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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA-2024-0017]

Surface Transportation Project Delivery Program; Arizona Department of Transportation Final FHWA Audit Four 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 (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 4 years of State participation to ensure compliance with program requirements. This is the fourth audit of the responsibilities assigned to the Arizona Department of Transportation (ADOT) under the Program. This notice announces the final fourth audit report for ADOT.

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20590. Office hours are from 8:00 a.m. to 4:30 p.m., EST, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

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

Background

The Surface Transportation Project Delivery Program, codified at 23 United States Code (U.S.C.) 327, known commonly as Program Assignment, allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal-aid highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities it has assumed, in lieu of FHWA. The ADOT published its application for NEPA assumption on June 29, 2018, and solicited public comment. After considering public comments, ADOT submitted its application to FHWA on November 16, 2018. The application served as the basis for developing a memorandum of understanding (MOU) that identifies the responsibilities and obligations ADOT would assume. FHWA published a notice of the draft MOU in the Federal Register on February 11, 2019, at 84 FR 3275, with a 30-day comment period to solicit the views of the public and Federal Agencies. After the close of the comment period, FHWA and ADOT considered comments and proceeded to execute the MOU. Effective April 16, 2019, ADOT assumed FHWA's responsibilities under NEPA, and the responsibilities for other Federal environmental laws described in the MOU.

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 4 years of State participation and, after the fourth year, monitor compliance. FHWA must make the results of each audit available for public comment. FHWA published a notice in the Federal Register at

89 FR 85578 on October 28, 2024, soliciting comments for 30 days pursuant to 23 U.S.C. 327(g). The audit report reflects the findings at the time of the review and does not capture specific actions taken after the review. This notice informs the public that the final report of ADOT's fourth audit under the Program is available and may be downloaded at www.regulations.gov under FHWA-2024-0017.

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

Sean McMaster,
Administrator,
Federal Highway Administration.

Surface Transportation Project Delivery Program Final FHWA Audit #4 of the Arizona Department of Transportation

Executive Summary

This is Audit #4 of the Arizona Department of Transportation's (ADOT) assumption of National Environmental Policy Act (NEPA) responsibilities under the Surface Transportation Project Delivery Program. Under the authority of 23 United State Code.(U.S.C.) 327, ADOT and the Federal Highway Administration (FHWA) executed a memorandum of understanding (MOU) on April 16, 2019, to define ADOT's NEPA responsibilities and liabilities for Federal-aid highway projects and other related environmental reviews for highway projects in Arizona. This MOU covers environmental review responsibilities for projects that require the preparation of environmental assessments (EA), environmental impact statements (EIS), and unlisted (identified as individual by ADOT) categorical exclusions (CE).

FHWA conducted the fourth audit of ADOT's performance according to the terms of the MOU from March 27 to March 31, 2023. Prior to the audit, the FHWA audit team reviewed ADOT's environmental manuals and procedures, NEPA project files, ADOT's response to FHWA's pre-audit information request (PAIR), and ADOT's NEPA Assignment Self-Assessment Report. During the fourth audit, the audit team conducted interviews with staff from ADOT's Office of Environmental Planning (EP), Civil Rights Office, Construction Districts, Right-of-Way, Alternative Delivery Group, and the Deputy Director, as well as the Salt River Pima-Maricopa Indian Community Tribal Historic Preservation Officer (THPO), the Arizona State Historic Preservation Officer (SHPO), and the Arizona Attorney General's Office (AGO) and prepared preliminary audit results. The audit team presented these preliminary results to ADOT EP leadership on March 30, 2023, and to ADOT leadership on April 7, 2023.

The audit team found that ADOT has carried out the responsibilities it assumed consistent with the terms of the MOU and ADOT's application. The ADOT continues to develop, revise, and implement procedures and processes required to deliver its NEPA Assignment Program. This report describes several general observations and successful practices, as well as identified non-compliance observations where ADOT must implement corrective actions pursuant to MOU Part 13.2.2. This report concludes with the status of FHWA's observations from the third audit review. After the fourth year of ADOT's participation in the program, FHWA will continue to monitor ADOT's compliance with the terms of this MOU, in accordance with 23 U.S.C. 327(h).

