

**DEPARTMENT OF TRANSPORTATION****Federal Highway Administration****[FHWA Docket No. FHWA–2015–0017]****Surface Transportation Project Delivery Program; TxDOT Audit Report****AGENCY:** Federal Highway Administration (FHWA), DOT.**ACTION:** Notice.

**SUMMARY:** Section 1313 of the Moving Ahead for Progress in the 21st Century Act (MAP–21) established the permanent Surface Transportation Project Delivery Program that allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. This section mandates semiannual audits during each of the first 2 years of State participation to ensure compliance by each State participating in the Program. 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 permanent program follows a pilot program established by Section 6005 of Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), where the State of California assumed FHWA's environmental responsibilities (from June 29, 2007). This notice presents the findings of the first audit report for the Texas Department of Transportation (TxDOT).

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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](http://www.regulations.gov),

**Background**

Congress proposed and the President signed into law, MAP–21 Section 1313, establishing the Surface Transportation Project Delivery Program that 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. 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 permanent program follows a pilot program established by Section 6005 of SAFETEA–LU, where the State of California assumed FHWA's environmental responsibilities (from June 29, 2007). The TxDOT published its application for assumption under the National Environmental Policy Act (NEPA) Assignment Program on March 14, 2014, at Texas Register 39(11): 1992, and made it available for public comment for 30 days. After considering public comments, TxDOT submitted its application to FHWA on May 29, 2014. The application served as the basis for developing the Memorandum of Understanding (MOU) that identifies the responsibilities and obligations TxDOT would assume. The FHWA published a notice of the draft of the MOU in the **Federal Register** on October 10, 2014, at 79 FR 61370 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 TxDOT considered comments and proceeded to execute the MOU. Since December 16, 2014, TxDOT has assumed FHWA's responsibilities under NEPA, and the responsibilities for the NEPA-related Federal environmental laws. Section 327(g) of Title 23, United States Code, requires the Secretary to conduct semiannual audits during each of the first 2 years of State participation, and annual audits during each subsequent year of State participation to ensure compliance by each State participating in the Program. The results of each audit must be presented in the form of an audit report and be made available for public comment. The FHWA published a notice in the **Federal Register** on August 21, 2015, to solicit the views of the public and Federal agencies. The FHWA received no comments as a result of the public notice of the draft report. This notice provides the final draft of the first FHWA audit report for TxDOT.

**Authority:** Section 1313 of Pub. L. 112–141; Section 6005 of Pub. L. 109–59; 23 U.S.C. 327; 49 CFR 1.48.

Issued on: November 12, 2015.

**Gregory G. Nadeau,***Administrator, Federal Highway Administration.***Surface Transportation Project Delivery Program—FHWA Audit of the Texas Department of Transportation for the Period Between December 16, 2014, and June 16, 2015****Executive Summary**

This is the first audit conducted by a team of Federal Highway Administration (FHWA) staff of the performance of the Texas Department of Transportation (TxDOT) regarding responsibilities and obligations it has been assigned under a memorandum of understanding (MOU) whose term began on December 16, 2014. From that date, TxDOT assumed FHWA's National Environmental Policy Act (NEPA) responsibilities and liabilities for the Federal-aid highway program funded projects in Texas (NEPA Assignment Program) and FHWA's environmental role is now limited to program oversight and review. The FHWA audit team (team) was formed in January 2015 and met regularly to prepare for conducting the audit. Prior to the on-site visit, the team performed reviews of TxDOT project file NEPA documentation in the Environmental Compliance Oversight System (ECOS, TxDOT's official project filing system), examined the TxDOT pre-audit information response and developed interview questions. The on-site portion of this audit, when all TxDOT and other agency interviews were performed, was conducted between April 13 and 17, 2015.

As part of its review responsibilities specified in 23 U.S.C. 327, the team planned and conducted an audit of TxDOT's responsibilities assumed under the MOU. The TxDOT is still in the transition of preparing and implementing procedures and processes required for the NEPA Assignment. It was evident that TxDOT has made reasonable progress in implementing the start-up phase of the NEPA Assignment Program and that overall the team found evidence that TxDOT is committed to establishing a successful program. This report provides the team's assessment of the current status of several aspects of the NEPA Assignment Program, including successful practices and 16 observations that represent opportunities for TxDOT to improve their program. The team identified two non-compliance observations that TxDOT will need to address as corrective actions in their self-assessment report.

