



DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA-2021-0010]

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

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

ACTION: Notice.

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 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. The program mandates annual audits during each of the first 4 years of State participation to ensure compliance with program requirements. This notice finalizes the findings of the fourth and final audit report for the Utah Department of Transportation (UDOT).

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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 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 in lieu of FHWA. The UDOT published its application for NEPA assumption on October 9, 2015, and made it available for public comment for 30 days. After considering public comments, UDOT submitted its application to FHWA on December 1, 2015. The application served as the basis for developing a memorandum of understanding (MOU) that identifies the responsibilities and obligations that UDOT would assume. The FHWA published a notice of the draft MOU in the *Federal Register* on November 16, 2016 (81 FR 80710), with a 30-day comment period to solicit the views of the public and Federal agencies. After the end of the comment period, FHWA and UDOT considered comments and proceeded to execute the MOU. Effective January 17, 2017, UDOT assumed FHWA's responsibilities under NEPA, and the responsibilities for other Federal environmental laws described in the MOU. On May 26, 2022, FHWA and UDOT renewed the MOU for another 5-year term.

Section 327(g) of Title 23, U.S.C., 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 FHWA must make the results of each audit available for public comment. This notice finalizes the findings of the fourth audit report for UDOT participation in the NEPA Assignment Program. The FHWA published a draft version of this report in the *Federal Register* on June 23,

2022 (87 FR 37547), and made it available for public review and comment for 30 days in accordance with 23 U.S.C. 327(g). The FHWA received three responses to the *Federal Register* notice during the public comment period for the draft report, and FHWA responds to these comments in the final report, pursuant to 23 U.S.C. 327(g)(2). The FHWA also determined that the comments required no changes to the draft audit report. This notice finalizes the fourth and final NEPA Assignment audit report in Utah.

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

Shailen P. Bhatt,
Administrator,
Federal Highway Administration.

**Surface Transportation Project Delivery Program
FHWA Audit of the Utah Department of Transportation – Final Report
July 1, 2019 – June 30, 2020**

Executive Summary

This report summarizes the results of the Federal Highway Administration’s (FHWA) fourth and final audit of the Utah Department of Transportation’s (UDOT) National Environmental Policy Act (NEPA) review responsibilities and obligations that FHWA assigned and UDOT assumed pursuant to 23 United State Code (U.S.C.) 327. Throughout this report, FHWA uses the term “NEPA Assignment Program” to refer to the program codified at 23 U.S.C. 327. Pursuant to 23 U.S.C. 327, UDOT and FHWA executed a memorandum of understanding (MOU) on January 17, 2017, to memorialize UDOT’s NEPA responsibilities and obligations for Federal-aid highway projects and certain other FHWA actions in Utah. The FHWA and UDOT recently renewed the MOU on May 26, 2022, for another 5-year term. The section 327 MOU covers environmental review responsibilities for projects that require the preparation of environmental assessments (EA), environmental impact statements (EIS), and non-designated documented categorical exclusions (DCE). A separate MOU, pursuant to 23 U.S.C. 326, authorizes UDOT’s environmental review responsibilities for other categorical exclusions (CE), commonly known as CE Program Assignment. The scope of this audit did not include the CE Program Assignment responsibilities and projects.

As part of FHWA’s review responsibilities under 23 U.S.C. 327, FHWA formed a team (the “Audit Team”) in August 2020 to plan and conduct an audit of NEPA responsibilities UDOT assumed. Due to COVID-19-related travel restrictions, the Audit Team conducted a virtual audit during the period from November 9, 2020, to December 2, 2020. Prior to the virtual audit, the Audit Team reviewed UDOT’s NEPA project files, UDOT’s response to FHWA’s pre-audit information request (PAIR), UDOT’s NEPA Assignment Self-Assessment Report, UDOT’s NEPA Quality Assurance/Quality Control (QA/QC) Guidance, and UDOT’s NEPA Assignment Training Plan. The Audit Team conducted videoconference interviews with four members of UDOT central office staff, six of UDOT’s legal counsel (one current Assistant Attorney General assigned to UDOT, one former Assistant Attorney General assigned to UDOT, and four outside counsel), three staff members from the U.S. Environmental Protection Agency, and two staff members from the U.S. Fish and Wildlife Service (FWS) as part of the virtual audit.

Overall, the Audit Team found that UDOT continues to successfully carry out its DCE, EA, and EIS project review responsibilities. The UDOT has also made efforts to respond to the FHWA findings from the third audit, including improving document management and QA/QC procedures. In the third audit, the Audit Team found that UDOT issued an environmental document without a final legal sufficiency finding, and had observed that there were ways UDOT could improve their training.