Background

The purpose of the audits performed under the authority of 23 U.S.C. 327 is to assess a State's compliance with the provisions of the MOU as well as all applicable Federal statutes, regulations, policies, and guidance. FHWA's review and oversight obligation entails the need to collect information to evaluate the success of the NEPA Assignment Program; to evaluate a state's progress toward achieving its performance measures as specified in the MOU; and to collect information for the administration of the NEPA Assignment Program. This report summarizes the results of the fourth audit in Arizona and ADOT's progress towards meeting the program review objectives identified in the MOU.

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). The definition of an audit is one where an independent, unbiased body makes an official and careful examination and verification of accounts and records. Auditors who have special training with regard to accounts or financial records may follow a prescribed process or methodology in conducting an audit of those processes or methods. FHWA considers its 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 ADOT's assumption of environmental responsibilities.

The audit team consisted of NEPA subject matter experts from FHWA Headquarters, Resource Center, Office of the Chief Counsel, and staff from FHWA's Arizona Division. This audit is an unbiased official action taken by FHWA, which included an audit team of diverse composition, and followed an established process for developing the review report and publishing it in the Federal Register.

The audit team reviewed six NEPA Assignment Program elements: program management; documentation and records management; quality assurance/quality control (QA/QC); performance measures; legal sufficiency; and training. The audit team considered three additional focus areas for this review: the project-level conformity procedures outlined in 40 Code of Federal Regulations (CFR) 93; the Section 106 consultation procedures contained in the National Historic Preservation Act of 1966 (36 CFR 800 et seq.); and ADOT's environmental commitment tracking and implementation process. This report concludes with a status update for FHWA's observations from the second and third audit reports.

The audit team conducted a careful examination of ADOT policies, guidance, and manuals pertaining to NEPA responsibilities, as well as a representative sample of the ADOT project files. Other documents, such as ADOT's PAIR responses and ADOT's Self-Assessment Report, also informed this review. In addition, the audit team interviewed ADOT, the Arizona AGO and THPO staff, as well as the Arizona SHPO in person and via videoconference.

The timeframe defined for this fourth audit includes highway project environmental approvals completed between January 1 and December 31, 2022. During this timeframe, ADOT completed NEPA approvals and documented NEPA decision points for seven projects. Due to the small sample size, the audit team reviewed all seven projects. This consisted of three EA re-evaluations, one EA with a Finding of No Significant Impact, one draft EA that completed the public hearing and review process, and two unlisted CEs. FHWA also reviewed information pertaining to project tracking and mitigation commitment compliance for all projects that have been processed by ADOT since the initiation of the NEPA Assignment Program.

The PAIR submitted to ADOT contained 25 questions covering all 6 NEPA Assignment Program elements. The audit team developed specific follow-up questions for the interviews with ADOT staff and others based on ADOT responses to the PAIR. The audit team conducted a total of 18 interviews. Interview participants included staff from ADOT, a THPO and the Arizona AGO, as well as the Arizona SHPO.

The audit team compared ADOT manuals and procedures to the information obtained during interviews and project file reviews to determine if ADOT's performance of its MOU responsibilities is in accordance with ADOT procedures and Federal requirements. The audit team documented individual observations and successful practices during the

interviews and reviews and combined these under the six NEPA Assignment Program elements. The audit results are described below by program element.

Overall Audit Opinion

The audit team found that ADOT has carried out the responsibilities it has assumed consistent with the terms of the MOU. FHWA is notifying ADOT of two non-compliance observations identified in this audit that require ADOT to take corrective action. The ADOT must address these non-compliance observations per MOU Part 13.2.2 and continue making progress on non-compliance observations in the previous audits as a section of the 327 MOU renewal process. Future monitoring reviews will continue to report on ADOT's corrective actions. By addressing the observations cited in this report, ADOT will continue to ensure a successful program.

