was from TxDOT and the other was from the American Road and Transportation Builders Association. Only the TxDOT response contained substantive comments.

The first TxDOT comment stated that it disagreed with the draft report's characterization of issues related to the degree or consistency with which TxDOT has followed guidance, policies, and internal TxDOT procedures as "non-compliance" observations, as these issues do not involve any violation of a statute or rule. Further, TxDOT stated that it would consider adherence to regulation and rule as meeting the compliance standard while adherence to guidance or policy is a second tier threshold that, while important, does not merit a non-compliance characterization if/when it is not met. The TxDOT disagrees with these types of issues being characterized as "non-

compliance” along with alleged violations of statutes and rules. The FHWA responds that TxDOT has applied an incorrect standard of review to this audit. The MOU subpart 11.1.1 states that the standard is to review “TxDOT’s discharge of the responsibilities it has assumed under this MOU.” As such, the review is not limited only to possible violations of statute or rule. Further, TxDOT has subjected itself to following the guidance and policy of FHWA and other Federal agencies pursuant to MOU subpart 5.1.1. The FHWA has made no change in the way that non-compliance observations are characterized in finalizing the report.

Another TxDOT comment questions the basis of Non-Compliance Observation #1 regarding compliance with Section 7 of the Endangered Species Act (ESA). The TxDOT alleges that the audit team questioned the TxDOT biologist’s judgement regarding its decisions on four projects. The TxDOT disagrees with FHWA’s characterization that the report did not evaluate or second guess those decisions. The FHWA responds that the non-compliance observation was based on a number of actions documented for specific projects that did not comply either with U.S. Fish and Wildlife Service (USFWS) guidance, or that TxDOT toolkit procedures did not comply with the ESA requirements and USFWS policy in circumstances where an endangered species or its habitat is present. The FHWA will revise the text in Non-Compliance Observation #1 for further clarity.

The TxDOT commented that under Successful Practices and Other Observations, the draft audit report states “[t]hroughout the following subsections, the team lists nine remaining observations that FHWA recommends TxDOT consider in order to make

improvements.” The TxDOT has only identified six numbered observations present in the draft report. The FHWA appreciates TxDOT’s identification of this error, and the final report will reflect the six numbered observations.

The TxDOT’s next comment is that the statement: “The ECOS [Environmental Compliance Oversight System] is a tool for storage and management of information records, as well as for disclosure within TxDOT District Offices, between Districts and ENV [TxDOT’s Environmental Affairs Division], and between TxDOT and the public,” is incorrect. The TxDOT indicated that ECOS was never envisioned to be a tool for the public’s use. The FHWA recognizes that while ECOS may be the means by which TxDOT identifies and procures information requested by the public, ECOS itself was not intended to be the tool available to the public to allow the public, on their own, to access project specific information. The sentence identified by TxDOT will be revised to remove mention of the public.

The next TxDOT comment raises three issues about Non-Compliance Observation #1: (1) that the report has not clearly identified which, if any, “ESA requirements” are the basis for the observation; (2) there is nothing in the ESA rules about determining if “impact is possible”; and (3) there is no requirement to “provide documentation explaining how the project impacts will have no effect,” as neither Section 7 itself nor USFWS’s regulations require the preparation of any level of documentation when a Federal agency determines that it is not necessary to consult under Section 7. Regarding item (1), FHWA responds that it has provided TxDOT with specific instances identified in the file reviews where ESA requirements were not met,

including use of improper species lists and not defining a project's action area for species. Regarding item (2), FHWA responds that Congress intended to "give the benefit of the doubt to the species" (H.R. Conf. Rep. 96-697, 96 Cong., 1st sess. 1979). It follows that regarding Section 7 compliance, anytime impacts are possible, the agency may not ignore that possibility. Finally, regarding item (3), FHWA's expectation for documented compliance is established in the MOU [subpart 10.2.1(A)(i)]. The draft report points out that TxDOT's Section 7 compliance procedures promote the utilization of professional judgment but allow for a project record to logically contradict the compliance decision based on that judgment. The Non-Compliance Observation #1 discussion was revised to include: (1) mention of critical habitat, and (2) the justification for consideration of possible impacts to a species or their habitat.

The next TxDOT comment clarifies that TxDOT follows only one noise policy that was approved by FHWA in 2011. The comment states that FHWA's observations are the result of incorrect actions by individual project sponsors and are not the result of a new noise policy. The TxDOT developed in 2016 an Environmental Handbook for Traffic Noise that did not replace the approved 2011 Guidelines for Analysis and Abatement of Highway Traffic Noise. The FHWA appreciates TxDOT's identification of this error, and the final report will remove mention of a second noise policy and focus the observation on incorrect actions identified in project files.

Authority: Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59; 23 U.S.C. 327; 49 CFR 1.48.

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Federal Highway Administration

Surface Transportation Project Delivery Program

FHWA Audit #3 of the Texas Department of Transportation

December 17, 2015, to June 16, 2016

Executive Summary

This report summarizes the findings of the Federal Highway Administration's (FHWA) third audit review (Audit #3) to assess the performance by the Texas Department of Transportation (TxDOT) regarding its assumption of responsibilities and obligations, as assigned by FHWA, under a memorandum of understanding (MOU) which took effect on December 16, 2014. From that date, TxDOT assumed FHWA National Environmental Policy Act (NEPA) responsibilities assigned for the environmental review and compliance, and for other environmental laws related to NEPA for highway projects in Texas (NEPA Assignment Program). The status of FHWA's observations from the second audit review (Audit #2), including any TxDOT self-imposed corrective actions, is detailed at the end of this report.

The FHWA Audit #3 team (team) was formed in February 2016 and met regularly to prepare for the on-site portion of the audit. Prior to the on-site visit, the team: (1) performed reviews of project files in TxDOT's Environmental Compliance Oversight System (ECOS), (2) examined TxDOT's responses to FHWA's information requests, and (3) developed interview questions. The on-site portion of this audit, comprised of TxDOT and other agency interviews, was conducted on April 11-15, 2016.

