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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA-2016-0034]

Surface Transportation Project Delivery Program; Ohio Department of Transportation Audit Report

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: The Moving Ahead for Progress in the 21st Century Act (MAP-21) established the permanent Surface Transportation Project Delivery Program that allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities it has assumed, in lieu of FHWA. This program mandates annual audits during each of the first 4 years of State participation to ensure compliance by each State participating in the Program. This notice makes available the final report of Ohio Department of Transportation's (ODOT) first audit under the program.

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Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., EST, 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, codified at 23 U.S.C. 327, allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities it has assumed, in lieu of the FHWA. The ODOT published its application for assumption under the National Environmental Policy Act (NEPA) Assignment Program on April 12, 2015, and made it available for public comment for 30 days. After considering public comments, ODOT submitted its application to FHWA on May 27, 2015. The application served as the basis for developing a Memorandum of Understanding (MOU) that identifies the responsibilities and obligations that ODOT would assume. The FHWA published a notice of the draft MOU in the Federal Register on October 15, 2015, 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 ODOT considered comments and proceeded to execute the MOU. Effective December 28, 2015, ODOT assumed FHWA's responsibilities under NEPA, and the responsibilities for NEPA-related Federal environmental laws described in the MOU.

Section 327(g) of Title 23, United States Code, requires the Secretary to conduct annual audits during each of the first 4 years of State participation. After the fourth year, the Secretary shall monitor the State's compliance with the written agreement. The results of each audit must be made available for public comment. The FHWA published a notice in the Federal Register on March 16, 2017, soliciting public comment for 30-days, pursuant to 23 U.S.C. 327(g). This notice is available at 82 FR 14096. The FHWA received comments on the draft report from the American Road & Transportation Builders Association (ARTBA). The ARTBA's comments were supportive of the Surface Transportation Project Delivery Program and did not relate specifically to Audit #1. The team has considered these comments in finalizing this audit report. This notice makes available the final report of ODOT's first audit under the program.

Authority: 23 U.S.C 327; 23 CFR 773; 49 CFR 1.85.

Issued on: June 29, 2017.

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Acting Deputy Administrator,

Federal Highway Administration.

**Surface Transportation Project Delivery Program
FHWA Audit of the Ohio Department of Transportation
December 28, 2015 through August 5, 2016**

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Executive Summary

As part of responsibilities specified in 23 U.S.C. 327, as amended by the Fixing America’s Surface Transportation (FAST) Act (P.L. 114-94), this is the first audit of the Ohio Department of Transportation (ODOT)’s assumption of National Environmental Policy Act (NEPA) responsibilities, conducted by a team of Federal Highway Administration (FHWA) staff (the team). On December 28, 2015, ODOT assumed Federal Highway Administration’s (FHWA) NEPA responsibilities and liabilities for the Federal-aid highway program in Ohio, as specified in a Memorandum of Understanding (MOU) signed on December 11, 2015. This audit examined ODOT’s performance under the MOU regarding responsibilities and obligations assigned therein.

The FHWA review team, formed in February 2016, met regularly to prepare and conduct elements of the review. Prior to the on-site visit, the team performed reviews of ODOT’s project NEPA documentation in EnviroNet (ODOT’s official environmental document filing system), the ODOT pre-audit information request (PAIR) response, and ODOT’s self-assessment report. In addition, the team reviewed ODOT guidance documents, including the NEPA Quality Control/Quality Assurance Guidance, and the ODOT NEPA Assignment Training Plan. The team developed interview questions for ODOT Central Office, ODOT Districts, and outside agencies for the on-site portion of this review, which took place from August 1-5, 2016.

The ODOT is still in a transition phase and is developing and implementing procedures and processes for Federal decisionmaking responsibility under the NEPA Assignment Program. Overall, the team found evidence that ODOT made reasonable progress in implementing the NEPA Assignment Program and is committed to establishing a successful program. This report provides the team’s assessment of ODOT’s

implementation of the NEPA Assignment Program, embodied in 11 observations and 3 successful practices.

