



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

[FHWA Docket No. FHWA-2020-0008]

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

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

ACTION: Notice; Request for comment.

SUMMARY: The Moving Ahead for Progress in the 21st Century Act (MAP-21) established the Surface Transportation Project Delivery Program that allows a State to assume FHWA's environmental responsibilities for environmental review, consultation, and compliance under the National Environmental Policy Act (NEPA) 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. This program mandates annual audits during each of the first four years of State participation to ensure compliance with program requirements. This notice announces and solicits comments on the fourth and final audit report for the Ohio Department of Transportation (ODOT).

DATES: Comments must be received on or before [Insert Date 30 Days After Publication].

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 notifications 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 can search the electronic form of all comments in any 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: Ms. Megan Cogburn, Office of Project Development and Environmental Review, (202) 366-2056, megan.cogburn@dot.gov; or Mr. David Sett, Office of the Chief Counsel, (404) 562-3676, david.sett@dot.gov; Federal Highway Administration, U.S. 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, codified at 23 United States Code (U.S.C.) 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's responsibilities for environmental 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 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 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, 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. The FHWA and ODOT amended the MOU on June 6, 2018, to update recent national program guidance and objectives for consistency with other States under the NEPA Assignment Program.

Section 327(g) of Title 23, U.S.C., requires the Secretary to conduct annual audits to ensure compliance with the MOU during each of the first four years of State participation and, after the fourth year, monitor compliance. The results of each audit

must be made available for public comment. The first audit report of ODOT compliance was finalized on July 7, 2017. The second audit report of ODOT compliance was finalized on October 3, 2018. The third audit report was finalized on November 13, 2019. This notice announces the availability of the fourth and final audit report for ODOT and solicits public comment on the same.

Authority: Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59; 23 U.S.C. 327; 23 CFR 773.

Nicole R. Nason,
Administrator,
Federal Highway Administration.

**Surface Transportation Project Delivery Program
Draft FHWA Audit #4 of the Ohio Department of Transportation
July 29, 2019 to August 2, 2019**

Executive Summary

This is a report of the Federal Highway Administration's (FHWA) fourth and final audit of the Ohio Department of Transportation's (ODOT) assumption of National Environmental Policy Act (NEPA) responsibilities. A team of FHWA staff (the team) conducted the audit. The ODOT made the effective date of the project-level NEPA and environmental review responsibilities it assumed from FHWA on December 28, 2015, as specified in a memorandum of understanding (MOU) signed on December 11, 2015, and amended on June 6, 2018. Within ODOT, the Division of Planning Office of Environmental Services (OES) is responsible to deliver the environmental program. This audit examined ODOT's performance under the MOU regarding responsibilities and obligations assigned therein.

Prior to the on-site visit, the team performed reviews of ODOT's project NEPA approval documentation in EnviroNet (ODOT's official environmental document filing system). This audit consisted of a review of a statistically valid random sample of 72 project files out of 1,113 approved documents for Federal-aid projects in ODOT's EnviroNet system with an environmental approval date between April 1, 2018, and March 31, 2019. The team conducted 100 percent sampling of the two Environmental Impact Statement (EIS) re-evaluations, five Environmental Assessment (EA) re-evaluations, and one new EA approved by ODOT as part of the sample. The team also reviewed ODOT's response to the pre-audit information request (PAIR) and ODOT's Self-Assessment report. In addition, the team reviewed ODOT's environmental processes, manuals, and guidance; ODOT NEPA Quality Control and Quality Assurance Processes and Procedures; and the ODOT NEPA Assignment Training Plan (collectively, "ODOT procedures"). The team conducted an on-site review during the week of July 29 to August 2, 2019. The team conducted interviews with ODOT's Central Office staff on July 29, 2019, and with staff from three District Offices on July 30, 2019. The team also interviewed staff with the U.S. Fish and Wildlife Service (USFWS) on August 9, 2019, as part of the review.

Overall, the team found ODOT to be in substantial compliance with the terms of the MOU. The ODOT continues to make reasonable progress in implementing the NEPA Assignment Program based on the results of four audits, which demonstrates commitment to the success of the program. For Audit #4, the team found zero non-compliance observations, but did note one successful practice and four general observations.