Successful Practices and Observations

Successful practices are practices that the team believes are positive and encourages ADOT to consider continuing or expanding the use of those practices in the future. While not accounting for all the successful practices used by ADOT in implementing the NEPA Assignment Program, the audit team identified four successful practices in this report.

Observations are items the audit team would like to draw ADOT's attention to, which may improve processes, procedures, and outcomes. The audit team identified 13 general observations in this report.

Non-compliance observations are instances where the audit team finds the State is not in compliance or is deficient with regard to a Federal regulation, statute, guidance, policy, State procedure, or the MOU. Non-compliance may also include instances where the State has failed to secure or maintain adequate personnel or financial resources to carry out the responsibilities they have assumed. FHWA expects the State to develop and implement corrective actions to address all non-compliance observations. The audit team identified three non-compliance observations in this report.

Program Management

Successful Practice #1

The ADOT EP meets monthly with the Arizona (AZ) Division. This has resulted in improved communication and contributes to the tracking and ultimate resolution of issues.

Successful Practice #2

The audit team acknowledges the efforts to address lessons learned on alternative delivery projects through the development of NEPA and Public Private Partnership Guidance. These include improving communication with ADOT EP and advancing environmental commitment activities earlier for more successful projects.

Successful Practice #3

The ADOT has taken steps over the past year to improve Tribal engagement. The ADOT EP sent letters to Tribes introducing the EP Tribal Liaison and offered to meet. The ADOT created and filled a Native Nations Ambassador for Infrastructure position in the State Engineer's Office to improve communication with the Tribes and be a point of contact for them regarding any issues. And finally, ADOT EP developed the first project-specific Tribal Environmental Engagement Plan which outlines communication protocols, outreach practices and points of contact for a project that crosses into Tribal land.

Observations

Non-compliance Observation #1: Incomplete reporting to the Federal Infrastructure Permitting Dashboard

The ADOT is responsible for inputting project information for assigned projects into the Federal Infrastructure Permitting Dashboard (Dashboard), per MOU Part 8.5.1. During the time period covered by this audit, the audit team reviewed the Dashboard and found that it did not include all Federal permit and authorization information for the applicable projects assigned to ADOT. In addition, the audit team found that not all active projects were included, updates appeared in draft form or were not published. The audit team also found that milestone dependencies, which are milestone dates on the Permitting Dashboard that are contingent on the completion of another milestone found in the permitting timetable, were not identified and there were misidentifications of Major Infrastructure Projects which no longer applied due to the rescission of Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects. Per the Office of the Secretary of Transportation Dashboard reporting standards, ADOT is required to identify all Federal permits and authorizations that are anticipated to be needed for the project to complete construction, and to input target and actual milestone completion dates for those permits and authorizations. In accordance with the Office of the Secretary of Transportation Dashboard reporting standards, ADOT must take corrective action to address this issue.

Observation #1: Deficiencies and gaps in ADOT's manuals and procedures

The audit team reviewed ADOT's manuals and procedures. Part 4.2.4 of the MOU specifies that ADOT must implement procedures to support appropriate environmental analysis and decisionmaking under NEPA and associated laws and regulations. The audit team identified the following deficiencies in ADOT's manuals and procedures which may result in incomplete project documentation or analysis and increase the risk for non-compliance:

- The ADOT manuals and procedures do not make a clear statement that the 23 U.S.C. 327 MOU disclosure language is required in the consultation that is completed as part of the NEPA process for Local Public Agency (LPA)/Certification Acceptance (CA) projects per MOU Parts 3.1.2 and 3.2.6.
- The ADOT EA/EIS Manual should be updated to clearly indicate that a purpose and need statement should not include discussion of the build alternative nor use the build alternative as justification for the need to construct a transportation facility.

FHWA recommends an update to the ADOT EA/EIS Manual related to the public involvement process for re-evaluations. While public circulation is not required for

re-evaluations, FHWA recommends that ADOT establish a review process to determine if controversial projects or those of public concern require public outreach, or at a minimum, to post the NEPA document for public and stakeholder review.