In this fourth and final audit, the Audit Team identified four observations and two successful practices. The Audit Team finds UDOT is carrying out the responsibilities it has assumed, and they are in substantial compliance with the provisions of the MOU. This report also concludes with the status of FHWA’s non-compliance observation from the third audit review, including any UDOT self-imposed corrective actions. After the fourth year of UDOT’s participation in the program, FHWA will continue to monitor UDOT’s compliance with the terms of this MOU, in accordance with 23 U.S.C. 327(h).

Background

The NEPA Assignment Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal-aid highway projects and certain other FHWA actions. Under 23 U.S.C. 327, a State that assumes these Federal responsibilities becomes solely responsible and solely liable for carrying them out. Effective January 17, 2017, UDOT assumed FHWA's responsibilities under NEPA and other Federal environmental laws. Examples of responsibilities UDOT has assumed in addition to NEPA include section 7 consultation under the Endangered Species Act and consultation under section 106 of the National Historic Preservation Act.

Audits are the primary mechanism through which FHWA oversees UDOT's compliance with the MOU and the NEPA Assignment Program requirements. This includes ensuring compliance with the applicable Federal laws and policies, evaluating UDOT's progress toward achieving the performance measures identified in MOU Section 10.2, and collecting information needed for the Secretary's annual report to Congress. The FHWA must present the results of each audit in a report and make it available for public comment in the *Federal Register*. Through this fourth and final audit, FHWA will satisfy provisions of 23 U.S.C. 327(g) and Part 11 of the MOU. This report summarizes the results of the fourth and final audit in Utah, and it includes a summary discussion that describes progress since the last audit.

Scope and Methodology

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 UDOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the U.S. Department of Transportation Secretary's responsibilities for compliance with the NEPA, 42 U.S.C. 4321 *et seq.* with respect to the highway projects specified under subpart 3.3. This assignment includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for highway projects such as 23 U.S.C. 139, 40 C.F.R. parts 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 UDOT to maintaining documented compliance with requirements of all applicable statutes and regulations as well as the provisions in the MOU.

The Audit Team consisted of NEPA subject matter experts from the FHWA Utah Division, FHWA Resource Center, the Volpe Center, FHWA Headquarters, and FHWA Office of the Chief Counsel. These experts received training on how to evaluate implementation of the NEPA Assignment Program.

The Audit Team conducted an examination of UDOT's NEPA project files, UDOT's responses to the PAIR, and UDOT's self-assessment. The audit also included interviews with staff and reviews of UDOT policies, guidance, and manuals pertaining to NEPA responsibilities. All reviews focused on objectives related to the six NEPA Assignment Program elements: program management; documentation and records management; QA/QC; legal sufficiency; training; and performance measurement. In particular, the Audit Team reviewed UDOT's process and procedures for conducting environmental reevaluations.

The focus of the audit was on UDOT's process and program implementation. Therefore, while the Audit Team reviewed project files to evaluate UDOT's NEPA process and procedures, the Audit Team did not evaluate UDOT's project-specific decisions to determine if they were, in FHWA's opinion, appropriate or not. The Audit Team reviewed 20 NEPA Project files with DCEs, EAs, EISs, and reevaluations, representing all projects with decision points or other actionable items between July 1, 2019, and June 30, 2020. The Audit Team also interviewed environmental staff in UDOT's headquarters office.

The PAIR consisted of 25 questions about specific elements in the MOU. The Audit Team used UDOT's response to the PAIR to develop specific follow-up questions for the UDOT staff. The Audit Team conducted four interviews with UDOT environmental staff, one virtual interview with staff from the U.S. Environmental Protection Agency (EPA), one interview with staff from the FWS, two interviews with UDOT's outside legal counsel, and one interview with legal counsel from the Utah Attorney General's Office. All interviews were conducted as videoconferences.

Throughout the document reviews and interviews, the Audit Team verified information regarding the UDOT NEPA Assignment Program including UDOT policies, guidance, manuals, and reports. This included the NEPA QA/QC Guidance, the NEPA Assignment Training Plan, and the NEPA Assignment Self-Assessment Report.

The Audit Team compared the procedures outlined in UDOT environmental manuals and policies to the information obtained during interviews and project file reviews to determine if there were discrepancies between UDOT's performance and documented procedures. The Audit Team documented observations under the six NEPA Assignment Program topic areas and arrived at the following audit opinion.