Background

The Surface Transportation Project Delivery Program (NEPA Assignment Program) allows a State to assume FHWA's responsibilities for review, consultation, and

compliance with environmental laws for Federal-aid highway projects. When a State assumes these responsibilities, it becomes solely responsible and liable for carrying out the responsibilities assumed, in lieu of FHWA.

The State of Ohio, represented by ODOT, completed the application process and entered an MOU with FHWA on December 28, 2015, which was amended on June 6, 2018. With this MOU, ODOT assumed FHWA's project approval responsibilities under NEPA and NEPA-related Federal environmental laws.

The FHWA must conduct four annual compliance audits of ODOT's compliance with the provisions of the MOU. Audits serve as FHWA's primary mechanism of determining ODOT's compliance with the MOU, applicable Federal laws and policies, evaluating ODOT's progress toward achieving the performance measures identified in the MOU, and collecting information needed for the Secretary's annual report to Congress.

The team provided a draft of this report to ODOT for its review and the team considered their comments in preparing this draft, which will be available for public review and comment. The FHWA will consider any public comments on this draft in finalizing the report.

Scope and Methodology

The team conducted a careful examination of the ODOT NEPA Assignment Program through a review of ODOT procedures and project documentation, ODOT's PAIR response, and the Self-Assessment summary report, as well as interviews with ODOT Central Office and District environmental staff and resource agency staff. This review focuses on the following six NEPA Assignment Program elements: 1) program management; 2) documentation and records management; 3) quality assurance/quality control (QA/QC); 4) legal sufficiency; 5) performance measurement; and, 6) training.

The PAIR consisted of 18 questions based on the responsibilities assigned to ODOT in the MOU. The team reviewed ODOT's PAIR response and compared the responses to ODOT's written procedures. The team utilized ODOT's responses to draft interview questions to clarify information in ODOT's PAIR response.

The ODOT provided its NEPA Assignment Self-Assessment summary report 30 days prior to the team's on-site review. The team considered this summary report both in focusing on issues during the project file reviews and in drafting interview questions. The team compared the report against the previous year's Self-Assessment report and the requirements in the MOU to identify any trends.

Between April 1 and May 31, 2019, the team conducted a review using a statistically valid random sample of 72 project files out of 1,113 approved documents for Federal-aid projects in ODOT's EnviroNet system with an environmental approval date between

April 1, 2018, and March 31, 2019. The team conducted a 100 percent sampling of the two EIS re-evaluations, five EA re-evaluations, and one new EA approved by ODOT as part of the audit. The projects reviewed represented all NEPA classes of action available, with coverage of 11 out of 12 of the ODOT Districts and the Ohio Rail Development Commission (ORDC) within those Districts.

In addition, the team reviewed ODOT's project file review associated with its self-assessment to determine if ODOT evaluated its projects in a similar fashion and using similar standards to that of the Federal portion of this review. The ODOT reviewed projects within the same sampling period as FHWA. The ODOT reviewed a statistically valid random sample of 199 projects, including 154 categorically excluded (CE) c-listed projects, 38 CE d-listed projects, 5 EAs, and 2 EISs. The ODOT's review included projects in all Districts including ORDC and included representatives of all classes of action.

During the on-site review week, the team conducted interviews with 20 ODOT staff members at the Central Office and three Districts: District 2 (Bowling Green), District 3 (Ashland), and District 8 (Lebanon). Interviewees included ODOT OES management and subject matter experts, District Environmental Coordinators (DEC), and environmental staff, representing a diverse range of expertise and experience. These interviews focused on NEPA Assignment with an emphasis on items where additional information was necessary to complete the review.

The team conducted a phone interview with USFWS on August 9, 2019, to determine if the resource agency had any potential concerns regarding ODOT's performance and relationships with partner resource agencies. The USFWS reported that ODOT continues to perform well and offered no concern at the program-level. The ODOT staff continues to partner with Agency staff in the delivery of projects and for the protection of threatened and endangered species.

The team identified gaps between the information from the desktop review of ODOT procedures, PAIR, Self-Assessment, 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 successful practices and review observations.

Overall, the team found ODOT to be in substantial compliance with the terms of the MOU. The ODOT continues to make reasonable progress in management of the NEPA Assignment Program based on the results of four audits, which demonstrates commitment to the success of the program. For Audit #4, the team found zero non-compliance observations, but did note one successful practice and four general observations.