The TxDOT continues to develop, revise, and implement procedures and processes required to carry out the NEPA Assignment Program. Overall, the team found continued evidence that TxDOT is committed to establishing a successful program. This report summarizes the team's assessment of the current status of several aspects of the NEPA Assignment Program, including numerous successful practices and six observations that represent opportunities for TxDOT to improve its program. The team identified four non-compliance observations that TxDOT will need to address as corrective actions, if not already addressed, in FHWA's next review or audit.

The TxDOT has continued to make progress toward meeting the responsibilities it has assumed in accordance with the MOU. Through this report, FHWA is notifying TxDOT of several non-compliance observations that require TxDOT to take corrective action. By taking corrective action and considering changes based on the observations in this report, TxDOT should continue to move the NEPA Assignment Program forward successfully.

Background

The Surface Transportation Project Delivery Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for highway projects. This Program is codified at 23 U.S.C. 327. When a State assumes these Federal responsibilities for NEPA project decisionmaking, the State becomes solely responsible and liable for carrying out these obligations in lieu of and without further approval by FHWA.

The State of Texas was assigned the responsibility for making project NEPA

approvals and the responsibility for making other related environmental decisions for highway projects on December 16, 2014. In enacting Texas Transportation Code, §201.6035, the State has waived its sovereign immunity under the 11th Amendment of the U.S. Constitution and consents to defend any actions brought by its citizens for NEPA decisions it has made in Federal court.

The FHWA responsibilities assigned to TxDOT are specified in the MOU. These responsibilities include: compliance with the Endangered Species Act (ESA), Section 7 consultations with the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration National Marine Fisheries Service, and Section 106 consultations with the Texas Historical Commission (THC) regarding impacts to historic properties. Other responsibilities may not be assigned and remain with FHWA. They include: (1) responsibility for project-level conformity determinations under the Clean Air Act and (2) the responsibility for government-to-government consultation with federally recognized Indian tribes. Based on 23 U.S.C. 327(a)(2)(D), any responsibility not explicitly assigned in the MOU is retained by FHWA.

The TxDOT's MOU specifies that FHWA is required to conduct six audit reviews. These audits are part of FHWA's oversight responsibility for the NEPA Assignment Program. The reviews are to assess a State's compliance with the provisions of the MOU as well as all applicable Federal laws and policies. They also are used to evaluate a State's progress toward achieving its performance measures as specified in the MOU; to evaluate the success of the NEPA Assignment Program; and to inform the administration of the findings regarding the NEPA Assignment Program. In December

2015, statutory changes in Section 1308 of the Fixing America's Surface Transportation (FAST) Act, reduced the frequency of these audit reviews to one audit per year during the first 4 years of State participation in the program.

Scope and methodology

The overall scope of this audit review is defined both in statute (23 U.S.C. 327) and the MOU (Part 11). An audit generally is defined as an official and careful examination and verification of accounts and records, especially of financial accounts, by an independent unbiased body. With regard to accounts or financial records, audits may follow a prescribed process or methodology, and be conducted by "auditors" who have special training in those processes or methods. The FHWA considers this review to meet the definition of an audit because it is an unbiased, independent, official, and careful examination and verification of records and information about TxDOT's assumption of environmental responsibilities. Principal members of the team that conducted this audit have completed special training in audit processes and methods.

The diverse composition of the team, the process of developing the review report, and publishing it in the Federal Register help maintain an unbiased review and establish the audit as an official action taken by FHWA. The team for Audit #3 included NEPA subject-matter experts from the FHWA Texas Division Office, as well as FHWA offices in Washington, DC, Atlanta, GA, and Tallahassee, FL. In addition to the NEPA experts, the team included FHWA planners, engineers, and air quality specialists from the Texas Division office.

Audits, as stated in the MOU (Parts 11.1.1 and 11.1.5), are the primary

mechanism used by FHWA to oversee TxDOT's compliance with the MOU and ensure compliance with applicable Federal laws and policies, evaluate TxDOT's progress toward achieving the performance measures identified in the MOU (Part 10.2), and collect information needed for the Secretary's annual report to Congress. These audits also must be designed and conducted to evaluate TxDOT's technical competency and organizational capacity, adequacy of the financial resources committed by TxDOT to administer the responsibilities assumed, quality assurance/quality control process, attainment of performance measures, compliance with the MOU requirements, and compliance with applicable laws and policies in administering the responsibilities assumed. The four performance measures identified in the MOU are: (1) compliance with NEPA and other Federal environmental statutes and regulations, (2) quality control and quality assurance for NEPA decisions, (3) relationships with agencies and the general public, and (4) increased efficiency, timeliness, and completion of the NEPA process.

The scope and focus of this audit included reviewing the processes and procedures (i.e., toolkits) used by TxDOT to reach and document its independent project decisions. The team conducted a careful examination of highway project files in TxDOT's ECOS and verified information on the TxDOT NEPA Assignment Program through inspection of other records and through interviews of TxDOT and other staff. The team gathered information that served as the basis for this audit from three primary sources: (1) TxDOT's response to a pre-audit #3 information request, (2) a review of both a judgmental and random sample of project files in ECOS with approval dates subsequent to the execution of the MOU, and (3) interviews with TxDOT, the USFWS,

U.S. Environmental Protection Agency (USEPA), and THC staff. The TxDOT provided information in response to FHWA pre-audit questions and requests for documents. That material covered the following six topics: program management, documentation and records management, quality assurance/quality control, legal sufficiency review, performance measurement, and training. The team subdivided into working groups that focused on considering TxDOT's performance according to each of the six topics.