It is important to differentiate between program-level compliance and project-level compliance under the NEPA Assignment Program. Project-level compliance refers to whether ODOT followed Federal environmental laws and regulations for a specific environmental action on a project. Project-level compliance trends may indicate program-level compliance. Program-level compliance refers to whether ODOT followed requirements (1) described in programs, processes, and procedures including Federal environmental laws and regulations for NEPA; (2) embodied in 23 U.S.C. 327 (as amended by the FAST Act); and (3) stipulated in the MOU between FHWA and ODOT for the Assignment Program. The team did not make any program-level non-compliance observations during this first review; however, the team did note project-level non-compliance observations, which this report discusses in further detail.

The team finds ODOT to be in substantial compliance with the provisions of the MOU. The ODOT has carried out the responsibilities that it has assumed, keeping with the intent of the MOU and its application for NEPA assumption responsibilities. We encourage ODOT to consider the observations in this report to continue to build upon the early successes of its program.

Background

The Surface Transportation Project Delivery Program (NEPA Assignment Program) allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance with environmental laws 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. The NEPA assignment first began as a pilot program established by Section 6005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). Section 1313 of the Moving Ahead for Progress in the 21st Century Act (MAP-21), as codified in 23 U.S.C. 327 and amended by the FAST Act, made this program permanent.

Pursuant to Ohio Revised Code Section 5531.30, signed into law by Governor Kasich on April 1, 2015, the State of Ohio expressly consented to exclusive Federal court jurisdiction with respect to the compliance, discharge, and enforcement of any responsibility with respect to duties under NEPA and other Federal environmental laws assumed by ODOT. Ohio has therefore waived its sovereign immunity under 11th Amendment of the U.S. Constitution and consents to Federal Court jurisdiction for actions brought by its citizens for projects it has approved under the NEPA Assignment Program.

The ODOT published its application for assumption under the NEPA Assignment Program on April 12, 2015, and made it available for public comment for 30 days. After considering public comments, ODOT submitted its application to FHWA on May 27,

2015. The application served as the basis for developing the MOU that identifies the responsibilities and obligations that ODOT would assume. The FHWA published a notice of the draft MOU in the Federal Register on October 15, 2015, at 80 FR 62153, with a 30-day comment period to solicit the views of the public and Federal agencies. After the comment period closed, FHWA and ODOT considered comments and executed the MOU.

Effective December 28, 2015, ODOT assumed FHWA's project approval responsibilities under NEPA and NEPA-related Federal environmental laws.

Federal responsibilities not assigned to ODOT that remain with FHWA include:

- (1) any highway projects authorized under 23 U.S.C. 202 (Tribal Transportation Program);
- (2) any highway projects authorized under 23 U.S.C. 203 and 204 (Federal Lands Transportation Program), unless such projects will be designed and constructed by ODOT;
- (3) any project that crosses State boundaries, and any project that crosses or is adjacent to international boundaries (A project is considered "adjacent to international boundaries" if it requires the issuance of a new or the modification of an existing Presidential Permit by the U.S. Department of State.);
- (4) project-level conformity determinations under the Federal Clean Air Act; and
- (5) conducting government-to-government consultation with federally recognized Indian tribes.

The FHWA will conduct a series of four annual compliance audits of the ODOT NEPA Assignment Program to satisfy provisions of 23 U.S.C. 327(g) and Part 11 of the MOU. Audits, as stated in MOU Sections 11.1.1 and 11.1.5, are the primary mechanism to oversee ODOT's compliance with the MOU, ensure compliance with applicable Federal laws and policies, evaluate ODOT's progress toward achieving the performance measures identified in MOU Section 10.2, and collect information needed for the Secretary's annual report to Congress.

This audit report will be available to ODOT and the public for review and comment. The FHWA will consider the status of observations from an audit as part of the scope of future audits and will include a summary discussion describing the progress made since the prior audit in all subsequent audit reports.

To ensure a level of diversity and guard against unintended bias, the team is comprised of NEPA subject matter experts from the FHWA Ohio Division Office, as well as FHWA offices in Washington, DC; Atlanta, GA; Austin, TX; Tallahassee, FL; and Baltimore, MD. In addition to the NEPA experts, two individuals from FHWA's Program Management Improvement Team in Lakewood, CO, provided technical assistance in conducting reviews. All of these experts received training specific to evaluation of

implementation of the NEPA Assignment Program. The diverse composition of the team and the process of developing the audit report for publication in the Federal Register ensure that the team conducted the audit in an unbiased and official manner.