Observation #2: Improvements to Tribal engagement

Interviews with ADOT staff, the SHPO and a THPO identified the need for ADOT to continue efforts to improve Tribal consultation practices and relationships with Tribes. The SHPO encourages ADOT to engage Tribes earlier, strengthen consultation processes, and build trust, while emphasizing the need for more training of ADOT staff. The THPO expressed continued communication and transparency issues with ADOT, noting that ADOT lacked an understanding of Tribal consultation requirements, frustration with continued violations of cultural commitments during construction, and continued lack of trust. The audit team acknowledges that ADOT seems to be attempting to work on some of these issues, but the actions are inconsistent. FHWA recommends:

- ADOT seek input from THPOs and AZ SHPO on the specification developed to address cultural resource commitment non-compliance by construction contractors and advance the specification to implementation.
- ADOT improve transparency regarding project information for projects in Tribal land or of Tribal interest.
- ADOT build and maintain relationships with the Tribes.
- ADOT fully implement the FHWA/ADOT Tribal Consultation Letter Agreement executed on August 5, 2022.

Observation #3: Incomplete identification and reporting of responsibilities under the 327 MOU assigned to additional divisions independent of ADOT EP

During Audit #3, the previous audit team identified that ADOT divisions outside of EP have NEPA responsibilities and these divisions have not been identified or addressed in the ADOT EP procedures; nor were they included in the ADOT documentation and reporting. Based on interviews of ADOT staff, the PAIR responses and review of ADOT's manuals for this audit, ADOT has not taken corrective actions to develop or implement procedures to apply the 327 MOU provisions to all divisions of ADOT in accordance with MOU Part 1.1.2. In addition, the audit team identified a lack of training and awareness of NEPA assignment and MOU responsibilities within the other divisions, in particular at management levels. The ADOT should identify methods to ensure future compliance.

Non-compliance Observation #2: Inadequate or incomplete documentation and implementation of environmental commitments

The ADOT is obligated to implement all committed environmental impact mitigation measures (23 CFR 771.109(b)(2)) for projects funded with Federal-aid. Therefore, it is also responsible for environmental commitment tracking. The ADOT does not have a process manual or consolidated report which documents the tracking of all environmental commitments made during the environmental review process. Based on the ADOT interviews, ADOT has taken steps to establish some tracking mechanisms to cover environmental commitments which are the responsibility of ADOT EP or the contractors. This includes official use of the Environmental, Permits, Issues, and Commitments (EPIC) tracking sheet. The ADOT Districts are inconsistent in how they describe

tracking commitments, and reporting whether they prepare documentation demonstrating implementation of the remaining types of environmental commitments. These gaps include commitment tracking that are the responsibility of other divisions of ADOT, LPA/CA, and those covered by a standard specification. Project file reviews indicated that environmental commitments were not stated clearly or if they were identified in environmental documentation, ADOT's record keeping did not demonstrate how, when, and who is responsible for environmental commitment documentation. The ADOT will need to take corrective actions to address the lack of documentation, implementation and tracking of environmental commitments and mitigation compliance.

Documentation and Records Management

Observations

Observation #4: Incomplete project file submission based on a FHWA request for information and standard folder structure issues

For this audit, FHWA requested all project files pertaining to the NEPA approvals and documented NEPA decision points completed during the audit review period. The audit review team received project file information from ADOT, but this information was found to be incomplete with attachments or other supporting information missing. FHWA worked with ADOT Information Technology (IT) Group to ensure that project file issues were not due to technology challenges resulting from the transfer of electronic files between ADOT and FHWA. While FHWA had fewer issues when attempting to access the files ADOT provided for the audit than in past years, the audit team still found several inconsistencies between ADOT's procedures for maintaining project files and the project file documentation provided to FHWA. Examples of missing documentation included: public involvement plan (PIP); public involvement summary report; signed noise analysis form; Section 404 and 408 documentation; Section 106 Closeout Memorandum; 327 air quality EA/EIS checklist; authorization letters/NEPA certification approval; Statewide Transportation Improvement Program/Transportation Improvement Program verification; and email communication. In addition, there were instances of missing or incomplete QC reviews, and environmental commitments resulting from technical analysis or consultation that were not included in the NEPA document. In these instances, the determinations were not supported by the project file. The audit review team could not reconcile information about project file completeness and QC provided through interviews with the content of project files supplied by ADOT. It may also be the case that there is a shortfall in ADOT filing practices performed by an individual developing a project file to ensure a project file is complete. By this observation the audit review team is making ADOT aware that both by (1) implementing sound internal controls related to project filing and records retention, and (2) improving QCs, fewer ADOT files would contain errors or omissions once the reviews are complete.