The FHWA team urges ODOT to monitor and make additional improvements to the program for continued success moving forward.

Successful Practices and General Observations

This section summarizes ODOT's practices that the team believes are successful, as well as observations on issues that ODOT may want to consider as areas to improve. Further information on these successful practices and observations are in the following subsections that address the six MOU program elements: program management; document and records management; QA/QC; legal sufficiency; performance measures; and training.

Program Management

Successful Practice 1: ODOT developed improvements to EnviroNet to provide access to the federally recognized American Indian Tribes with ties to Ohio.

The ODOT has developed an enhancement to EnviroNet, which allows Tribal representatives to customize a Tribal profile and receive notifications and project information based on their preferences. This notification system allows Tribes to tailor the types of projects, locations of projects, and the point in the project development process for which they want to be notified (via email) and become involved. These upgrades also provide the Tribes the opportunity to enter comments and receive responses for each project. It is important to note that this system does not replace personal relationships with Tribal representatives as this is an important part of Tribal consultation. The ODOT and FHWA will continue to host on-site meetings for the Tribes and agencies to consult on the Federal-aid highway program, projects, concerns, and processes in Ohio.

Observation 1: There are opportunities for ODOT to continue to improve upon the identification and engagement of Environmental Justice (EJ) populations to ensure full and fair participation in the transportation decisionmaking process.

During each of the previous audits, both FHWA and ODOT identified project-level compliance issues for EJ and public involvement (PI). The team notes and appreciates ongoing efforts by ODOT to improve its processes, documentation, and training in the areas of EJ and PI in response to previous audits and self-assessments. While substantial progress has been made in these areas, there are opportunities for ODOT to continue to improve upon the identification and engagement of EJ populations to ensure full and fair participation in the transportation decisionmaking process.

During this year's audit, the team found that ODOT tends to use general PI activities in lieu of targeted EJ outreach and engagement activities. As a result, ODOT's CE documentation does not always include a discussion of the steps taken to provide

meaningful opportunities for PI by members of minority and/or low-income populations in the decisionmaking process, including the identification of potential effects, alternatives, and mitigation measures.

Identification of EJ populations, soliciting and understanding their issues or concerns, and actively engaging them throughout project development is a continuing concern for FHWA. The team encourages ODOT to continue to improve its EJ identification and outreach practices to ensure full and fair participation in the transportation decisionmaking process.

Documentation and Records Management

Observation 2: Opportunities exist to improve documentation by the ODOT Districts and LPAs in response to ODOT's File Management Plan and other guidance.

Over the course of NEPA assignment, ODOT has developed many procedures relating to the NEPA process to improve its processes and meet Federal requirements. The updates included changes to ODOT's internal documentation and filing guidelines and updates to EnviroNet. These changes appear to have positively impacted the program and we continue to support ODOT's use of these procedures.

The team heard throughout the Audit #4 process that some Districts had concerns about the requirements in the ODOT NEPA File Management and Documentation Guidance and other applicable guidance that did not allow the CE to include what they viewed as decision documents.

The Districts' concerns and resulting levels of understanding of ODOT guidance appear to support the findings of both the team and ODOT's OES. The team and ODOT's Self-Assessment both noted during the project file reviews that the Districts and local public agencies (LPAs) exhibit documentation inconsistencies pursuant to ODOT's File Management Plan and related guidance. Between the FHWA and ODOT data, approximately 31 percent of projects exhibited these types of inconsistencies.

The team met with ODOT to discuss individual inconsistencies noted by both FHWA and ODOT OES during this audit. The ODOT evaluated these findings and then communicated them individually with the Districts. The ODOT remains committed to improvements in documentation, with plans to continue updates to EnviroNet and guidance as needed and with the training required to deliver effective results.

Observation 3: Opportunities exist for ODOT to develop written procedures and guidance for the re-evaluation of EAs and EISs.