Scope and Methodology

The team conducted a careful examination of the ODOT NEPA Assignment Program through review of three primary sources of information: project files, ODOT's responses to the pre-audit information request, and interviews with ODOT Central Office and District environmental staff, as well as resource agency staff. All reviews focused on objectives related to the six NEPA Assignment Program elements contained in the MOU: program management; documentation and records management; quality assurance/quality control; legal sufficiency; performance measurement; and training.

The purpose of the project file review was to evaluate the NEPA process and procedures utilized by ODOT, but not project-specific NEPA decisions. Fourteen members of the team reviewed a statistically valid sample of project files in ODOT's online environmental file system, EnviroNet. The universe of projects included any highway project with an environmental approval date between December 28, 2015, and May 31, 2016. Using a 90 percent confidence level and 10 percent margin of error, the team reviewed 82 out of 535 total projects. The projects reviewed represented all NEPA classes of action available, all 12 ODOT Districts, and the Ohio Rail Development Commission.

The team composed the 40-question PAIR based on requirements in the MOU that were incorporated into the objectives for the audit. The ODOT provided responses to the questions and the requests for documentation, such as its organizational structure. The team reviewed ODOT's responses to gain an understanding of how ODOT is currently meeting the requirements of the MOU. The team also compared the procedures described in the response to ODOT's written procedures. Finally, the team developed specific questions for the interviews to gather more information or to seek clarification based on ODOT's PAIR response.

The team conducted approximately 40 on-site interviews with staff at three ODOT Districts (District 4 [Akron], District 5 [Jacksonstown], and District 9 [Chillicothe]); ODOT's Division of Planning, Office of Environmental Services (OES); the Ohio Rail Development Commission; and the Columbus, Ohio field offices of both the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers. In each office, interviewees included staff, middle management, and executive management. The selected interviewees represented a diverse range of expertise and experience. The interviews at the ODOT Districts also included a discussion with the District Environmental Coordinators and environmental staff on project specific issues identified in the team's project file review. In addition, the team met with ODOT OES to discuss the audit's identified project file issues following the on-site review week.

The team verified information on the ODOT NEPA Assignment Program through review of ODOT policies, guidance, manuals, and reports. This included the NEPA Quality Control/Quality Assurance Guidance, ODOT NEPA Assignment Training Plan, and ODOT NEPA Assignment Self-Assessment report. The team identified gaps between the information in the documents, project file review, and interviews. The team documented the results of its reviews and interviews and consolidated the results into related topics or themes. From these topics or themes, the team developed the review observations and successful practices. The FHWA defines an observation as a statement that explains the condition, criteria, cause, and effect. The team considers observations as sufficiently important to urge ODOT to consider improvements or enhancement to the area of project management in its NEPA Assignment Program.

The FHWA defines successful practices as processes, procedures, practices, and technologies that the team wants to recognize, and that may benefit others. Successful practices should be replicable and scalable for other agencies.

Overall Audit Opinion

The ODOT has carried out the responsibilities it has assumed pursuant to both the MOU and the Application. As such, the team finds ODOT to be in substantial compliance with the provisions of the MOU. Overall, the team found evidence that ODOT made reasonable progress in implementing the NEPA Assignment Program and is committed to establishing a successful program. The team identified eleven (11) observations, including both successful practices and opportunities for ODOT to improve its implementation of the NEPA Assignment Program.

Project-level compliance refers to whether ODOT properly documented and followed Federal environmental laws and regulations for a specific environmental action on a project. Project-level compliance trends may indicate program-level compliance. The project-level compliance issues noted by the review team did not indicate a trend of program non-compliance in this review.

Program-level compliance refers to whether ODOT followed requirements described in programs, processes and procedures including Federal environmental laws and regulations for NEPA; requirements imposed by 23 U.S.C. 327; and compliance with the MOU between FHWA and ODOT for the NEPA Assignment Program. The team did not make any program-level, non-compliance observations during this first review; however, the team noted project-level non-compliance observations, which this report discusses in further detail below.

The team recognizes that ODOT is still implementing the NEPA Assignment Program and is in the early stages of fully adapting and incorporating the requisite programs, policies, and procedures into its overall project development program. The ODOT's efforts are appropriately focused on establishing and refining policies, procedures, and guidance; training staff, including those within and outside of ODOT; clarifying role and

responsibility changes due to NEPA Assignment; and monitoring compliance with its assigned responsibilities.