The intent of the review was to check that TxDOT has the proper procedures in place to implement the responsibilities assumed through the MOU, ensure that the staff is aware of those procedures, and that staff implements the procedures appropriately to achieve compliance with NEPA and other assigned responsibilities. The review did not evaluate the substance of project-specific decisions or second guess those decisions, as such decisions are the sole responsibility of TxDOT. The team focused on whether the procedures TxDOT followed complied with Federal statutes, regulation, policy, procedure, process, guidance, and guidelines.

The team defined the timeframe for highway project environmental approvals subject to this third audit to be between July 1, 2015, and January 29, 2016. The third audit intended to: (1) evaluate whether TxDOT's NEPA decisionmaking and other actions comply with all the responsibilities it assumed in the MOU, and (2) determine the current status of observations in the Audit #2 report, as well as required corrective actions (see summary at end of this report). The population of environmental approvals included 1489 projects based on certified lists of NEPA approvals reported monthly by TxDOT. The NEPA approvals included 1423 categorical exclusion determinations (CE), approvals

to circulate Environmental Assessments (EA), findings of no significant impacts (FONSI), re-evaluations of EAs, Section 4(f) decisions, approvals of a draft environmental impact statement (EIS), and records of decision (ROD). The team drew a sample with a 95 percent confidence interval with a 10 percent margin of error. This sample included 93 randomly selected CE projects and all 66 approvals that were not CEs. The team reviewed 159 project files in this review.

The interviews conducted by the team focused on TxDOT's leadership and staff at the Environmental Affairs Division (ENV) Headquarters in Austin and staff in 10 of TxDOT's Districts. The team divided into three groups to complete the face-to-face interviews of District staff in El Paso and Odessa; Pharr and Yoakum; and San Angelo, Abilene, and Brownwood. Staff from the Wichita Falls, Atlanta, and Lufkin Districts completed interviews via remote tele-conference. The team continued to use the same review form and interview questions for Districts as used in Audits #1 and 2. With these last 10 interviews completed, staff from all 25 TxDOT Districts were interviewed as part of FHWA's audits.

Overall Audit Opinion

The TxDOT continues to make progress in the implementation of its program that assumes FHWA's NEPA project-level decision authority and other environmental responsibilities. The team acknowledges TxDOT's effort to refine, and when necessary, establish internal policies and procedures. The team found ample evidence of TxDOT's continuing efforts to train staff in clarifying the roles and responsibilities of TxDOT staff, and in educating staff in an effort to assure compliance with all of the assigned

responsibilities.

The team identified several non-compliant observations in this review that TxDOT will need to address through corrective actions. These observations come from a review of TxDOT procedures, project file documentation, and interview information. This report also identifies several notable good practices that we recommend be expanded upon.

Non-Compliance Observations

AUDIT #3

Non-compliance observations are instances where the team found the TxDOT was out of compliance or deficient with regard to a Federal regulation, statute, guidance, policy, the terms of the MOU, or TxDOT's procedures for compliance with the NEPA process. Such observations may also include instances where TxDOT has failed to maintain technical competency, adequate personnel, and/or financial resources to carry out the assumed responsibilities. Other non-compliance observations could suggest a persistent failure to adequately consult, coordinate, or take into account the concerns of other Federal, State, tribal, or local agencies with oversight, consultation, or coordination responsibilities. The FHWA expects TxDOT to develop and implement corrective actions to address all non-compliance observations. As part of information gathered for this audit, TxDOT has informed the team they are still implementing some recommendations made by FHWA on Audit #2 to address non-compliance. The FHWA will conduct follow up reviews of non-compliance observations.

The MOU (Part 3.1.1) states that “[p]ursuant to 23 U.S.C. 327(a)(2)(A), on the

Effective Date, FHWA assigns, and TxDOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the U.S. Department of Transportation (DOT) Secretary's responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq. with respect to the highway projects specified under subpart 3.3. This includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for Federal highway projects such as 23 U.S.C. 139, 40 CFR 1500-1508, DOT Order 5610.1C, and 23 CFR 771 as applicable.” Also, the performance measure in MOU Part 10.2.1(A) for compliance with NEPA and other Federal environmental statutes and regulations commits TxDOT to maintaining documented compliance with requirements of all applicable statutes and regulations, as well as procedures and processes set forth in the MOU. The following four non-compliance observations were found by the team based on review of TxDOT ENV toolkit/handbook procedures, documentation in project files, and other sources.

Audit #3 Non-Compliance Observation #1: Section 7 Consultation

The TxDOT has assumed the responsibilities for compliance with the ESA of 1973 (16 U.S.C. 1531-1544) and developed a procedure, as part of the TxDOT environmental toolkit, for staff to make ESA effect determinations. Through project file reviews, the team found that TxDOT's toolkit procedures do not comply with the ESA requirements and USFWS policy¹ in circumstances where an endangered species, its habitat or critical habitat may be present. Pursuant to MOU part 3.1.1 (see above),

¹ USFWS & NMFS 1998 Endangered Species Consultation Handbook, Standard Operating Procedure for Accessing USFWS Ecological Services for Technical Assistance and Section 7 Consultations; 300.01 SOP Version 2, September 2015.

TxDOT's procedures must also be consistent with FHWA guidance and the USFWS & NMFS 1998 Endangered Species Consultation Handbook. Specifically, when a species or its habitat or critical habitat may be present within a project's action area and an effect is possible, the project file needs to show consultation with USFWS (for a may affect determination) or include documentation explaining how the project will have no effect on the species and its habitat or critical habitat. The TxDOT needs to take action to revise its ESA guidance and procedures when an endangered species or its habitat may be present to make those procedures consistent with Federal policy and guidance. The team acknowledges that TxDOT staff have met with FHWA and USFWS staff to discuss how the revised procedures would result in more a consistent set of determinations.

