



4910-22-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Surface Transportation Project Delivery Program; TxDOT Audit #4 Report

[FHWA Docket No. FHWA-2017-0038]

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice, request for comment.

SUMMARY: The Surface Transportation Project Delivery Program 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 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 announces and solicits comments on the fourth audit report for the Texas Department of Transportation's (TxDOT) participation in accordance with these pre-FAST Act requirements.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Mail or hand deliver comments to Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12-140, Washington, DC 20590. You may also submit comments electronically at www.regulations.gov. All comments should include the docket number that appears in

the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone is able to search the electronic form of all comments in any one of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). The DOT posts these comments, without edits, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

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, SE., 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 allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. This provision has been codified at 23 U.S.C. 327. Since December 16, 2014, TxDOT has assumed FHWA's responsibilities under National Environmental Policy Act and the responsibilities for reviews under other Federal environmental requirements under this authority.

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, annual audits during years 3 and 4, and monitoring 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 notice announces the availability of the report for the fourth audit for TxDOT conducted prior to the FAST Act and solicits public comment on it.

Authority: Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59; Public Law 114-94; 23 U.S.C. 327; 49 CFR 1.85.

Issued on: December 8, 2017.

Brandy L. Hendrickson,

Acting Administrator,

Federal Highway Administration.

DRAFT
Surface Transportation Project Delivery Program
FHWA Audit #4 of the Texas Department of Transportation
June 16, 2016 to August 1, 2017

Executive Summary

This report summarizes the results of FHWA's fourth audit review (Audit #4) to assess the performance by the Texas Department of Transportation (TxDOT) regarding its assumption of responsibilities assigned by Federal Highway Administration (FHWA), under a memorandum of understanding (MOU) that took effect on December 16, 2014. TxDOT assumed FHWA's National Environmental Policy Act (NEPA) responsibilities and other environmental review responsibilities related to Federal-aid highway projects in Texas. The status of FHWA's observations from the third audit review (Audit #3), including any TxDOT self-imposed corrective actions, is detailed at the end of this report. The FHWA Audit #4 team (team) appreciates the cooperation and professionalism of TxDOT staff in conducting this review.

The team was formed in October 2016 and met regularly to prepare for 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. Interviews of TxDOT and resource agency staff occurred during the on-site portion of this audit, conducted on May 22-26, 2017.

The TxDOT continues to develop, revise, and implement procedures and processes required to carry out the NEPA Assignment Program. Based on information provided by TxDOT and from interviews, TxDOT is committed to maintaining a successful program. This report describes two (2) categories of non-compliance observations and eight (8) observations that represent opportunities for TxDOT to improve its program. It also includes brief status updates of the Audit #3 conclusions.

The TxDOT has continued to make progress toward meeting the responsibilities it has assumed in accordance with the MOU. The non-compliance observations identified in this review will 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 (NEPA Assignment 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 decision-

making, the State becomes solely responsible and liable for carrying out these obligations in lieu of, and without further NEPA related 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 against any actions brought by its citizens for NEPA decisions it has made in Federal court.

The FHWA project-specific environmental review 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's 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 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. 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 Act (FAST Act) reduced the frequency of these audit reviews to one audit per year during the first four years of state participation in the program. This audit is the fourth completed in Texas. The 5th and final audit is planned for 2018.

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. Regarding 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 and the process of developing the review report and publishing it in the Federal Register help to maintain an unbiased review and establish the audit as an official action taken by FHWA. The team for Audit #4 included NEPA subject-matter experts from the FHWA Texas Division Office, as well as FHWA offices in Washington, DC, Atlanta, GA, Charleston, SC, and Salt Lake City, UT. 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, 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 consider 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.

This audit reviewed processes and procedures (i.e., toolkits and handbooks) TxDOT staff use to process and make NEPA approvals. The information the team gathered that served as the basis for this audit came from three primary sources: (1) TxDOT's response to a pre-audit #4 information request (PAIR #4), (2) a review of both a judgmental and random sample of project files in ECOS with approval dates after February 1, 2016, and (3) interviews with TxDOT and the USFWS staff. The TxDOT provided information in response to FHWA pre-audit questions and requests for documents and provided a written clarification to FHWA thereafter. That material covered the following six topics: program management, documentation and records management, quality assurance/quality control, legal sufficiency review, performance measurement, and training. In addition to considering these six topics, the team also considered the following topics: Endangered Species Act (ESA) compliance, consideration of noise impacts and noise mitigation (Noise), and adherence to the TxDOT Public Involvement plan.