Observation #5: Deficiencies in Section 4(f) analyses

The ADOT has a number of manuals and procedures that describe the requirements for Section 4(f) analyses, consultation, and documentation. Based on those requirements, the review team found some of the project files to be deficient. Observations based on project file reviews included: (1) no Section 4(f) form or memorandum; (2) lack of documented communication with the official with jurisdiction; (3) no research documentation to support the determinations; (4) an empty Section 4(f) file folder; (5) a

Section 4(f) resource that was not accounted for in the project documentation; and (6) one instance where the consultation letter did not determine whether the Section 4(f) archeological resource had value for preservation in place. FHWA recommends that ADOT personnel who have Section 4(f) training identified as a requirement for their position take the training within a year and that ADOT EP updates the Section 4(f) manual to increase reviews and oversight of decisions made.

Observation #6: Continuing issues with Air Quality Conformity analysis

While ADOT has made progress regarding the level of communication and coordination with FHWA and the U.S. Environmental Protection Agency on project-level air quality conformity analysis, the audit team identified areas in need of improvement. Per MOU Part 3.2.4, FHWA retained responsibilities for conformity determinations. This authority includes whether a conformity determination remains valid under 40 CFR 93.104(d). The ADOT does not include FHWA in the decisionmaking process when it determines that project level conformity determinations remain valid for re-evaluations, which conflicts with FHWA authority under 40 CFR 93.104(d). In addition, no interagency consultation is conducted by ADOT for those decisions. Re-evaluations should be shared with interagency consultation partners as early as possible so their input can inform the FHWA determination of whether a conformity determination remains valid. FHWA also recommends that, for interagency consultation, when a consultation period ends, ADOT summarizes who responded, who did not, and what follow-up ADOT did with those agencies that did not provide a response. The ADOT should continue to build on the progress made with the air quality conformity process and maintain communication amongst all the interagency consultation partners.

Observation #7: Inconsistent use and absence of the 327 MOU disclosure statement

Part 3.1.3 of the MOU specifies that ADOT shall include a disclosure statement to the public, Tribes and agencies as part of agency outreach and public involvement procedures. The audit team project file reviews found the absence of the statement in agency correspondence and technical reports, and public involvement materials, as well as the wrong MOU reference when the statement was present. The audit team found no consistent process or procedure for inclusion of the 327 MOU disclosure statement in the current ADOT manuals or guidance as required by MOU Part 3.1.3. The ADOT should strive to achieve consistency in the placement of disclosure statements in documents. The audit team acknowledges that the new ADOT PIP has updated requirements and details to prevent instances in future public involvement materials.

Observation #8: Deficiencies in re-evaluation analyses and documentation

The ADOT has an EA/EIS guidance manual that contains EA re-evaluation procedures. The manual states, “the re-evaluation should consider the entire project analyzed in the original NEPA document. All environmental sections require re-evaluation to review whether impacts have changed as compared with the previous NEPA document and whether any impact changes result in new or significant impacts...Documentation should be appropriate to the project changes, environmental impacts from the changes, potential for controversy, and length of time since the last NEPA document was completed.” Observations based on project file reviews included (1) lack of supporting documentation in the project files for all analyses summarized in EA re-evaluation errata that support the outcome of the re-evaluation, and (2) two project files with purpose and need statements that changed from the original EA and did not document whether that change affected the

validity of the re-evaluation conclusion. Based on the required procedures, the review team found some of the project files to be deficient.