In four of the five project files reviewed, where an endangered species its habitat or critical habitat was potentially present, TxDOT's procedure allowed for ESA determinations of "no effect" to be made based upon a biologist's professional judgment without supporting analysis and documentation including a reasoned assessment of the best available data. For some, the analysis and documentation included in the project files supported a "may affect" determination and informal consultation with USFWS. In fulfilling ESA section 7(a)(2) responsibilities, Congress intended the "benefit of the doubt" be given to the species (H.R. Conf. Rep. 96-697, 96 Cong., 1st sess. 1979). The team has informed TxDOT of this deficiency and TxDOT has indicated it has reviewed similarly made ESA determinations to check for errors. The TxDOT is collaborating with FHWA and the USFWS to revise its' ESA handbook and standard operating procedures.

Audit #3 Non-Compliance Observation #2: Noise Policy

Non-compliance observation #2 results from 11 project files where the template letter fails to inform about the non-eligibility for Federal-aid participation in Type II traffic noise abatement projects as required by 23 CFR 772.17(a)(3). Three of those same projects did not follow TxDOT's noise wall policy previously approved by FHWA. The FHWA complies with its noise regulations (23 CFR 772) by reviewing and approving each State's noise guidance and then relying on the State to follow those procedures. For Texas, its noise guidelines (Guidelines for Analysis and Abatement of Roadway Traffic Noise, 2011) represents the noise policy reviewed and approved by FHWA that serves as the basis for compliance with 23 CFR 772. In 2016, TxDOT updated its noise handbook according to the 2011 noise policy guidelines that we learned from staff interviews lead to some confusion. The team found inconsistencies and incorrect information in the ECOS project file of record such as: notification to locals with jurisdiction occurring before a NEPA decision was made; the date of public knowledge improperly occurring before the NEPA decision; and holding a noise workshop before the public hearing.

Audit #3 Non-Compliance Observation #3: Public Involvement

Non-compliance observation #3 is based upon evidence in files for four projects reviewed that TxDOT did not follow its public involvement procedure and handbook requirements.² The FHWA's regulation at 23 CFR 771.111(h)(1) requires that each State have FHWA approved public involvement procedures to implement the public involvement/public hearing requirements in law and regulation. The review team found

² TxDOT's Environmental Handbook/Public Involvement; 760.01 GUI Version 2, August 2015.

that TxDOT inconsistently applied its public involvement procedures. Although TxDOT has detailed public involvement procedures in place, TxDOT staff sometimes fails to follow those procedures. In one project file, TxDOT did not hold a public hearing for a project on new alignment as required in the State's procedures.³ Another project file lacked documentation of public involvement required by the TxDOT procedures.⁴

In addition, the team reviewed a project file showing that TxDOT issued a FONSI for an action described in 23 CFR 771.115(a) without evidence of a required additional public notification. The FHWA's regulation at 23 CFR 771.119(h) requires a second public notification to occur 30 days prior to issuing a FONSI. The team reviewed the TxDOT public involvement handbook and found no mention of the Federal requirement for a second public notification under these circumstances. The TxDOT modified its public involvement procedures and FHWA reviewed and approved those procedures pursuant to 23 CFR 771.111(h). The TxDOT needs to take corrective action to comply with the regulatory requirements for public involvement consistent with the revised public involvement policy that has been reviewed and approved by FHWA.

Audit #3 Non-Compliance Observation #4: Section 4(f)

Non-compliance observation #4 results from the review of one project file that lacked the required documentation for compliance with Section 4(f) as specified in 23 CFR 774.7 and TxDOT's Environmental Handbook/U.S. Department of Transportation Act: Section 4(f); 810.01 GUI Version 1 dated May 2015. The project file lacked the

³ See *id.*, Part 5.1.

⁴ See *id.*, Part 11.

date and identity of the individual who made a de minimis impact determination. The TxDOT did not follow established Section 4(f) toolkit procedures. The TxDOT should ensure that all required Section 4(f) documentation is complete and included in a project's file.

Successful Practices and Other Observations

This section summarizes the team's observations about issues or practices that TxDOT may consider as areas to improve. It also summarizes practices that the team believes are successful, so that TxDOT can consider continuing or expanding those programs in the future. Further information on these observations and successful practices is contained in the following subsections that address these six topic areas: program management; documentation and records management; quality assurance/quality control; legal sufficiency; performance management; and training.

Throughout the following subsections, the team lists six remaining observations that FHWA recommends TxDOT consider in order to make improvements. The FHWA's suggested implementation methods of action include: corrective action, targeted training, revising procedures, continued self-assessment, or some other means. The team acknowledges that, by sharing the preliminary draft audit report with TxDOT, TxDOT has begun the process of implementing actions to address these observations to improve its program prior to the publication of this report.

1. Program Management

Successful Practices and Observations

Over the course of interviewing all 25 Districts over the past 18 months, the team noted that District staff welcomed the opportunity to be responsible for making CE approvals. Additionally, TxDOT District staff members and management have said in interviews that they are more diligent with their documentation because they know that these approvals will be internally assessed and the District held accountable by the TxDOT ENV Self-Assessment Branch (SAB). District staff indicated in interviews that the SAB detailed reviews are highly valued because they can learn from their mistakes and improve. Accountability, in part, is driving an enhanced desire for TxDOT staff to correctly document environmental compliance.

The team recognizes enhanced communication among individuals in the project development process as a successful practice. Information gained from interviews and materials provided by TxDOT demonstrate improved communication amongst Districts and between Districts and ENV. Staff interviewed in Rural Districts indicated that in the past they received less attention from ENV than Metropolitan Districts. The team noted that “NEPA Chats” (regular conference calls led by ENV, providing a platform for Districts to discuss complex NEPA implementation issues) have helped remove any perceived disparity. Urban and Rural Districts feel more included and a part of the conversation. The team noted that Rural District staff developed their own networks to keep each other informed. District environmental and planning staff told the team that they take initiative and break down internal District silos between planning, design, construction, and maintenance. This includes providing internal self-initiated training across disciplines so everyone in the District Office is aware of TxDOT procedures to

ensure that staff follows NEPA-related processes and either keeps projects on-schedule or ensures that there are no surprises if projected schedules slip. Finally, the ENV Division Director initiated a new approach to effective ENV-District staff communication. The Director established an informal three-member advisory board with rotating representatives from each of the Metropolitan, Urban, and Rural Districts. This board meets with the Director to identify and discuss issues and concerns that should be addressed by ENV. This exchange and feedback loop should prove informative, enable the success of the NEPA Assignment Program, and allow for any needed changes or adaptations based on District input.