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 make certain the staff implements the procedures appropriately to achieve compliance with NEPA and other assigned responsibilities. The review did not second guess project-specific decisions, as such decisions are the sole responsibility of TxDOT. The team focused on whether the procedures TxDOT followed complied with all Federal statutes, regulation, policy, procedure, process, guidance, and guidelines.

The team defined the timeframe for highway project environmental approvals subject to this fourth audit to be between February 1, 2016, and January 31, 2017. The project file review effort occurred in two phases: approvals made during Round 1 (Feb 1, 2016 – July 31, 2016) and Round 2 (Aug 1, 2016 - Jan 31, 2017). One important note is that this audit project file review time frame spans a full 12 months, where previous audits reviewed project approvals that spanned 6 months. The population of environmental approvals included 224 projects based on 12 certified lists of NEPA approvals reported monthly by TxDOT. The NEPA project file approvals reviewed included: (1) categorical exclusion determinations (CEs), (2) approvals to circulate draft Environmental Assessments (EAs), (3) findings of no significant impacts (FONSI), (4) re-evaluations of EAs, Section 4(f) decisions, (5) approvals of a draft environmental impact statement (DEIS), and (6) re-evaluations of EISs and records of decision (RODs). Project files reviewed constitute a sample of randomly selected c-listed CEs, and 100 percent of the following file approvals: 4(f) approvals; CE determinations for actions not listed in the “c” or “d” lists; the FONSI and its EA; the ROD and its EIS; and re-evaluations of these documents and approvals.

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 four of TxDOT’s Districts. The team interviewed the Austin District and then divided into two groups (the next day) to complete the face-to-face interviews of District staff in Waco and San Antonio. Members of the team interviewed staff from the Ft. Worth District via teleconference. The team used the same ECOS project document review form but updated interview questions for Districts and ENV staff with new focus areas to gather data.

Overall Audit Opinion

The TxDOT continues to make progress in the implementation of its program that assumes FHWA’s NEPA project-level decision responsibility and other environmental responsibilities. The team acknowledges TxDOT’s effort to refine and, when necessary, establish additional written internal policies and procedures. The team found 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 two non-compliant observations in this audit that TxDOT will need to address through corrective actions. These non-compliance observations come from a review of TxDOT procedures, project file documentation, and interview information. This report also identifies several notable observations and successful practices that we recommend be expanded .

Non-Compliance Observations

Non-compliance observations are instances where the team found the TxDOT was out of compliance or deficient in proper implementation of a Federal regulation, statute, guidance, policy, the terms of the MOU, or TxDOT's own 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 consider 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 informed the team they are still implementing some recommendations made by FHWA on Audit #3 to address non-compliance. The FHWA will conduct followup reviews of non-compliance observations in Audit #5 from this review.

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 USDOT 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 provisions in the MOU. The following non-compliance observations are presented as two categories of non-compliance observations: (1) with procedures specified in Federal laws, regulations, policy, or guidance, or (2) with the State’s environmental review procedures.

Audit #4 Non-Compliance Observation #1: Section 5.1.1 of the MOU requires the State to follow Federal laws, regulations, policy, and procedures to implement the responsibilities assumed. This review identified several examples of deficient adherence to these Federal procedures.

a) Project scope analyzed for impacts differed from the scope approved
Making an approval that includes actions not considered as part of environmental review is deficient according to the FHWA Technical Advisory 6640.8A. The scope of the FONSI cannot include actions not considered in the EA. This recurring deficiency was also identified for a project file in Audit #3.

b) Plan consistency prior to NEPA approval

Section 3.3.1 of the MOU requires that prior to approving any CE determination, FONSI, Final EIS, or final EIS/ROD, TxDOT will ensure and document that the project is consistent with the current Transportation Improvement Plan (TIP), Regional Transportation Plan (RTP), or Metropolitan Transportation Plan (MTP). The team identified two projects where TxDOT made NEPA approval without meeting the MOU consistency requirement.

c) Public Involvement

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 a project file where TxDOT approved a FONSI for an action described in 23 CFR 771.115(a) without evidence of a required additional public notification. TxDOT acknowledges this requirement in their updated public involvement handbook.

d) Timing of NEPA approval

One project file lacked documentation for Section 106 compliance prior to TxDOT making a NEPA approval. The FHWA regulation at 23 CFR 771.133 expects compliance with all applicable laws or reasonable assurance all requirements will be met at the time of an approval.