The ODOT's EnviroNet system provides a framework for ODOT's NEPA Assignment Program by serving as a records retention repository and as a project management tool for decisionmaking in the NEPA process. It also provides documentation of agency coordination and public involvement in that decision. The system has built-in controls, allowing ODOT to apply a measure of quality control and to enable the preparer to monitor project status, track when key decisions are required, and to record when they are completed.

The team has noted 11 observations. The team urges ODOT to consider improvements through one or more of the following: revising policies, procedures, and guidance, as needed; educating staff on the content and parameters of the policies, procedures, and guidance through targeted training; continued self-assessment; and continued information dissemination both inside and outside of ODOT and with the public. We encourage ODOT to consider the observations in this report to continue to build upon the early successes of its program.

Observations and Successful Practices

Program Management

Observation 1: ODOT has established a strategy, direction, and framework for the integration and implementation of NEPA Assignment throughout ODOT, including OES, Districts, agencies, LPAs, and consultants.

The ODOT has communicated—through procedure development and/or refinement, its day-to-day correspondence, and rollout presentations within and outside of ODOT—that it has a strategy for incorporating NEPA Assignment into the overall project development process. The team found in ODOT's responses to the PAIR and through interviews that ODOT has utilized various means to disseminate this information to ODOT Central Office, Districts, coordinating agencies, Local Public Agencies (LPA), consultants, and the public. The Administrator of OES has stated that NEPA Assignment should be invisible on a day-to-day basis, as the NEPA process itself has not changed. The ODOT is simply completing the process under the MOU, which reflects ODOT's authority to make NEPA decisions, as agreed to by FHWA and ODOT.

Staff at all levels affirmed that OES management continuously stresses the responsibility and liability inherent in NEPA Assignment. Management stressed that all levels of staff should be fully aware of their responsibilities in all day-to-day activities. In addition, ODOT is also enhancing its working relationship with LPAs to ensure consistency in the preparation and review of NEPA documents, whether prepared by ODOT or the LPA. In general, ODOT takes pride in its assumed responsibilities and has worked to ensure that its staff is comfortable in this new role through policy and procedure review, and through

various training opportunities. Interview responses also reflected that prior to NEPA Assignment, OES provided in-house training for ODOT consultants and staff at all levels.

Additional training opportunities noted in the PAIR and interviews include the newly established, bi-weekly NEPA Chats and quarterly District Environmental Coordinator (DEC) meetings. Interviewees indicated that they appreciate these opportunities and view them as an effective forum for learning and practice. These activities provide avenues for OES to dispense information, examples, and tips; answer questions; and explain new concepts to enhance staff understanding of new processes and procedures. Attendance at the NEPA Chats is mandatory, and when staff cannot attend a session, ODOT provides a summary of the information covered shortly after the NEPA Chat is completed.

The ODOT added three positions to address specific NEPA Assignment responsibilities: the NEPA Assignment Coordinator, environmentally focused legal counsel, and another staff person who dedicates half her time to NEPA Assignment. The OES and District staff stated that there are sufficient personnel to deliver a successful NEPA Assignment program. District staff also indicated that OES subject matter staff and management are available to assist the Districts when needed.

Observation 2: ODOT has proactively revised its policies, manuals, guidance, and processes to ensure that they are current and compliant with NEPA Assignment requirements.

In demonstrating preparedness for NEPA Assignment, ODOT has been pro-active in revising its policies, manuals, guidance, and processes to ensure the documents are current, per NEPA Assignment requirements. An interview with OES executive management confirmed that these revisions account for approximately 80 documents to date, plus updates to ODOT's training curriculum.

To prepare for NEPA Assignment, ODOT has reached out to each of the external resource agencies to assure them that long-established relationships will not change as a result of NEPA Assignment. The ODOT's PAIR response and self-assessment, as well as in resource agency interviews, evince this effort. In addition, ODOT developed escalation procedures with some resource agencies. Resource agencies have praised both the technical competency of ODOT staff and the effective documentation on ODOT sponsored projects. During the resource agency interviews, interviewees shared some opportunities for improvement; these included better response time from ODOT on non-compliance notices and project-specific information requests.