The team noted that the Air Quality reviewers at TxDOT ENV work extremely well with FHWA in processing this unassigned component of the program. The ENV reviewers are empowered to perform their own Quality Assurance/Quality Control (QA/QC) review of District-produced material before it is sent to FHWA for approval. Retaining and using highly skilled, technical expertise in-house at ENV promotes an efficient and consistent interpretation of Federal regulations and a successful procedure-driven process. This ensures compliance from the outset and should be seen as a model to be duplicated in other areas.

Audit #3 Observation #1

The team identified one project file that showed that the NEPA review was incomplete despite the project appearing on a list of projects certifying that all environmental requirements had been completed pursuant to the MOU (See Part 8.2.6.). Projects that TxDOT reports as certified may be processed to receive Federal-aid funding

from FHWA. Through follow up conversations with TxDOT, the team learned that reporting this project was an error that has since been rectified. The team urges TxDOT to include a quality control review step as part of its process to ensure that only projects that have satisfied all environmental requirements are certified and reported to FHWA.

2. Documentation and Records Management

The team relied on information in ECOS, TxDOT's official file of record, to evaluate project documentation and records management practices. Many TxDOT toolkit and handbook procedures mention the requirement to store official documentation in ECOS. The ECOS is also a tool for storage and management of information records, as well as for disclosure within TxDOT District Offices. The ECOS is the means by which TxDOT identifies and procures information required to be disclosed to and requested by the public. The TxDOT staff noted that ECOS is both adaptable and flexible. The TxDOT must maintain and update the ECOS operating protocols (for consistency of use and document/data location) and educate its users on updates in a timely manner.

Successful Practices and Observations

A number of best practices demonstrated by TxDOT were evident as a result of the documentation and records management review.

The team learned through interviews that many TxDOT staff members routinely use and are becoming increasingly comfortable with the (still optional) scope development tool. Some staff indicated that they also utilized the scope development tool to develop their own checklists to ensure that all environmental requirements have been met prior to making a NEPA approval.

The team noted from interviews of USFWS and ENV subject matter staff that Biological Assessment (BA) and Biological Opinion (BO) documentation is more detailed and provides for supportable conclusions. Specifically, the team learned that information in the BA was formatted so that it could be incorporated directly into a BO, which results in faster completion of ESA compliance and thus reduced review timeframes.

Audit #3 Observation #2

The team continued to find instances in which individual project files contained inconsistent and, in some cases, contradictory Environmental Permits Issues and Commitments (EPIC) information. The TxDOT procedures allow for documentation to be uploaded into the documentation tab as well as into an EPIC tab. The EPIC tab indicates “No EPICs exist for this project” as the default statement. The ENV management stated that an updated procedure allows for this discrepancy. The team urges TxDOT to develop a procedure where EPIC information may be consistently documented and found in ECOS.

1. Quality Assurance/Quality Control (QA/QC)

Successful Practices and Observations

The team observed several successful practices currently in place that align with TxDOT’s QA/QC Control Procedures for Environmental Documents.

The team found evidence that TxDOT’s approach to Quality Assurance by SAB is functioning well as a post-NEPA approval review. The team once again heard positive feedback in District staff interviews regarding the SAB, noting that the SAB’s comments

are very helpful and timely. According to TxDOT's self-assessment report, the SAB group reviewed 100 percent of all CE documents in January 2016 and reported the results to all Districts via webinars to ensure that all District personnel were up to date on proper procedures and a consistent message regarding corrective actions were relayed to all District environmental staff. The TxDOT also reports that there was a SAB effort to train District staff in public involvement procedures and to provide information on the new Section 106 programmatic agreement. During our interviews, we also learned that close out meetings have been held for EA projects to share lessons learned among District, ENV, and TxDOT subject matter expert environmental staff. As a result of this team effort, since Audit #1, we observed that Districts have welcomed the opportunity to be responsible for CE decisions that are delegated to their level. Additionally those Districts are more careful with their documentation and reviews because they know that the TxDOT ENV SAB will internally assess those decisions and hold them accountable.

2. Legal Sufficiency Review

Based on the interviews and review of documentation, the requirements for legal sufficiency under the MOU are being adequately fulfilled.

The level of legal expertise available for reviews appears to be sufficient, based on information gained from interviews. Currently there are three attorneys in TxDOT's General Counsel Division (GCD) (previously referred to as Office of General Counsel, OGC) with two of the attorneys having been hired in the last 6 months. One of the new attorneys has environmental law experience (primarily in water quality and water utilities issues) but no highway or NEPA experience. Both new attorneys have attended four

NEPA training courses that ENV provided (via the FHWA Resource Center) and are scheduled to attend two more. One of the new attorneys was very complimentary of the quality of the training and its usefulness in guiding her reviews. The GCD also has contracts with three outside law firms on an “as needed” basis and an outside contract attorney who has provided legal assistance on environmental issues for a number of years to ENV.

The GCD assistance continues to be guided by ENV's Project Delivery Manual Sections 303.080 through 303.086. These sections provide guidance on conducting legal sufficiency review of FHWA-funded projects and publishing a Notice of Intent to prepare an EIS and a Notice of Availability in the **Federal Register**.