Audit #4 Non-Compliance Observation #2: Section 7.2.1 of the MOU requires the State to develop State procedures to implement the responsibilities assumed. This review identified several examples of deficient adherence to these state procedures.

a) Reporting of approvals made by TxDOT

MOU section 8.7.1 requires the State to certify on a list the approvals it makes pursuant to the terms of the MOU and Federal review requirements so FHWA knows which projects completed NEPA and are eligible for Federal-aid funding. The FHWA identified a project whose approval was made pursuant to State law and therefore should not have been on the certified list of projects eligible for Federal-aid funding. This is a recurrence from Audit #3.

b) Noise workshop timing

One project did not follow the TxDOT Noise guidelines for the timing of a required noise workshop. TxDOT improperly held a noise workshop months before the public hearing opportunity. The TxDOT noise guidelines (Guidelines for Analysis and Abatement of Roadway Traffic Noise, 2011) identifies procedures for compliance with 23 CFR 772. This is a recurrence of the same non-compliance observation in Audit #3.

c) Endangered Species Act Section 7

The TxDOT provided training to staff and updated its Section 7 compliance procedures, as part of a partnering effort after Audit #3 between FHWA, TxDOT, and USFWS. However, one project was still not in compliance with the updated procedures.

d) Indirect & Cumulative Impacts

One project file reviewed by the team lacked the indirect and cumulative impact analysis that is expected according to TxDOT's indirect and cumulative impact evaluation procedures.

e) Federal approval request for a State-funded project

The review team reviewed a project file where TxDOT followed State environmental laws and then requested Federal-aid to purchase right-of-way. TxDOT informed the team that they are removing Federal funds from the ROW portion of this project as corrective action. This is a recurrence from Audit #3.

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 successful practices and observations 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 8 observations for TxDOT to consider in order to make improvements. The FHWA's suggested implementation methods of action include: corrective action, targeted training, revising procedures, continued self-assessment, improved QA/QC, 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 and improve its program prior to the publication of this report.

1. Program Management

Successful Practices and Observations

The team appreciates TxDOT ENV willingness to partner with FHWA before, during, and after audit reviews. This has resulted in improved communication and assisted the team in verifying many of the conclusions in this report. The quarterly partnering sessions, started in 2016, will be an ongoing effort. These exchanges of information between FHWA and TxDOT have clarified and refined FHWA's reviews and assisted TxDOT's efforts to make improvements to their environmental review processes and procedures.

The team noted in District and ENV staff interviews that they welcomed the opportunity to be responsible and accountable for NEPA decisions. 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 Program Review Team (formerly TxDOT's Self-Assessment Branch, [SAB]). District staff indicated in interviews that the former SAB detailed reviews were highly valued because they learned from their mistakes and make improvements. Accountability, in part, is driving an enhanced desire for TxDOT staff to consistently and carefully complete environmental reviews.

The team recognizes enhanced communication among individuals in the project development process through the Core Team (a partnership of District and ENV environmental staff assigned to an individual EIS project) as a valuable concept. Information gained from interviews and materials provided by TxDOT in most cases demonstrate improved communication amongst Districts and between Districts and ENV. The team noted that "NEPA Chats" (regular conference calls led by ENV, providing a platform for Districts to discuss complex NEPA implementation issues) are still, for the most part, well received. Districts also provide internal self-initiated training across disciplines so everyone in the District Office is aware of TxDOT procedures to try to ensure that staff follows NEPA-related, discipline specific processes. This keeps projects on-schedule or ensures that there are no surprises if projected schedules slip.