Observation 3: EnviroNet, ODOT's robust and comprehensive NEPA process system, has facilitated implementation of NEPA Assignment.

EnviroNet (ODOT's official online environmental file system) provides a framework for ODOT's NEPA Assignment Program, serving as a records retention repository and a project management tool for the NEPA process. It also provides documentation of

agency coordination and public involvement for a particular decision. The system has built-in controls, allowing ODOT to apply a measure of quality control and to enable the preparer to monitor project status, track when key decisions are required, and record when they are completed.

EnviroNet provides a robust and comprehensive system to capture the NEPA process. The system has been a useful tool in facilitating the implementation of NEPA Assignment. Two key features are its ease of use and the fact that it acts as a process guide to enhance the completion of NEPA documentation, assuring that the requisite documents are included in the electronic project file. The team supports ODOT's plans to upgrade the EnviroNet System and resource agency access.

EnviroNet serves as ODOT's official online environmental file system, and ODOT procedures require that staff save all project-related documents therein. The ODOT NEPA File Management and Documentation Guidance,¹ dated March 23, 2016, states, "*ODOT must retain project files and general administrative files related to NEPA responsibilities. Every related decision-making document must be included the EnviroNet Project File.*" However, the team learned through its interviews with ODOT staff that ODOT deletes internal comments related to draft documents from the project file once the document is final. In addition, interviewees indicated that alternate and duplicate files are stored outside of the EnviroNet system. The team also discovered instances where the Environmental Assessment (EA) and the Environmental Impact Statement (EIS) documentation were located outside of EnviroNet.

These practices may represent a risk to ODOT, since they could eliminate documentation and evidence that support the "hard look" at projects required by NEPA. More specifically, the deleted comments and the use of alternate files could leave gaps in the decisionmaking process that may be subject to litigation. The deletion of internal document review comments and use of alternate files could also hinder the transparency of the process and potentially call into question reasonable assurances of compliance with NEPA and other recordkeeping requirements. In addition, ODOT's process of internal comment deletion does not allow for documenting trends in matters of compliance and non-compliance.

Observation 4: ODOT does not include EAs, EISs, or their re-evaluations in the EnviroNet system in the same way as Categorical Exclusions (CE).

During interviews, ODOT personnel acknowledged EnviroNet contains date fields to track EAs, EISs, and their re-evaluations, but the system does not have fields to enter all information for these classes of NEPA actions. Interviewees stated that staff typically upload a PDF of the EA, EIS, or associated re-evaluation to the Project File Tab in EnviroNet, in addition to entering data into the date fields.

¹ Available at: https://www.dot.state.oh.us/NEPA-Assignment/Documents/ODOT_NEPA_File_Management.pdf.

The team reviewed two EIS re-evaluations that had incomplete documentation in EnviroNet, per ODOT’s NEPA File Management and Documentation Guidance. Upon further inquiry, the team determined that ODOT had stored the complete documentation outside of EnviroNet because the original EIS documentation predated EnviroNet. Due to inconsistencies between ODOT’s guidance and actual practices, the team encourages ODOT to update its NEPA File Management and Documentation Guidance to clarify how EAs, EISs, and their re-evaluations should be documented and filed to ensure that staff includes all necessary information in the official environmental project file.

Documentation and Records Management

Observation 5: FHWA identified project-level compliance issues with 12 projects in 7 environmental resource areas, including: Public Involvement, Environmental Justice, Environmental Commitments, Wetlands, Floodplains, and Section 4(f).

The team discovered project compliance issues in the areas of Public Involvement (PI), Environmental Justice (EJ), Environmental Commitments, Wetlands, Floodplains, and Section 4(f). The ODOT’s self-assessment identified these same issues, with the exception of Section 4(f). The review noted several instances that indicated the improvements ODOT should make in these areas. The project-level compliance issues noted did not rise to the level of a finding of program-level non-compliance. None of the reviewed projects were in danger of losing Federal funding. For example, 24 percent of the sampled projects demonstrated a need for improved public involvement, and 6 percent of sampled projects had insufficient EJ analyses to satisfy all Federal requirements.