The team found that ODOT has robust guidance for documentation expectations for CEs and specific resource areas. However, during the project file review, the team and ODOT both noted inconsistencies regarding the preparation of re-evaluations for EAs and EISs. While there is no required format for written re-evaluations, a written re-evaluation should briefly document any changes in the project, applicable laws or regulations, the project study area, and any resulting impacts (beneficial and/or adverse). The re-evaluation should succinctly acknowledge areas where there are few or no changes, and document any public or Agency consultation, if appropriate and undertaken. A conclusion or finding as to whether the previous NEPA document remains valid, should be plainly evident.

During the audit, the team found one of the two EIS re-evaluations and three of the five EA re-evaluations had inconsistencies related to FHWA regulation, policy, and guidance on re-evaluation requirements discussed above. During the onsite interviews, several ODOT staff members agreed that it could be beneficial to develop a written procedure to establish expectations and memorialize ODOT's re-evaluation process in compliance with Federal requirements. The team also made note that in ODOT's Self-Assessment, several ODOT Districts requested development of re-evaluation guidance. Based on these concerns, the team supports consideration of the development of written procedures and guidance for the re-evaluation of EAs and EISs to reduce risk to ODOT's program.

Quality Assurance/Quality Control (QA/QC)

Observation 4: Opportunities exist to improve QA/QC procedures relevant to c-listed CE documentation.

The ODOT NEPA Quality Control and Quality Assurance Processes and Procedures, dated April 6, 2017, indicates d-listed CEs (D2 and D3 actions per ODOT's CE guidance), EAs, and EISs will be peer reviewed by OES staff and c-listed and d-listed CEs (D1 actions per ODOT's guidance) will be reviewed by District environmental staff prior to review and approval by the DEC. The team learned through all four audits that District staff have their own methods of conducting reviews which may lead to inconsistencies across the Districts in the review of c-listed projects. EnviroNet provides some programmed QA/QC. The system itself does not identify missing support documentation under the project file tab, or mistakes in data entry into the system, which comprise most of the errors found by both FHWA and ODOT's Self-Assessment. A more robust QA/QC process for c-level projects could reduce risk and improve efficiency in ODOT's program. In addition, there is no stand-alone QA/QC training to train ODOT personnel per ODOT's expectations and guidance.

Legal Sufficiency Review

The ODOT did not have any documents that required legal sufficiency reviews during the Audit #4 timeframe; therefore, the team had no observations related to legal sufficiency.

Performance Measures

The MOU Section 10.2 requires the development of performance measures. The ODOT has refined its performance measures to provide a better overall indication of ODOT's execution of its responsibilities as assigned by the MOU. The team found evidence that the results obtained through the performance measures are allowing ODOT to make appropriate changes as it manages its environmental program. The team had no observations related to performance measures.

Training Program

Previous audits noted that ODOT had a robust environmental training program and provided adequate budget and time for staff to access a variety of internal and external training. The ODOT continues to enhance its traditional training program and plan with the development of additional online courses. The ODOT currently offers 28 online trainings for free to ODOT staff, consultants, LPAs, partner agencies, and anyone else who desires to take them. The ODOT utilizes the Ohio's Local Technical Assistance Program to manage the courses. This free online training makes training more accessible to a greater number of staff and consultants and allows consistent, self-paced, and individualized training. Also, the previous audit noted ODOT's training plan required environmental consultants to take the pre-qualification training courses and all ODOT environmental staff (both central and District offices) take all environmental courses.

The team encourages ODOT to broaden its training program and training collaboration with other Federal agencies and environmental organizations. The team commends ODOT for its efforts in taking external ecological and cultural resource courses, but feels there is room for improvement exploring external human environment training. During the interviews, ODOT staff noted they are reluctant to take National Highway Institute training courses because of their broad perspective; however, they did express interest in taking specialized FHWA training that focus on specific topics such as the recently offered FHWA Resource Center Air Quality Workshop. The ODOT also expressed interest in getting assistance from FHWA to develop training case studies that were relevant to its transportation program, which the audit team supports. The team had no observations related to training.

Next Steps

The FHWA provided a draft of this audit report to ODOT for a 14-day review and comment period and considered ODOT's comments in developing this draft report. In addition, FHWA will consider comments on the draft report received from the public within the 30-day comment period after publication in the Federal Register, pursuant to 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, pursuant to 23 U.S.C. 327(g)(2)(B). Once finalized, FHWA will publish the final audit report in the Federal Register.
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