Audit #4 Observation #1: Noise procedure clarification.

TxDOT ENV is currently in the process of proposing an update to their Noise Guidelines. The team reviewed a project file where the decisions based on an original noise study were re-examined to reach a different conclusion. The current TxDOT Noise Guidelines do not address how, or under what conditions a re-examination of an original Noise Study report that reaches different conclusions could occur. The team urges TxDOT to clarify their noise guidelines to ensure consistent and fair and equitable treatment of stakeholders affected by highway noise impacts.

Audit #4 Observation #2: Section 7 of the Endangered Species Act

During the interviews, the review team learned that there is a disincentive for "may affect" determinations because TxDOT cannot predict the amount of time required to complete informal consultation. If a particular project's schedule could accommodate the time required for informal consultation, a "may affect" determination might be made to minimize a risk of a legal challenge.

The review team would like to draw TxDOT's attention to the possibility that risk management decisionmaking can introduce a bias or "disincentive" to coordinate with USFWS when it is expected according to Federal policy and guidance. In fulfilling ESA Section 7(a)(2) responsibilities, Congress intended the "benefit of the doubt" to be given to the species (H.R. Conf. Rep. 96-697, 96 Cong., 1st sess. 1979).

The team acknowledges that TxDOT plans to train staff on its revised ESA handbook and standard operating procedures, and this may inform staff of this bias. Through interviews, the team learned that in certain Districts with sensitive habitats (i.e., karst) or the possibility of a species present (i.e., a salamander), ENV managers would review a project's information in addition to the District's and/or ENV biologists. This enhanced review process is currently limited only to two Districts and could be expanded to include instances where such bias may occur.

Audit #4 Observation #3: Project description and logical termini

The team reviewed one project where the scope described in the NEPA document differed from what was proposed to be implemented. A proposed added capacity project's description indicated a longer terminus compared to a schematic. The team could not determine whether the description or the schematic accurately reflected the project proposal.

A second reviewed project contained a description of the proposed project as the project's purpose instead of identifying a purpose that would accommodate more than one reasonable alternative. The team urges TxDOT to make reviewers aware of these challenges.

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. ECOS is how TxDOT identifies and procures information required to be disclosed to, and requested by, the public. ECOS is being upgraded, and there are four more phased upgrades planned over time. The most recent work includes incorporation of a revised scope development tool, Biological Evaluation (BE) form, and new way to electronically approve a CE determination form in lieu of paper. The TxDOT staff noted that ECOS is both adaptable and flexible.

Successful Practices and Observations

A number of successful practices demonstrated by TxDOT were evident as a result of the documentation and records management review. The team learned that ECOS continues to improve in download speed and compatibility. The team learned through interviews with TxDOT staff members that ENV is changing the scope development tool within ECOS and that functionality will improve. 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.

Audit #4 Observation #4: Record keeping integrity

The team's review included project files that were incomplete because of missing or incorrect CSJ references that would link the files to environmental review documentation. TxDOT has indicated that they are working to address this problem. In addition to the issue of database links, the team identified a project file that lacked a record of required public involvement required per TxDOT procedures. The team learned from interviews that ENV and District staff do not consistently include such documentation in ECOS. Also, one reviewed project file had outdated data for threatened and endangered species. The team urges TxDOT staff to rely upon up to date and complete data in making project decisions.

The team identified one project file where total project costs were not presented in the project documentation and EA documents were added after the FONSI was signed. The added EA documentation was editorial in nature. The team urges TxDOT to ensure the project file contains supportive documentation. Material that was not considered as part of the NEPA decision, and that was dated after the NEPA approval should not be included in a project's file.

The team found a project file that had conflicting information about a detour. The review form indicated that no detour was proposed, but letters to a county agency said that a road would be closed, which would require addressing the need for a detour. Our review was unable to confirm the detour or whether the impact road closure was considered.