Areas Noted in Need of Improvement by Agency		
Areas in Need of Improvement	FHWA	ODOT
PI	✓	✓
EJ	✓	✓
Floodplains	✓	✓
Environmental Commitments	✓	✓
Wetlands Findings per E.O. 11990	✓	✓
Section 4(f)	✓	
Project File Management*	✓	✓

*ODOT’s Self-Assessment identified Project File Management (Documentation) is another area in need of improvement, in terms of documentation input errors within the EnviroNet project file.

The team met with ODOT, and ODOT agreed with the identified project compliance issues. The ODOT continues to improve its processes and procedures to ensure complete documentation and project-level compliance. The ODOT has indicated that it will take actions to correct the individual project compliance issues, such as adding missing documentation to the Project File tab in EnviroNet. The team encourages ODOT to look

for any needed improvements to EnviroNet, policies, procedures, and manuals to ensure complete documentation and compliance on future projects.

Observation 6: The team identified several instances where the information included in the online environmental file did not follow ODOT standards.

The FHWA identified instances where ODOT was inconsistent with its documentation procedures, per the *ODOT NEPA File Management and Documentation Guidance*, and various other ODOT NEPA resource-area guidance documents. The ODOT's Self-Assessment also identified project file management as another area in need of improvement (see table above), in terms of documentation input errors within the EnviroNet environmental files. Overall, ODOT has sound documentation tools, procedures and guidance. However, opportunities exist for ODOT to refine the EnviroNet system, accompanying procedures and guidance, and improve documentation standards. The team encourages ODOT to refine its controls and training to ensure proper documentation. This may include upgrades to EnviroNet and policies, procedure, and manuals.

Quality Assurance/Quality Control (QA/QC)

Observation 7: There are variations in awareness, understanding, and implementation of QA/QC process and procedures that may result in the potential for inconsistencies in project documentation.

Interviews with ODOT District and OES staff revealed differences in the level of knowledge and understanding of the QC process. Some interviewees knew that they played a role and could describe exactly how they complete the process. Other interviewees were less familiar with their role in the QC process or indicated that they had little to no role. In addition, some interviewees who hold the same title, but work in different offices (both Districts and OES), reported different roles or engagement in the QC process. At the same time, nearly all interviewees reported that they review projects or other NEPA documents and provide or respond to comments, indicating a misunderstanding of the term QC.

In addition, interviews with ODOT District and OES staff revealed many of ODOT's resource area manuals and guidance documents contain information that can assist in the QC review process. Interviewees reported that the contents of the manuals or guidance help them determine if the document under review is in compliance, that all necessary analysis was complete, and that all documentation is included. The FHWA did hear variation in the frequency and extent to which interviewees utilized the manuals and guidance as a tool in their QC reviews. For example, many interviewees stated that they use the manuals and guidance on a frequent basis, but others stated that they do not need to reference the documents during their review.

Interviews also revealed variation in the implementation of the QC process, particularly related to comments generated through the QC process. Many interviewees indicated that they were able to generate comments and address them through EnviroNet; however,

some indicated that they provided comments via email or other methodologies. In addition, some staff discussed capturing the comments generated during the QC process in EnviroNet through different means and saving them outside of the EnviroNet system.

The FHWA reviewed ODOT's response to the PAIR, the ODOT NEPA Quality Control/Quality Assurance Guidance, and the ODOT NEPA Assignment Self-Assessment report to obtain clarification about some of the variation in the District and OES responses. The PAIR response contains the most detailed information regarding the manuals and guidance documents, ODOT staff's role in the QC process, and how the staff should capture comments generated in the QC process. The QC/QA Guidance contains general information about staff roles in some of the QC process, but does not discuss the use of manuals or comment documentation. Lastly, the self-assessment report contains some information about use of manuals, but does not discuss staff roles or comment documentation.

Review of the ODOT NEPA Quality Control/Quality Assurance Guidance and ODOT's response to the PAIR revealed that ODOT's QA is primarily comprised of its self-assessment process. Interviews with ODOT Districts and OES staff revealed differences in awareness and understanding of the self-assessment process. Many of the interviewees indicated they did not know about ODOT's first self-assessment.

The ODOT Self-Assessment report included statements about areas of improvement. However, FHWA was uncertain how ODOT planned to implement changes. Through review of ODOT's response to the PAIR and interviews, FHWA determined that OES provided the Districts with Interoffice Communication memos that contained self-assessment results and suggestions for improvement for the specific District. In addition, OES emailed the self-assessment report to the District Environmental Coordinator's email list (includes staff and DECs) and shared the results with ODOT's executive management.