Observation #9: Inappropriate Purpose and Need Statement

The review team found that a draft EA purpose and need statement contained a discussion of the build alternative throughout. The need statement had a figure with the build alternative in it, travel demand data that included the build alternative, and the connectivity discussion referenced the build alternative. The purpose and need statement serve as the basis for the alternatives analysis and should not discuss alternatives. The alternatives analysis is the section of the document to explain how the considered range of alternatives meet the purpose and need. In addition, the purpose section of the draft EA used population and employment growth as a justification but presented no data.

Quality Assurance/Quality Control

Observations

Observation #10: QA/QC procedures lack assessment of compliance

The ADOT has procedures in place for QA/QC which are described in the ADOT QA/QC Plan and the ADOT Project Development Procedures. When implemented, ADOT focuses on the completeness of the project files, not the accuracy or technical merits of the decisions documented by those files. The ADOT does not appear to have an adequate process to review and confirm compliance of the decision making according to its own procedures and it is therefore unclear how the project-level QC reviews inform the program. These observations were also found with Audits #1, #2, and #3, and no updates were made to the ADOT QA/QC procedures in response. The ADOT does not appear to have a process in place for assessing the effectiveness of its QA/QC procedures to identify opportunities to improve the processes and procedures in its program, in ways that could help ensure improved compliance with MOU requirements.

Performance Measures

Observations

Observation #11: Incomplete development and implementation of performance measures to evaluate the quality of ADOT's Program

The audit team reviewed ADOT's development and implementation of performance measures to evaluate their program as required in the MOU (Part 10.2.1). The ADOT's QA/QC Plan, PAIR response, and self-assessment report identified several performance measures and reported the data for the review period. The ADOT's reporting data dealt primarily with increasing efficiencies and reducing project delivery schedules rather than measuring the quality of relationships with agencies and the general public, and decisions made during the NEPA process. The metrics ADOT has developed are not being used to provide a meaningful or comprehensive evaluation of the overall program. This observation was made in Audits #1, #2, and #3. FHWA recommends the creation of new performance measures in the 327 renewal MOU that ADOT would use to evaluate and improve their program.

Legal Sufficiency

During the audit period, ADOT had no formal legal sufficiency reviews of assigned environmental documents. This is based on the information provided by ADOT and interviews of the Assistant Attorneys General (AAG) assigned to ADOT's NEPA Assignment Program. Currently, ADOT retains the services of two AAGs for NEPA Assignment reviews and related matters. The assigned AAGs have received formal and informal training in environmental law matters and participated in a legal sufficiency training conducted by FHWA Office of Chief Counsel in May 2023. The ADOT and the AGO also have the option to procure outside counsel in accordance with 23 U.S.C. 327(a)(2)(G), but this was not necessary during the audit period.

Successful Practice #4

Through the interviews, the audit team learned ADOT seeks to involve lawyers early in the environmental review phase, with AAGs participating in project coordination team meetings and reviews of early drafts of environmental documents. The AAGs will provide legal guidance at any time ADOT requests it throughout the project development process. For formal legal sufficiency reviews, the process includes a submittal package from ADOT's NEPA program manager containing a request for legal sufficiency review. Various ADOT manuals set forth legal sufficiency review periods, which involve typically a 30-day review period, and the AAGs coordinate with ADOT to ensure timely completion of legal sufficiency reviews. In addition, the AAGs regularly notify ADOT of relevant changes in Federal law and guidance applicable to the NEPA Assignment Program.