3. Quality Assurance/Quality Control (QA/QC) Successful Practices and Observations

The team observed some continued successful practices from previous audits in (QA/QC). These successful practices include the use of established checklists, certifications, NEPA Chats, and the CORE Team concept (items described in previous audit reports). The TxDOT District Office environmental staff continue to do peer reviews of environmental decisions to double check the quality and accuracy of documentation. The Environmental Affairs Division has established a post-NEPA review team (performance review team) that was briefly mentioned in the Self-Assessment report to FHWA. Through our interviews, we learned that the team reaches out to ENVs own Section Directors and subject matter experts, in addition to District environmental staff, regarding their observations to improve the quality of documentation in future NEPA decisions. The FHWA team observed increased evidence in ECOS of documentation of collaboration illustrating the efforts to improve document quality and accuracy.

Audit #4 Observation #5: Effectiveness and change in QA/QC

Based on project file reviews, the team found errors and omissions that should have been identified and addressed through TxDOT quality control. Also, TxDOT's certified monthly list of project decisions contained errors, some of which were recurring.

During this review period, the team was informed that TxDOT's approach to QA/QC had changed since the previous audit review. In audit #3, the team identified the Self-Assessment Branch (SAB) as a successful practice. TxDOT's response in the PAIR #4 indicated SAB was disbanded and ENV did not explain how its function would be replaced. Through interviews, the team learned that TxDOT had reorganized its SAB staff and modified its approach to QA/QC. This report identifies a higher number of observations that were either non-compliant or the result of missing or erroneous information compared to previous audits. The team could not assess the validity and relevance of TxDOT's self-assessment of QA/QC because TxDOT's methodology (sampling and timeframe) was not explained. Lastly, through interviews with District environmental staff, the team learned that they are unclear on how errors and omissions now identified by the new "performance review team" and ENV SMEs are to be resolved. The team urges TxDOT to evaluate its new approach to QA/QC with relevant and valid performance measures and to explain its approach to QA/QC to its staff.

4. Legal Sufficiency Review

Based on the interviews with two of the General Counsel Division (GCD) staff and documentation review, the requirements for legal sufficiency under the MOU continue to be adequately fulfilled.

There are five attorneys in TxDOT's GCD, with one serving as lead attorney. Additional assistance is provided by a consultant attorney who has delivered environmental legal assistance to ENV for several years and by an outside law firm. The contract for the outside law firm is currently going through a scheduled re-procurement. 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 those documents that are to be published in the Federal Register, such as the Notice of Intent (NOI) to prepare an EIS, Statute of Limitation (139(1)), and Notice of Availability of EIS.

GCD continues to serve as a resource to ENV and the Districts and is involved early in the development of large and complex projects. One example is the very large Houston District IH 45 project around downtown Houston with an estimated cost of \$4.5 billion. The GCD lead attorney has been involved in the project and participated in the project's public hearing. GCD participates in the monthly NEPA chats and recently provided informal training during the chat on project scoping, logical termini, and independent utility.

According to TxDOT's response to FHWA's PAIR #4, GCD staff has reviewed or been involved in legal review for eight projects. The ENV project delivery managers make requests for review of a document or assistance to the lead attorney, who then assigns that project to an attorney for legal review. Attorney comments are provided in the standard comment response matrix back to ENV and are reviewed by the lead attorney. All comments must be satisfactorily addressed for GCD to complete its legal sufficiency determination. The GCD does not issue conditional legal sufficiency determinations. Legal sufficiency is documented by email to ENV.

A notable effort by GCD, in the last year, were the two lawsuits on TxDOT issued Federal environmental FONSI decision on the MOPAC intersections, the ongoing environmental process on the widening of south MOPAC, and State environmental decision on SH 45 SW. The lawsuit advanced only the Federal environmental decision on the MOPAC intersections. GCD worked first to develop the administrative record, having the numerous consultant and TxDOT staff provide documentation of their involvement on the MOPAC intersections project. Staff from GCD, Attorney General, and outside counsel then developed the voluminous record, which is their first since assuming NEPA responsibilities. The initial request by the plaintiffs for a preliminary injunction on the project was denied in Federal court, and, since a hearing on the merits was held later, they are awaiting the judge's decision. The FHWA and DOJ were notified, as appropriate, of the notices of pleadings through the court's PACE database.

Successful Practice

ENV involves GCD early on projects and issues in need of their attention and expertise. Based on our discussions, GCD continues to be involved with the Districts and ENV throughout the NEPA project development process, when needed, and addresses legal issues, as appropriate. Based on interview responses, observation, and the comments above, TxDOT's approach to legal sufficiency is adequate.