The TxDOT has carried out the responsibilities it has assumed in keeping with the intent of the MOU and the application. The team finds TxDOT to be in substantial compliance with the provisions of the MOU. By addressing the observations in this report, TxDOT will continue to move the program toward success.

### Background

Congress proposed and the President signed into law, the Moving Ahead for Progress in the 21st Century Act Section 327, that established the Surface Transportation Project Delivery Program that allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of FHWA. This permanent program follows a pilot program established by Section 6005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, where the State of California assumed FHWA's environmental responsibilities (from June 29, 2007).

The TxDOT published its application for assumption under the NEPA Assignment Program on March 14, 2014, and made it available for public comment for 30 days. After considering public comments, TxDOT submitted its application to FHWA on May 29, 2014. The application served as the basis for developing the MOU that identifies the responsibilities and obligations TxDOT would assume. The FHWA published a notice of the draft of the MOU in the **Federal Register** on October 10, 2014, at 79 FR 61370, 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 TxDOT considered comments and proceeded to execute the MOU. Since December 16, 2014, TxDOT has assumed FHWA's responsibilities under NEPA, and the responsibilities for the NEPA-related Federal environmental laws. These are responsibilities for (among a list of other regulatory interactions) the Endangered Species Act, Section 7 consultations with the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration National Marine Fisheries Service, and Section 106 consultations regarding impacts to historic properties. Two Federal responsibilities were not assigned to TxDOT and remain with FHWA: (1) Making project-level conformity determinations under the Federal Clean

Air Act, and (2) conducting government to government consultation with federally recognized Indian tribes.

Under the NEPA Assignment Program, the State of Texas was assigned the legal responsibility for making project NEPA decisions. In enacting Texas Transportation Code, § 201.6035, the State has waived its sovereign immunity under 11th Amendment of the U.S. Constitution and consents to Federal court jurisdiction for actions brought by its citizens for projects it has approved under the NEPA Assignment Program.

As part of FHWA's oversight responsibility for the NEPA Assignment Program, FHWA is directed [in 23 U.S.C. 327(g)] to conduct semiannual audits during each of the first 2 years of State participation in the program; and audits annually for 2 subsequent years. The purpose of the audits is to assess a State's compliance with the provisions of the MOU as well as all applicable Federal laws and policies. The FHWA's review and oversight obligation entails the need to collect information to evaluate the success of the Project Delivery 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 first audit.

### 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. With regard to 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.

The diverse composition of the team, the process of developing the review report, and publishing it in the **Federal Register** help define this audit as unbiased and an official action taken by FHWA. To ensure a level of diversity and guard against unintended bias, the team consisted of NEPA subject matter experts from the FHWA Texas Division Office, as well as FHWA offices in Washington, DC, Atlanta, GA, Columbus, OH, and Baltimore, MD. All

of these experts received training specific to evaluation of implementation of the NEPA Assignment Program. Aside from the NEPA experts, the team included a trainee from the Texas Division office and two individuals from FHWA's Program Management Improvement Team who provided technical assistance in conducting reviews. This audit team conducted a careful examination of highway project files and verified information on the TxDOT NEPA Assignment Program through inspection of other records and through interviews of TxDOT and other staff.

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, ensure compliance with applicable Federal laws and policies, 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 must be designed and conducted to evaluate 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. The four performance measures identified in the MOU are (1) compliance with NEPA and other Federal environmental statutes and regulations, (2) quality control and quality assurance for NEPA decisions, (3) relationships with agencies and the general public, and (4) increased efficiency and timeliness and completion of the NEPA process.

The scope of this audit included reviewing the processes and procedures used by TxDOT to reach and document project decisions. The intent of the review was to check that TxDOT has the proper procedures in place to implement the MOU responsibilities assumed, ensure that the staff is aware of those procedures, and that the procedures are working appropriately to achieve NEPA compliance. The review is not intended to evaluate project-specific decisions as good or bad, or to second guess those decisions, as these decisions are the sole responsibility of TxDOT.