In February 2016, TxDOT received a notice of intent to sue by a Non-Governmental Organization for a Federal project for which they made the environmental decision. The TxDOT notified the FHWA Office of the Chief Counsel, as required by the MOU.

Based on a report provided by GCD, since April 2015, GCD had reviewed or been involved in legal review for six project actions. These included four 139(l) notices, an FEIS, and one Notice of Intent (NOI). The ENV project managers make requests for review of a document to the lead attorney, who then assigns that document for formal legal review. That lead attorney then assigns the document to one of the attorneys based on workload and complexity. Attorney comments are provided in the standard comment response matrix back to ENV. All comments must be satisfactorily addressed for GCD to complete its legal sufficiency review. The GCD does not issue conditional legal sufficiency determinations.

Successful Practice

Based on our discussions, GCD is very involved with the Districts and ENV throughout the NEPA project development process and legal issues. The team did note more open communication between all GCD, ENV, and District staff. All of the attorneys are regular participants in the monthly ENV NEPA Chats.

3. Performance Measurement

As TxDOT explained in its response to FHWA's pre-audit #3 information request, performance measurement (evaluating how well TxDOT is managing the program and determining the value delivered for customers and stakeholders) is a complex issue. The TxDOT devotes a high level of effort developing the metrics to measure performance. Despite the challenges of complexity and effort, TxDOT informed the team that it uses performance measurements to identify potential risk, review areas needing improvement, and recognize successful practices.

Successful Practices and Observations

The team acknowledges the utility of TxDOT's performance measures for quality control and quality assurance in its CE determinations. As explained in their self-assessment summary report and their response to FHWA's pre-audit #3 information request, TxDOT conducted an extensive analysis of whether project file errors were substantive or not substantive. The team generally found substantive errors to be non-compliant with respect to the validity of environmental decisions, whereas non-substantive errors were flaws in information that substantiated those decisions. The

TxDOT's analysis of these errors demonstrates that non-substantive errors largely affect TxDOT efficiency in reporting and data analysis. The TxDOT's procedures result in the identification and correction of substantive errors. This careful consideration of performance regarding CE determination errors and corrective actions demonstrates how measurement and application of corrective actions improved overall performance. In addition, TxDOT is applying this information to design specific ECOS upgrades to eliminate several categories of errors.

The specific consideration of errors is just one example of what the team learned from interviewing TxDOT's ENV Director and assessing TxDOT leadership's review measures to monitor continuous improvement. The TxDOT's leadership, consultants, and District staff all noted an improvement and a higher consistency in the quality of environmental decisions and environmental documentation for CE determinations. The TxDOT identified issues that may require policy or program attention. These issues are memorialized in the self-assessment report's root cause analysis for substantive and non-substantive errors.

Audit #3 Observation #3

The team considered TxDOT's QA/QC target measure of 95 percent of project files determined to be complete and accurate and TxDOT's reported measure of 77.7 percent. While the target of any performance measure should be at or close to 100 percent, FHWA acknowledges that attaining this measure may be extremely difficult, especially given that the project class is an EA or EIS. The TxDOT has analyzed the range of errors and identified missing or incomplete information as a persistent problem.

Given TxDOT's efforts to date and careful consideration of FHWA's observations on QA/QC, TxDOT may consider error rates and/or different measure(s) that demonstrate continuous improvement.

Audit #3 Observation #4

Timeliness measures reported by TxDOT in their recent self-assessment summary report identify time frames for completion of EA and EIS projects. Most of these projects were initiated prior to December 2014, when TxDOT was assigned FHWA's NEPA responsibilities. The average time to complete a FONSI before and after assignment dropped from 1060 days to 686 days (eliminating an outlier project that took 2590 days). While one expects projects initiated and completed under assignment to finish faster than any previous average time frame, even TxDOT recognizes that complex EAs require more time to reach a FONSI than projects with fewer impacts or complexities. The TxDOT's summary report contains too few data points to determine trends, and there is no control to differentiate between "complex" and "simple" EAs. The team urges TxDOT to consider a timeliness measure for CEs, recognizing the issues of consistency within and among CE actions listed in 23 CFR 771.117(c) and 23 CFR 771.117(d). Meaningful timeliness measures should accommodate the time TxDOT takes to initiate and complete environmental reviews, given that some reviews will take less time and entail fewer tasks or steps than others. The TxDOT could consider ways to "control" for project complexity, perhaps by stratifying their data or by measuring the timeliness to complete certain tasks (such as defining purpose and need, the range of alternatives, or the time to prepare an Draft EIS, Final EIS, or ROD).

4. Training Program

The TxDOT has specifically designed an environmental professional training program for its environmental professional staff and others. This program was updated for 2016 and the team learned about it through a four-page description and share point site information provided in TxDOT's response to FHWA's pre-audit #3 information request. This information was supplemented through interviews with TxDOT ENV staff responsible for the training program. This program, FHWA was told, must satisfy requirements in State law (Texas Administrative Code, or TAC, title 43, part 1, chapter 2, subchapter A, rule §2.11) as well as requirements specified in Part 12 of the MOU. Texas law requires that TxDOT individuals be "certified" before they may make environmental decisions and must maintain "certification" to continue to make decisions. It follows then that TxDOT's training focus is TxDOT staff's initial certification and continuing certification. The MOU training requirements establish ongoing competency requirements for TxDOT's staff.

Successful Practices and Observations

The team recognizes the following successful training practices and observations. The team learned from an interview that TxDOT's new hire "on-boarding" process is extraordinarily responsive to delivering the ENV 207 training course. This course, which provides a general overview of environmental considerations in project development, also entails practical ECOS training in how to create a project, use the optional scope development tool, how to assign a task, and how to complete a form. In addition, an interviewee told the team that training updates to the ENV 207 course were continuous.

Another successful practice is to open up the full range of TxDOT's training classes to enrollment by local government and consultant staff, (after TxDOT staff has been provided an initial opportunity to enroll). And finally, TxDOT is archiving and providing easy access of recordings from all NEPA Chats/informal training including, notes, and handouts from those offerings/ training.