5. Performance Measurement

TxDOT states in their self-assessment summary report that they achieved acceptable performance goals for all five performance-based performance metrics with the remaining seven performance goals remaining, consistent with the March 2016 self-assessment. The TxDOT continues to devote a high level of effort to develop the metrics to measure performance. During this audit, the team learned through interviews that the methodology employed to assess QA/QC performance had been revamped to the point that the results do not appear to be comparable with measures from previous years.

Successful Practices and Observations

As part of TxDOT's response to the PAIR #4, TxDOT provided an alternate performance metric for EA timeframes that analyzed the distribution of EA durations for

projects initiated and completed prior to assignment, initiated prior to assignment but completed after assignment, and ones initiated and completed after assignment. This creative approach identified both improved and diminished performance in EA timeframes for projects initiated before assignment but completed after assignment. TxDOT reports in their response to the PAIR #4 that, at a 95 percent confidence interval, comparing completion times for EA projects before and after assignment, the post-assignment median timeframe for completion is faster after assignment.

Audit #4 Observation #6: Performance measure awareness and effectiveness

The team noted through interviews of TxDOT District Office staff that many were unaware of TxDOT performance measures and their results. We encourage TxDOT environmental leadership to make these results available to their staff, if only as a means of feedback on performance. Overall, these measures are a positive reflection of actions taken by TxDOT staff, and sharing changes in performance measures may lead to improved performance.

As mentioned above, the team learned that TxDOT's QA/QC methodology changed from that utilized since the previous audit. Previously, the measure reported the percent of project files determined to be complete and accurate, but included information on substantive errors made across different documents. Now the measure is limited only to the percent of project files determined to be complete that relies upon new yes/no/NA response questions whose result lacks an evaluation of the substantial-ness of errors of accuracy or completion. The team urges TxDOT to continue to analyze the information they are already collecting on the completeness and accuracy of project files as means of implementing information that usually leads to continuous improvement.

6. Training Program

Since the period of the previous audit, TxDOT has revamped its on-line training program, as training courses content were out of date. Training continues to be offered to TxDOT staff informally through NEPA chats as well as through in-person instructor training. All of the training information for any individual TxDOT District staff environmental professional can be found on a TxDOT sharepoint site and is monitored by the training coordinator (especially the qualifications in the Texas Administrative Code). This makes it much more straightforward for third parties (including FHWA) to assess the District staff competency and exposure to training. Since Audit #3 TxDOT has increased the number of hours of training that staff are required to have to maintain environmental certification from 16 to 32 hours. Based on interviews, we learned that some individuals had far exceeded the minimal number of training hours required. We learned that training hours could be earned by participating in the environmental conference, but with a stipulation that other sources of training would be required.

Successful Practices and Observations

The team recognizes the following successful training practices. We learned from interviews that two TxDOT District Offices conduct annual training events for staff of local governments as a means to help them develop their own projects. This training identifies the TxDOT expectations for successful project development, including environmental review.

Another successful practice we learned from interviews, and reported by TxDOT in the list of training scheduled, is that public involvement training has been revised to emphasize additional outreach that goes beyond the minimum requirements. The emphasis appears to be on achieving meaningful public engagement rather than simple public disclosure.

Finally, the team would like to acknowledge that TxDOT has recognized and taken advantage of cross training that is a successful practice. The TxDOT ENV strategic planning coordinator informed us in an interview that he co-taught a class on planning consistency by adding an environmental component. The team taught how the planning issues relate to environmental review and compliance 5 or 6 times throughout the State. The ENV strategic planning coordinator is now working with the local government division to add an environment module to the Local Project Assistance (LPA) class with specific discussion of environmental reviews (adding information on how to work with ENV at TxDOT, or how to find consultants who are approved to do work for TxDOT).

Audit #4 Observation #7: Additional outreach on improvements.