The team gathered information that served as the basis for this audit from three primary sources: (1) TxDOT's response to a pre-audit information

request, (2) a review of a random sample of project files with approval dates subsequent to the execution of the MOU, and (3) interviews with TxDOT, the Texas Historical Commission, and the USFWS staff. The pre-audit information request consisted of questions and requests for information focused on the following six topics: Program management, documentation and records management, quality assurance/quality control, legal sufficiency review, performance measurement, and training. The team subdivided into working groups that focused on five of these topics. The legal sufficiency review was limited to consideration of material in TxDOT's response to the pre-audit information request.

The team defined the timeframe for highway project environmental approvals subject to this first audit to be between December 2014 and February 2015. This initial focus on the first 3–4 months of TxDOT's assumption of NEPA responsibilities was intended to: (1) Assist TxDOT in start-up issues in the transition period where they assumed NEPA responsibilities for all highway projects, (2) follow an August 2014 Categorical Exclusion (CE) monitoring review that generated expected corrective actions, and (3) allow the first audit report to be completed 6 months after the execution of the MOU. Based on monthly reports from TxDOT, the universe of projects subject to review consisted of 357 projects approved as CE's, 9 approvals to circulate an Environmental Assessment (EA), 4 findings of no significant impacts (FONSI), 3 re-evaluations of EAs, 2 Section 4(f) decisions, and 1 approval of a draft environmental impact statement (EIS) project. The team selected a random sample of 57 CE projects sufficient to provide a 90 percent confidence interval and reviewed project files for all 19 approvals that were other than CEs (for a total of 76 files reviewed). Regarding interviews, the team's focus was on leadership in TxDOT's Environmental Affairs Division (ENV) Headquarters in Austin. Due to logistical challenges, the team could only interview a sample of environmental and leadership staff from TxDOT Districts focusing for this first audit on face-to-face interviews in Austin, Waco, and San Antonio and conference call interviews with Corpus Christi, Laredo, and Fort Worth Districts. The team plans to interview staff from at least 18 TxDOT District offices by completion of the third audit. There are a total of 25 TxDOT Districts

and the team anticipates covering all over the 5-year term of this MOU.

### Overall Audit Opinion

The team recognizes that TxDOT is still in the beginning stages of the NEPA Assignment Program and that its programs, policies, and procedures are in transition. The TxDOT's efforts are appropriately focused on establishing and refining policies and procedures; training staff; assigning and clarifying changed roles and responsibilities; and monitoring its compliance with assumed responsibilities. The team has determined that TxDOT has made reasonable progress in implementing the start-up phase of NEPA Assignment operations and believes TxDOT is committed to establishing a successful program. Our analysis of project file documentation and interview information found two non-compliance observations, several other observations, and noted ample evidence of good practice. The TxDOT has carried out the responsibilities it has assumed in keeping with the intent of the MOU and the Application and as such the team finds TxDOT to be in substantial compliance with the provisions of the MOU.

The TxDOT's staff and management expressed a desire to receive constructive feedback from the team. By considering and acting upon the observations contained in this report, TxDOT should continue to improve upon carrying out its assigned responsibilities and ensure the success of its NEPA Assignment Program.

### Non-Compliance Observations

Non-compliance observations are instances of being out of compliance with a Federal regulation, statute, guidance, policy, TxDOT procedure, or the MOU. The FHWA expects TxDOT to develop and implement corrective actions to address all non-compliance observations. The TxDOT may consider implementing any recommendations made by FHWA to address non-compliance and other observations. The team acknowledges that TxDOT has already taken corrective actions to address these observations. The FHWA will conduct follow up reviews of the non-compliance observations as part of Audit #2, and if necessary, future audits.

The MOU (Part 3.1.1) states "pursuant 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 U.S. Department of Transportation (DOT) Secretary's responsibilities for

compliance with 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 parts 1500–1508, DOT Order 5610.1C, and 23 CFR part 771 as applicable."

### Non-Compliance Observation #1

The first non-compliance observation, in 1 of the 76 projects reviewed, pertained to FHWA policy in 23 CFR 771.105(d) that (1) "measures necessary to mitigate adverse impacts be incorporated into the action," and (2) "the Administration will consider, among other factors, the extent to which the proposed measures would assist in complying with a federal statute, Executive Order, or Administration regulation or policy." The team identified a project whose description indicated that its purpose was to mitigate impacts of a larger project by constructing a noise abatement barrier. Classifying this project as a CE [23 CFR 771.117(c)(6)], that specifies the action as a separate noise abatement barrier mitigation project, does not comply with FHWA approved TxDOT 2011 Noise Guidelines. The TxDOT must have a program for Type II noise abatement projects in order to allow for the construction of a noise abatement barrier as a separate project (23 CFR 772.5). The TxDOT does not currently have such a program and, therefore, could not approve the noise abatement barrier as a separate project. Before approving any NEPA decision document, TxDOT should be knowledgeable of, and must apply, all applicable provisions of FHWA policy and regulation.