The OES stated in interviews that it is going to develop strategies to address programmatic issues from the self-assessment after it gets the results of this report. In addition, OES indicated that they will follow-up with Districts to determine if the Districts have implemented project specific corrections.

The QC/QA guidance does not contain detailed information on some elements of the QA/QC process. After the interviews, FHWA has a better understanding that many employees use the ODOT manuals and guidance as reference. However, staff still seems to be unclear about their role in the QC process, and there is variation in implementation of the process. This could create inconsistencies in the implementation of the QA/QC process around the State, particularly regarding project documentation. The FHWA previously encouraged ODOT to expand its QC/QA guidance document to include information that is more detailed. The ODOT indicated in its PAIR response that the final updated version of the QC/QA Guidance document would be available in the coming months.

Legal Sufficiency Review

Observation 8: ODOT has developed guidance for legal sufficiency. To date, guidance on legal sufficiency is untested.

In December 2015, ODOT developed legal sufficiency guidance entitled “ODOT NEPA Assignment Legal Sufficiency Review Guidance.” The guidance sets forth the review procedure and criteria. In addition, the guidance provides information to environmental staff on what criteria an attorney will focus on during the legal sufficiency review. Per that guidance, ODOT is required to conduct legal sufficiency reviews of combined Final Environmental Impact statements/Record of Decision documents, individual Section 4(f) evaluations, and Federal Register notices on the Statute of Limitations of claims pursuant to 23 U.S.C. 139.

To date, ODOT has not applied this guidance because it did not have any documents that required legal sufficiency review. However, if program staff were to receive such documents, they would forward a request for review to a dedicated attorney assigned to OES by the Chief Legal Counsel. The attorney has 15 business days to complete the legal sufficiency review. Upon receipt of the request, the attorney will notify the program staff, giving the staff an estimated date of completion, and provide any comments and a Legal Sufficiency finding to the OES Administrator, Deputy Director of Planning, and the Chief Legal Counsel.

Successful Practice 1: ODOT has successfully integrated a dedicated legal counsel as part of the environmental team.

Per the team’s suggestion, ODOT has assigned one attorney from the Office of Chief Legal Counsel to provide legal services on environmental issues to ODOT. This dedicated attorney serves as a resource on all environmental matters and provides legal assistance to OES. The dedicated staff attorney has 8 months experience in his position and has taken all required environmental training courses. However, he does rely on outside resources for complex environmental matters. At this time, ODOT does not have a specific, identified attorney to take on the work if this dedicated attorney leaves the agency. The ODOT should consider training a backup attorney to assist when the dedicated legal counsel is not available.

Since ODOT has not completed any documents that require a legal sufficiency review, the team’s audit on this topic is necessarily limited. At this time, our report on legal sufficiency reviews is a description of ODOT’s status as described in its response to the PAIR and during the interviews with ODOT staff. The team will examine ODOT’s legal sufficiency reviews by project file inspection and through interviews in future audits.

Performance Measures

Observation 9: Development of a program for collecting and maintaining Performance Measures as defined in Part 10.2 of the MOU is ongoing.

The FHWA established the Performance Measures included in MOU Section 10.2 to provide an overall indication of ODOT's execution of its responsibilities assigned by the MOU. During the interviews, the team learned that staff at both the Districts and OES was not informed about the performance measures contained in the MOU, nor of any actions taken by OES to address the performance measures.

Leadership at OES indicated in interviews that they were aware that the MOU requires ODOT to develop criteria for information and the means to collect such information. However, at the time of the interviews, ODOT was developing a plan to address the performance measures but it had not yet implemented that plan. Based on the responses contained in the PAIR and the Department's Self-Assessment report, OES indicated that it intends to report on performance measures in the future. The ODOT's timeline to fully develop the MOU performance measures is unclear. The FHWA is encouraged that ODOT executive management may add these performance measures, once developed, to the ODOT Critical Success Factors, which are ODOT's departmental performance measures.