The team learned through interviews the value and importance of NEPA chats for informing ENV staff when there are changes in procedures, guidance, or policy. For example, when the handbook for compliance with ESA was first completed, it was the subject of a NEPA chat. The team is aware of recent changes TxDOT made to the handbook related to a non-compliance related to ESA compliance. Based on information gained from interviews, the team learned that the changes to the ESA SOP/handbook were not followed by a NEPA chat. As a result, we confirmed that most of the TxDOT Biology SMEs were unaware of the handbook changes. The team appreciates that TxDOT has revised its ESA handbook and urges staff to implement training or other outreach to inform TxDOT staff of these revisions.

Audit #4 Observation #8: FAST Act training.

The Fixing America's Transportation (FAST) Act included several new statutory requirements for the environmental review process, as well as other changes that change NEPA procedures and requirements. The FHWA's Office of Project Development and Environmental Review has released some guidance on how to implement these requirements and anticipates releasing additional information. Even though additional information on these changes is forthcoming, States under NEPA assignment are required

to implement these changes. The team learned through TxDOT's PAIR #4, and through interviews, that TxDOT has neither developed nor delivered training to its staff concerning new requirements for the FAST Act for environmental review. In response to this observation, TxDOT is currently collaborating with FHWA to develop a presentation on this topic for its annual environmental conference.

Status of Non-Compliance Observations and Other Observations from Audit #3 (April 2017)

Audit #3 Non-Compliance Observations

1. *Section 7 Consultation*— TxDOT ENV made revisions to their ESA procedures that they have shared with FHWA and USFWS via partnering sessions. TxDOT implementation and training efforts are still pending by ENV management on the revised procedures to ENV and District staff.
2. *Noise Policy*— TxDOT has informed the team that they are in the process of updating the 2011 Noise Guidelines. TxDOT will submit those guidelines to FHWA for review and approval once they are updated. TxDOT has not indicated whether they intend to provide training on these guidelines for TxDOT District Office and consultant staff.
3. *Public Involvement*— TxDOT updated their FHWA approved Handbook in November of 2016. There was one recurrence of a non-compliant action that was reported in Audit #3 during Audit #4. TxDOT informed FHWA that ENV will request that FHWA review their Texas Administrative Code in lieu of their previous request that FHWA review only their Public Involvement Handbook.
4. *Section 4(f)*— FHWA did not have any non-compliance observations in regards to TxDOT carrying out their assigned Section 4(f) responsibilities during Audit #4.

Audit #3 Observations

1. *A certified project had an incomplete review*— TxDOT continues to certify NEPA approvals for projects on a list provided to FHWA. This audit review identified an error of the inclusion of a project on a certified list.
2. *Inconsistent and contradictory information in some project files*— TxDOT has made ECOS software upgrades recently that address this problem. This audit review continued to identify project file errors in the consistency of information.
3. *TxDOT's QA/QC performance measure could demonstrate continuous improvement*— Since Audit #3, TxDOT has developed a new approach to the QA/QC performance measure. For CE reviews, the methodology is based on "yes/no/NA" answers to 50 questions (for EA projects there are 100 questions) based on requirements in the TxDOT handbooks. The measures are an average of the individual projects reviewed. TxDOT has not addressed how this new measure may demonstrate continuous improvement.
4. *Consider implementing more meaningful timeliness measures*— TxDOT's response to the pre-audit information request as well as in their self-assessment summary included detailed discussions of the timeliness measures for CEs as well as for EA projects that are meaningful.

5. *TxDOT's ability to monitor the certification and competency status of their qualified staff*—TxDOT has included on its training sharepoint site a database that identifies each environmental staff member, a complete list of training they have completed, and when that training occurred. TxDOT's training coordinator is responsible for monitoring this database to ensure all staff maintain their competency and qualification status per State law as well as the ongoing training requirement specified by the ENV director.

Next Steps

The FHWA provided a preliminary draft audit report to TxDOT for a 14-day review and comment period. The team has considered TxDOT comments in developing this draft Audit #4 report. As the next step, FHWA will publish a notice in the Federal Register to make it available to the public for a 30-day review comment period [23 U.S.C. 327(g)]. No later than 60 days after the close of the comment period, FHWA will respond to all comments submitted in finalizing this draft audit report [pursuant to 23 U.S.C. 327(g)(2)(B)]. Once finalized, the audit report will be published in the Federal Register.

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