Observations

Observation #12: Assertion of attorney-client privilege limits NEPA Assignment Program Assessment

Since FHWA began auditing ADOT in 2020, the AGO's has regularly cited attorney-client privilege when answering interview questions posed by FHWA Office of Chief Counsel (HCC) staff about the legal sufficiency process it employs when reviewing ADOT NEPA documents. The ADOT's position is unique as compared to its peer NEPA Assignment States in the West. FHWA's HCC interviewers have affirmed, consistently, they seek only to understand the role of the AGO's in implementing ADOT's NEPA Assignment Program and do not seek privileged communications or advice. Nevertheless, the AGO's has maintained that disclosing any specific information about its role in advising on legal issues would constitute a waiver of attorney-client privilege under the State's open records act and could present legal risks to their clients. As a result, FHWA interviews of the AAG's have produced a somewhat informative, but limited and incomplete understanding of the AGO's role in NEPA Assignment matters in AZ.

Training

Observation #13: Training Gaps

The audit team reviewed ADOT's 2023 Training Plan, interview responses, and ADOT's PAIR responses pertaining to its training program. The ADOT's EP staff training matrix indicates that many staff have not taken the required training. In addition, there is no data regarding training from the other divisions within ADOT who have 327 MOU

responsibilities. The ADOT made no changes to the ADOT training plan in response to FHWA's previous training gap observations.

Status of Previous General Observations and Non-Compliance Observations from the Audit # 3 Report

This section describes the actions ADOT has taken or is taking in response to observations made during the third audit. The ADOT was provided the third audit draft report for review and provided comments to FHWA on November 17, 2022.

Non-compliance Observation #1: Incomplete Reporting to the Federal Infrastructure Permitting Dashboard

During Audit #3, the audit team identified deficiencies in the information ADOT is required to post on the Dashboard. The ADOT did post some of the additional projects and missing project information to the Dashboard but not until the week before audit week. The ADOT needs to establish a consistent and ongoing process to maintain the project information required to be inputted into the Dashboard.

Observation #1: Deficiencies and gaps in ADOT's manuals and procedures

During Audit #3, the audit team identified deficiencies in ADOT's manuals and procedures which may result in incomplete project documentation or analysis and increase the risk for non-compliance. The first was in the ADOT CE Checklist Manual and the EA/EIS Manual, specifically the process for re-evaluations for EAs and EISs was not well-defined. The other was that neither the ADOT EA/EIS Manual nor the current 2017 ADOT PIP approved prior to NEPA assignment contained procedures detailing the criteria ADOT uses to make the determination on when to hold public hearings for EA-level projects and what criteria will be used to make determinations on whether to hold a public hearing when one is requested, as specified in 23 CFR 771.111(h)(2)(iii). The ADOT EA/EIS Manual was not updated to address this deficiency and the updated PIP was not approved at the time of the audit. The deficiencies identified in Audit #3 were not addressed by ADOT, and additional related issues were identified by the audit team in Audit #4.

Observation #2: Improvements to Tribal engagement are warranted

The audit team observed in Audit #3 the need for improved engagement with the Tribes for ADOT to develop procedures that identify its responsibilities to coordinate and consult with Tribes in all phases of project development, and implementation of the FHWA/ADOT Tribal Consultation Letter Agreement executed on August 5, 2022. The deficiencies identified in Audit #3 were not addressed completely by ADOT, as the Letter Agreement was not fully implemented, and continued issues were identified by the audit team in Audit #4. The ADOT staff participated in the Section 106 and Tribal Consultation Training given by the Advisory Council on Historic Preservation and FHWA staff on June 13 and June 14, 2023.

Non-compliance Observation #2: Responsibilities under the 327 MOU assigned to additional divisions independent of ADOT EP

During Audit #3, the team identified ADOT divisions outside of EP that have responsibilities under NEPA Assignment. These divisions have not been identified by

ADOT EP during the past review processes or addressed in the ADOT EP procedures, manuals, or plans. The ADOT was directed to develop and implement procedures to apply the 327 MOU provisions to all divisions of ADOT who have responsibilities under the 327 MOU. The current audit team did not observe any progress on this corrective action.