Audit #3 Observation #5

The team learned through interviews that TxDOT oversight and tracking of environmental competency training/competency assurance is de-centralized. This means that individual TxDOT staff and supervisors are responsible for maintaining environmental "certification" under State law, as well as general competencies and capabilities to carry out MOU responsibilities (see MOU Part 4.2.2). The team was unable to assess the overall staff competency and exposure to training because information was spread across all 25 TxDOT Districts. These audit reviews require details demonstrating that TxDOT staff are capable, competent, qualified, and certified (from the perspective of TAC and the MOU) to perform these assigned responsibilities. Thus, TxDOT's ability to monitor the certification and competency status of their qualified staff is important. The TxDOT should consider at least an annual assessment that compiles all the environmental competency information from across all Districts and ENV.

Audit #3 Observation #6

The TxDOT acknowledged in its recent self-assessment summary report that many of the errors it detects in project files (both substantive and non-substantive) are

tied to staff knowledge and use of the ECOS program. In many ways, TxDOT has demonstrated that updating ECOS is the most efficient way to head off errors and increase consistency in TxDOT's environmental review process. The team learned from interviews that the first wave of ECOS changes will coincide with new training. In addition to the other recommendations made by FHWA, TxDOT should engage its subject matter experts, the self-assessment team, as well as its overall policy and program staff in crafting and delivering this training to address the non-compliance observations noted above. In addition, TxDOT should take any lessons learned from the corrective actions taken as a result of this audit and incorporate them into future training.

Status of Non-Compliance Observations and Other Observations from Audit #2

(September 2015) and FHWA Responses to TxDOT's Audit #2 comments

Audit #2 Non-Compliance Observations

1. CE determination prior to regulatory criteria being met – The TxDOT indicated in its comment on the **Federal Register** notice of the draft Audit #2 report that it (1) circulated a memo to its staff regarding conditional clearances, (2) revised its standard operating procedures to remove the discussion of conditional clearances, and (3) completed informal training on this issue utilizing the NEPA Chats. The TxDOT's comment included discussion on the timing of NEPA approvals, but after FHWA discussed these comments with TxDOT, TxDOT chose to withdraw comments regarding the timing of NEPA approvals.
2. NEPA Decision reporting – The TxDOT reported to FHWA that it revised its method of monthly NEPA Approval certification reporting in an effort to

eliminate errors. The recurrence of a reporting error in Audit #3 indicates that under current reporting procedures, it is still possible for TxDOT to erroneously certify projects that are still being processed as being complete. The FHWA relies upon TxDOT's independent NEPA decision to advance federally funded projects. If FHWA advances a project that has been improperly processed by TxDOT, this may jeopardize Federal-aid reimbursement or eligibility of Federal funds on that project.

3. Project file records and missing information – The TxDOT acknowledged the concern for incomplete project files in its comments on Audit #2. The TxDOT states that it has reviewed the projects under this observation and has provided corrective actions in the form of (1) individual communications with staff affected, and (2) through NEPA Chats.

Audit #2 Observations

All observations are purely for TxDOT's consideration only and should not be deemed non-compliance observations unless otherwise noted.

1. Relationships between TxDOT and other Federal Agency staff— The TxDOT indicated in its comments on Audit #2 that it has conducted follow up meetings with U.S. Coast Guard staff. It also disagrees with the characterization that TxDOT's relationship with the Texas SHPO is "strained." The FHWA has continued to include interviews with outside agency staff as part of this and future reviews/audits to seek information about relationships and to convey information back to TxDOT. The FHWA provides information for TxDOT to consider in

maintaining and/or improving its working relationship with both Federal and State regulatory agencies. The FHWA interviews these agencies in order to (1) provide feedback about those relationships that TxDOT may not otherwise hear directly and (2) to review and assess TxDOT's procedures. The FHWA is also able to observe program-level interactions between TxDOT and other agencies and to convey observations back to TxDOT for consideration purposes.

2. Legacy projects and TxDOT's "no effect" determinations for ESA — The TxDOT stated in its comments on Audit #2 that it met with FHWA staff on this matter and has assessed existing procedures, rules, and policies related to ESA consultation and reviewed related training. The team found a deficiency in the TxDOT procedure on making ESA determinations as a result of Audit #3. Since the procedure for making ESA determinations is non-compliant, TxDOT will need to implement a corrective action, which will be considered as part of FHWA's next review or audit.
3. Consistency in TxDOT's approach to defining 23 CFR 771.117(e)(4) for major traffic disruption — This TxDOT response to the draft Audit #2 report downplays the need for an agreed upon standard or threshold on how to apply the constraint in 23 CFR 771.117(e)(4) regarding traffic disruption. The TxDOT indicated that the decision is made by "professional judgment" according to the criteria the CEQ has identified for a determination of significant impact (i.e., context and intensity). However, TxDOT's approach does not fulfill FHWA policy on how to set the threshold for this constraint, stated in the preamble to the notice of the final

rule (79 FR 60110, Oct. 6, 2014). Thus, TxDOT should, at the minimum, identify examples of instances of substantial traffic disruption and instances that do not arise to the level of substantial disruption.