Overall, UDOT has carried out the environmental responsibilities it assumed through the MOU and the application for the NEPA Assignment Program, and as such, the Audit Team finds UDOT is substantially compliant with the provisions of the MOU.

Observations and Successful Practices

This section summarizes the Audit Team's observations of UDOT's NEPA Assignment Program implementation, including successful practices UDOT may want to continue or expand. Successful practices are positive results FHWA would like to commend UDOT for developing. These may include ideas or concepts that UDOT has planned but not yet implemented. Observations are items that the Audit Team would like to draw UDOT's attention to, which may benefit from revisions to improve processes, procedures, or outcomes. The UDOT may have already taken steps to address or improve upon the Audit Team's observations, but at the time of the audit they appeared to be areas where UDOT could make improvements. This report addresses all six MOU topic areas as separate discussions. Within each area, this report discusses successful practices followed by observations.

This audit report provides an opportunity for UDOT to implement actions to improve their NEPA Assignment Program. The FHWA and UDOT will continue to work together to monitor UDOT's compliance with the terms of this MOU, as required by 23 U.S.C. 327(h).

Program Management

Successful Practice #1

The Audit Team identified one of UDOT's project Websites which included detailed information about the proposed noise impact analyses, traffic noise abatement measures, and the proposed relocation of the existing noise barriers as a successful practice. The noise impact and abatement information presented to the public was comprehensive and easy to understand.

Observation #1

Section 5.1.4 of UDOT's NEPA Assignment MOU outlines an interagency planning and coordination protocol to make sure that all programmatic agreements reflect UDOT's new roles and responsibilities under NEPA Assignment. The Audit Team observed that UDOT's Section 106 programmatic agreements with four Tribal governments predate NEPA Assignment, and they do not reflect UDOT's assigned roles and responsibilities. We recommend that UDOT reach out to these Tribal governments and implement the interagency planning and coordination provisions of Section 5.1.4, which may include amending the programmatic agreements or obtaining a "written consent." The recommended path forward would enable UDOT to clarify its assigned roles and responsibilities during Section 106 consultations. The overall consistency across all five of the Section 106 programmatic agreements is important to clarify the organizational roles and responsibilities between UDOT and FHWA for both Section 106 and Government-to-Government consultations, resulting in more predictable lines of communication, more productive and meaningful interagency dialogue with the Tribes, and a positive reinforcement of FHWA's retained Tribal trust responsibilities.

Observation #2

In the course of reviewing the most recent Manual of Instruction (MOI), the Audit Team identified several areas that do not address the most recent requirements and guidelines associated with the Fixing America's Surface Transportation Act; FHWA's 2019 Reevaluation Q&A Guidance; Moving Ahead for Progress in the 21st Century Act Section 1319 interim guidance relating to the appropriate use of the combined Final Environment Impact Statement/Record of Decision documents; FHWA's 2011 Environmental Justice and NEPA guidance for identifying, disclosing and mitigating impacts to environmental justice communities; or FHWA's October 2018 memorandum addressing activities that may be completed prior to issuance of a Notice of Intent to prepare an EIS. During interviews, UDOT informed us that they make regular updates to the MOI, as needed. However, these examples illustrate that the MOI would benefit from a regularly scheduled, comprehensive review to ensure that it reflects current national policy and guidance.

Documentation and Records Management

Successful Practice #1

During this audit period, the Audit Team reviewed reevaluations for two EIS projects that appeared to use the same format. While it is not explicitly required by the MOI, UDOT did appear to use a standard procedure for these reevaluations. For example, both included a Summary of Re-evaluation Analysis Table that functions like an environmental checklist. This table creates a standard process for looking at changes in both the magnitude of project impacts, as well as project scope modifications.

Observation #1

The team reviewed multiple reevaluations for the West Davis Corridor Project. Each individual reevaluation addressed the changes on that portion of the larger project. The FHWA suggests UDOT also add language that summarizes the changes across all the reevaluations, such as providing a listing of all the related reevaluations and a statement correlating them, to clearly demonstrate and document that UDOT has considered impacts across the entirety of the project.

Quality Assurance/Quality Control

The UDOT has made improvements to its QA/QC procedures. These improvements are discussed in the Legal Sufficiency section of this report.