Non-compliance Observation #3: Deficiencies in environmental commitment tracking

During Audit #3, ADOT was unable to provide FHWA with a process manual or consolidated report documenting the tracking of environmental commitments made during the environmental review process. The ADOT was unable to identify a meaningful tracking and monitoring system for environmental commitments and mitigation compliance. Since the last audit, ADOT has developed a spreadsheet for EP responsibilities and has rolled out the EPIC tracking sheet process which covers the Contractor responsibilities— non-standard specification commitments only. There is still no process manual or consolidated reporting of all environmental commitments required for each project.

Non-compliance Observation #4: Incomplete project file submission and standard folder structure issues

As was observed in previous audits, during Audit #3, the audit team found several inconsistencies between ADOT's procedures for maintaining project files and the project file documentation provided to FHWA. Since that audit, ADOT's IT Group worked with the AZ Division to resolve the project file issue on the technological side. The ADOT IT Group determined that the electronic transfer process is working and is therefore not the cause of the incomplete project file submissions.

Observation #3: Minor edits needed to resolve deficiency in Section 4(f) evaluation of archaeological resources

During Audit #1 and #2, FHWA identified inconsistencies with ADOT's Section 4(f) evaluation and documentation of archaeological sites. In response to the Audit #2 finding, ADOT updated their Section 106 Federal-aid Programmatic Agreement Manual with new preservation in place language and in Audit #3 FHWA recommended edits to the new language. The ADOT has made the recommended edits.

Observation #5: Inconsistent use and absence of the 327 MOU disclosure statement

During Audit #3, the audit team project file reviews found inconsistent use of the disclosures statement on agency correspondence and technical reports, as well as absence of the statement in public involvement materials. The audit team found no consistent process or procedure for inclusion of the 327 MOU disclosure statement in the ADOT manuals and guidance as required by MOU Part 3.1.3. The ADOT has drafted a new PIP that contains disclosure statement guidance, but no updates were found in the ADOT EP manuals.

Observation #6: QA/QC procedures lack assessment of compliance and Observation #8: QA/QC procedures do not inform the performance measures

The audit team identified continuing issues with ADOT's QA/QC procedures, including the fact that ADOT does not check for compliance of the decision making and it is

therefore unclear how the project-level QC reviews inform the program. These observations were also found with Audits #1, #2, and #3. In addition, it is unclear how the QA/QC procedures, such as the use of QC checklists, are informing ADOT about the technical adequacy of the environmental analyses conducted for projects and thereby inform the performance measures. No updates to the ADOT QA/QC procedures were made.

Observation #8: Incomplete development and implementation of performance measures

During Audit #2 and #3, the audit team reviewed ADOT's performance measures and reporting data submitted for the review period and concluded that ADOT had made progress toward developing and implementing its performance measures. For Audit #4, FHWA continues to identify this program objective as an area of concern, described in the observations above, and will continue to evaluate this area in subsequent audits.

Observation # 9: Training Gaps

The audit team reviewed ADOT's 2021 training plan and ADOT's PAIR responses pertaining to its training program. The ADOT's EP staff training matrix indicates that while ADOT identifies the availability of staff training, many staff have not taken advantage of the opportunity for training, including other ADOT divisions subject to the 327 MOU provisions. The ADOT's training plan identifies that the training interval for some topics, such as the NEPA Assignment Program, is once only per staff member regardless of the period of time since the previous round of training. Staff may benefit from regular "refresher" type training, especially as regulatory requirements and policy may change over time. No changes in response to this observation were made to the 2023 training plan.

Finalizing This Report

FHWA provided a draft of the audit report to ADOT for a 14-day review and comment period pursuant to Part 11.4.1 of the MOU, as well as notification of the non-compliance observations. The ADOT provided comments which the audit team considered in finalizing this draft audit report. The audit team acknowledges that ADOT has begun to address some of the observations identified in this report and recognizes ADOT's efforts toward improving their program. This includes an action plan defined by ADOT and the AZ Division Office to address non-compliance observations identified in the AZ Program reviews to date. FHWA published the draft audit report for public comment pursuant to 23 U.S.C. 327(g)(2)(B) and no comments were received. FHWA is publishing this notice in the Federal Register for the final audit report.