The ODOT told the team that it has begun developing performance measures, and that further development will continue. The team did learn that some OES staff had considered potential means to collect and measure baseline data. For example, ODOT staff considered measuring the times for completing the NEPA/environmental process for pre- and post-assignment projects to compare differences of timeliness and efficiencies. The ODOT is currently establishing the baseline. The team will assess meaningful measures in Audit #2.

Training Program

Observation 10: ODOT has a robust environmental training program.

The ODOT documented its training plan in December 2015, as required by Section 12.2 of the MOU. The training plan includes both traditional, instructor-based training courses and quarterly District Environmental Coordinator meetings, where ODOT's OES can share new information and guidance with district staff and staff can participate in discussions on the environmental program. The training plan states that "consultants must successfully complete training classes to be pre-qualified in specific environmental areas and have specific experience required in each area." During interviews with ODOT management, the team learned that pre-qualification requirements also include the experience of the consultant in providing specific services, as well as the required ODOT training.

Successful Practice 2: ODOT uses pre-qualified consultants for environmental work. Part of the qualifying criteria is completion of the same training as is required of ODOT environmental staff.

The training plan states that all ODOT environmental staff (both central office and district offices) are required to take the pre-qualification training courses. Staff is

encouraged to take all training offered, beyond the required training. The team found through interviews with ODOT staff that there was a major effort to ensure that all staff was up to date on required training. The ODOT management indicated that there was a one-time increase in the training budget to ensure that staff had the necessary training to carry out their NEPA responsibilities. District management staff also indicated their support by describing how they prioritize and provide time for staff to attend training. All staff interviewed indicated that they had always received the support of management to receive necessary training.

The training plan includes a system to track training needs within and outside ODOT. Interviewees indicated that the NEPA Assignment Coordinator or the OES Training Coordinator notifies individuals when they need training. This includes information on when the training needs to be completed and when it is available. The system also tracks training histories for local agencies and consultants.

Successful Practice 3: ODOT includes required and on-going training of all environmental staff and consultants.

The ODOT's training plan relies solely on ODOT-developed courses, with no outside training offered in the plan. Discussions with ODOT management noted that they were not opposed to such training, as long as it was relevant to Ohio's needs and program implementation. In support of this statement, ODOT management pointed to an upcoming National Highway Institute (NHI) training for ODOT staff on public speaking. Additionally, ODOT has sent staff to other Federal agency training, such as the conservation training offered by the U.S. Fish and Wildlife Service.

Currently ODOT's training plan for required environmental courses consists of only instructor-led training and in-person meetings. Such courses allow for interaction among staff, consultants, and local agencies. However, ODOT management noted that relying solely on instructor-based training is costly and time consuming. The ODOT told the team that it is currently assessing each of its training courses to determine if any would be more suitable as web-based or electronic learning courses. The FHWA encourages ODOT to continue this evaluation and incorporate web based courses as appropriate.

Observation 11: Opportunities exist for expanding training in EJ.

In its Self-Assessment report, ODOT identified EJ as an area needing improvement. The team asked several ODOT staff about EJ training opportunities. While most staff indicated that they had received such training within the past 5 years, they also noted that such training was part of a larger course, such as the "NEPA – Managing the Environmental and Project Development Process" course, the "Categorical Exclusion" course, or the "Public Involvement" course. There is not a stand-alone training course on EJ in ODOT's Training Plan. In one District, a project manager (non-environmental staff) stated they had never received training on EJ. When the team asked management in one district about expectations for EJ, management indicated that they had none.

The ODOT management identified EJ as an area needing improvement in their Self-Assessment report. In the interim, FHWA encourages ODOT to consider EJ training for its staff and consultants, offered by the NHI and/or the FHWA Resource Center.

Preparation and Comment on the Draft Report

In consultation with ODOT, FHWA prepared a draft audit report and provided this draft to ODOT for a 14-day review and comment period. After considering ODOT's comments, FHWA published a notice in the Federal Register on March 16, 2017, soliciting public comment for 30-days, pursuant to 23 U.S.C. 327(g). This notice is available at 82 FR 14096.

Finalization of Report

The FHWA received comments on the draft report from the American Road & Transportation Builders Association (ARTBA). The ARTBA's comments were supportive of the Surface Transportation Project Delivery Program and did not relate specifically to Audit #1. The team has considered these comments in finalizing this audit report.

Since the completion of this report, staff from ODOT 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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