4. Addressing errors and corrections to NEPA decisions in ECOS — This TxDOT comment on Audit #2 acknowledges that a specific CE determination was incorrect, attributable to a typographical error. Thus, TxDOT completed a new CE determination for that project. As part of the project file reviews for Audit #4, FHWA proposes to engage with TxDOT to have a shared set of expectations on the process or procedures that addresses various errors or omissions in TxDOT's NEPA decisionmaking at a program-level, both before and after TxDOT requests that FHWA approve Federal-aid. The integrity of data in ECOS is paramount to retaining an official file of record for Federal-aid projects. It is anticipated that ECOS upgrades will also help to fully address this issue with an improved quality control process improvement by TxDOT.
5. Inadequate project description or project scope — The TxDOT stated in its comments on Audit #2 that discussions of adequate project descriptions have been the subject of several NEPA Chats and will continue to be discussed as long as this issue persists. The FHWA and TxDOT collaborated to develop a shared set of expectations for project development that was presented at the September 2015 TxDOT Environmental Conference.
6. EPIC documentation and decisionmaking — The TxDOT indicated in its comment on the Audit #2 report that TxDOT ECOS procedures allow information

to be loaded in two ways that can be confusing for reviewers. The TxDOT acknowledged this issue and stated that it has established an EPIC workgroup with the purpose of identifying a more consistent method to record and track EPICs. The results of this workgroup will be incorporated into a series of ECOS upgrades scheduled over the next 2 years.

7. Multiple CE approval documents in ECOS — The TxDOT stated in its comment on Audit #2 that the project file for this observation contained a typographical error that made the initial CE determination incorrect. The TxDOT then made a new CE determination. Having a shared set of expectations (see number 4, above) between TxDOT and FHWA on how to address errors and omissions should improve both the program and the review process.
8. Multiple reevaluations of a NEPA approval — The TxDOT indicated in its comment on Audit #2 that the multiple reevaluations resulted from a design-build project, where changes may occur often. The TxDOT prefers to respond to changes within a set time frame to keep the project moving especially on design-build projects. Reevaluations must look at the entire project. This situation will also be considered as part of the shared set of FHWA-TxDOT expectations on how to handle project changes.
9. ECOS upgrades schedule too slow — This TxDOT response to Audit #2 disagreed that the pace of ECOS upgrades might increase litigation risk. Based on information from Audit #3 interviews, this observation is tied to TxDOT's commitment of resources to assume responsibilities under the MOU (Part 4.2).

This was presented as a continued observation from previous audits and is restated to draw TxDOT's attention to an identified problem. This observation is not a statement of non-compliance, although it could lead to a non-compliance observation in the future. As ECOS is the official file of record, FHWA is concerned that TxDOT has not improved ECOS quickly enough. The TxDOT should consider making database updates more timely and related procedures mandatory in relation to documentation storage within ECOS.

10. Difficulty locating information in project files — This TxDOT comment on Audit #2 states that it formed a workgroup in the summer of 2015 for the purpose of developing statewide guidance regarding filing and naming conventions in ECOS. The TxDOT Districts themselves had issues locating documentation within their own ECOS project files during site visits in Audit #2. The team continued to have difficulty (and ENV management and staff also confirmed the same difficulty) finding key project documentation for this audit, especially for large and complex projects. The FHWA looks forward to reviewing the recommendations of this workgroup and assessing any changes as part of a future review or audit.

11. Evidence of recurring Non-Compliance Observations related to QA and QC application to individual projects — This TxDOT comment on Audit #2 commits to making project specific comments in SAB feedback reports available for Audit #3. These reports were made available and the TxDOT self-assessment report included an extensive analysis of QC outcomes for CE project reviews. The QC

is still an issue prior to NEPA decisions being finalized for larger scale CEs as well as for EAs and EISs.

12. Expectation for the timeframe necessary for a legal review — This TxDOT comment on Audit #2 commits to revising the standard operating procedure to establish an expected review time for the TxDOT's OGC now GCD to conduct a legal sufficiency review. As recommended during Audit # 2, OGC has issued a procedure establishing legal review times for FEIS (30 days) and for NOI and 139(l) documents (3 days). If necessary, OGC can request additional time for the review.
13. Measure for the TxDOT relationship with the public — The TxDOT continued to report the number of complaints received year-to-year as its performance measure for its relationship with the public. None were received, and the measure reported was unchanged from the prior self-assessment summary report. The team learned from interviews that it is possible that the public may not distinguish between performance pre- and post- assignment. The team was told that TxDOT is still getting feedback from the public and agencies and plans to include the measures into a continuous improvement process. The TxDOT also noted, in its Federal Register comment on the draft Audit #2 report, that (1) assessing change in communication with the general public is inherently difficult, (2) NEPA assignment presents little external differentiation to the general public, and (3) finding success in measuring this variable has proven difficult.

14. Implement ways to train local government staff— The TxDOT’s Environmental Professional Training Program is described in a four-page report provided to the team as part of TxDOT’s pre-audit information request response. That report identifies a series of workshops and training events jointly held with THC staff. The team learned through interviews and the training program report that TxDOT has established an ENV training SharePoint site that is accessible to the public for local government staff to register for training at no cost.

Finalization of Report

The FHWA received two responses from the American Road & Transportation Builders Association (ARTBA) and TxDOT during the 30-day comment period for the draft report. The team has considered these comments in finalizing this audit report. The ARTBA’s comments were supportive of the Surface Transportation Project Delivery Program and did not relate specifically to Audit #3. The TxDOT’s comments provided information about non-compliance and general observations from the draft report that should be revised. The response also describes actions TxDOT has taken in response to the report’s observations.

Several TxDOT comments have resulted in changes in this report. The number of observations in the draft report was incorrectly referred to in one instance as nine and has been corrected. The information storage and management role of ECOS was clarified by deleting mention of public use, but instead an internal tool TxDOT uses to disclose

information to the public. Because of TxDOT comments on the draft report's discussion of ESA compliance, the discussion of Non-Compliance Observation #1 was revised to include: mention of critical habitat, and the justification for consideration of possible effects to a species or their habitat. The TxDOT's response also clarified that it updated its handbook procedures for noise issues, but did not update the 2011 noise policy. The discussion of Non-Compliance #2 has removed mention of a TxDOT 2016 noise policy.

Since the completion of this report, staff from TxDOT and FHWA have established quarterly partnering sessions where observations and other issues relating to NEPA assignment are being discussed, clarified, and resolved.

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