Legal Sufficiency

During the audit period outside counsel issued three findings of legal sufficiency per the requirements of 23 CFR 771.125(b) and 23 CFR 774.7(d), copies of which were provided to the Audit Team. These include legal sufficiency reviews of one EIS and two Section 4(f) evaluations. The UDOT has continued using the legal sufficiency process it put in place for both Section 326 CE and Section 327 NEPA Assignment; that is, contracting with outside counsel who have extensive experience in NEPA, other environmental laws, and Federal environmental litigation. Since the signing of the initial FHWA–UDOT MOU for the NEPA Assignment Program in January 2017, no lawsuits have been filed against NEPA-assigned projects in the State of Utah.

Training

The UDOT has continued to develop an annual training plan, in compliance with Section 12.2 of the MOU.

Performance Measures

The UDOT has continued to assess its performance as required under the terms of the MOU. The UDOT's annual self-assessment report indicates that they are meeting their performance targets. The process of, and results from, the State's self-assessment have been an important factor in the improvement of UDOT's NEPA Program. *Observation #1* Section 10.2.1.C.i of the MOU requires UDOT to assess change in and ensure effective communication among UDOT, Federal, and State resource agencies resulting from assumption of responsibilities under the MOU. In interviews, resource agency staff at the EPA and the FWS stated that overall they have a good working relationship with UDOT staff. Some FWS staff indicated that they could utilize additional information on the differences between the 23 U.S.C. 326 (CE Assignment) program and the 23 U.S.C. 327 (NEPA Assignment) program. The Audit Team also learned that neither FWS nor EPA had responded to UDOT's annual resource agency survey. These are examples of where UDOT's program may benefit from more consistent, program-level discussions with resource agencies to ensure that all parties understand their respective roles and responsibilities, as well as the provisions of the 326 and 327 programs. Stronger managerial-level communications with the resource agencies may increase their understanding of the importance of the survey and improve the response rate.

No Non-Compliance Observations in Audit #4

Non-compliance observations are instances where the team found UDOT was out of compliance or deficient in proper implementation of a Federal regulation, statute, guidance, policy, the terms of the MOU, or UDOT's own procedures for compliance with the NEPA process. Such observations may also include instances where UDOT has failed to maintain technical competency, adequate personnel, and/or financial resources to carry out the assumed responsibilities. Other noncompliance 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 UDOT to develop and implement corrective actions to address all non-compliance observations. The Audit Team did not identify any non-compliance observations during this audit.

Follow-up on the Prior Non-Compliance Observations from Audit #3

The FHWA had reported a noncompliance observation relating to UDOT not complying with the State's environmental review procedures as a part of Audit #3.

2019 Audit #3—Issuing a Document Without Final Legal Sufficiency Finding

As noted earlier, in response to the 2019 audit finding that legal sufficiency review documentation was not provided prior to approval of a project FEIS, UDOT and outside counsel implemented a more formalized system by instituting a Legal Sufficiency Review Form to be completed by UDOT's outside counsel. The form would ensure a record that the legal sufficiency review occurred.

The Audit Team confirmed that UDOT developed and implemented the form for the legal sufficiency reviews during this audit period.

Response to Public Comments on the Draft Report and the Final Report

The FHWA received and responded to three comments on the draft audit report, pursuant to 23 U.S.C. 327(g)(2). The American Road & Transportation Builders Association (ARTBA) commented that they are in general support of UDOT's implementation of the NEPA Assignment Program to accelerate Federal-aid highway program and project delivery in Utah. The FHWA appreciates ARTBA's input. A private citizen commented that he is not supportive of UDOT's implementation of the NEPA Assignment Program, due to his experience with the Northern Corridor Highway Project in the Bureau of Land Management's (BLM) Red Cliffs National Conservation Area. The Audit Team, in conjunction with the FHWA Utah Division Office, independently reviewed and confirmed that the Federal action associated with this concern was the BLM's Federal land management decision, including BLM's NEPA approval for that Federal land management decision. It was not a NEPA approval by UDOT under the NEPA Assignment Program. Finally, an anonymous commenter raised concerns about UDOT's traffic noise abatement procedures as they apply to local public agencies. Based on FHWA's traffic noise abatement regulations in 23 CFR 772.7(b), UDOT has developed noise policies in conformance with 23 CFR part 772, and FHWA Utah Division Office approved them. The UDOT is required to apply these policies uniformly and consistently statewide, including the uniform and consistent application to the NEPA reviews of the Federal-aid highway projects administered by the local public agencies in Utah.

After reviewing the public comments, and looking into the concerns raised in the comments, FHWA determined that there is no need to revise the draft audit report. The

FHWA may also consider the public comments in scoping the future NEPA Assignment monitoring reviews in Utah.

Therefore, FHWA is finalizing UDOT's fourth and final NEPA Assignment audit report with this *Federal Register* notice.

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