### Non-Compliance Observation #2

The second non-compliance observation is a project approved by TxDOT staff before all environmental requirements had been satisfied. Before TxDOT's approval, the project required a project-level air quality conformity determination pursuant to 40 CFR 93.121 and be consistent with the State Transportation Improvement Program (STIP). The TxDOT staff made a conditional NEPA approval (CE determination) on a project that, according to records, was not correctly listed in the STIP. The TxDOT then reported the approval to FHWA. The FHWA's policy in 23 CFR 771.105 is to coordinate compliance with all environmental requirements as a single process under NEPA. Conditional approvals do not comply with the

FHWA NEPA policy because they have the effect of allowing a project to move to the next step of project development without satisfying all environmental requirements. Also, there is no authority in the MOU for TxDOT to make conditional approvals. There is a specific MOU requirement in Part 3.3.1 for a project to be consistent with the STIP. The team found evidence in ECOS that this project required a project-level air quality conformity determination. The responsibility for this determination was not assigned to TxDOT under the NEPA Assignment MOU, and FHWA subsequently made this determination. The team acknowledges this project was somewhat unusual as there was uncertainty at the Department as to whether the project was adding capacity requiring a Division Office conformity determination. Since that time, the Division Office has confirmed that such projects do add capacity and are subject to individual project level conformity. Where required, TxDOT must coordinate with the FHWA Texas Division Office staff to obtain a project-level air quality conformity determination before making a NEPA approval decision for a project.

### Observations and Successful Practices

This section summarizes the team's observations about issues or practices that TxDOT may want to consider as areas to improve as well as practices the team believes are successful that TxDOT may want to continue or expand in some manner. All six topic areas identified in FHWA's pre-audit information request are addressed here as separate discussions. Our report on legal sufficiency reviews is a description of TxDOT's current status as described in their response to the pre-audit information request. The team will examine TxDOT's legal sufficiency reviews by project file inspection and through interviews in future audits.

The team lists 16 observations below that we urge TxDOT to act upon to make improvements through one or more of the following: corrective action, targeted training, revising procedures, continued self-assessment, or by some other means. The team acknowledges that by sharing this draft audit report with TxDOT, they have already implemented actions to address the observations to improve their program. The FHWA will consider the status of these observations as part of the scope of Audit #2. We will also include a summary discussion that describes progress since the last audit in the Audit #2 report.

### Program Management

The team recognized four successful program management practices. First, it was evident through interviews that TxDOT has employed highly qualified staff for its program. Second, the team saw evidence of strong communication between TxDOT's ENV and District staff explaining roles and responsibilities associated with implementation of the MOU for NEPA Assignment. Third, based on the response to the pre-audit information request and from interviews, the team recognized efforts to create procedures, guidance, and tools to assist Districts in meeting requirements of the MOU. And finally, District staff understands and takes pride in ownership when making CE determinations. The ENV likewise takes pride in the responsibility for EA and EIS decisionmaking as well as oversight for the NEPA Assignment Program.

The team found evidence of successful practices in information provided by TxDOT and through interviews. They learned of specific incidences where TxDOT has intentionally hired new personnel and reorganized existing staff to achieve a successful NEPA Assignment Program. The TxDOT hired a Self-Assessment Branch (SAB) manager, a staff development manager (training coordinator), and an additional attorney to assist with NEPA Assignment responsibilities. The audit team recognizes the TxDOT "Core Team" concept (which provides joint ENV and District peer reviews for EAs and EISs only) as a good example of TxDOT utilizing their existing staff to analyze NEPA documents and correct compliance issues before finalization. Many Districts appreciate the efforts of the Core Team and credit them for assuring their projects are compliant. The "NEPA Chat" is another great example of TxDOT's intentional effort to achieve a compliant NEPA Assignment Program with enhanced communication among TxDOT environmental staff statewide. The NEPA Chat, led by ENV, provides a platform for complex issues to be discussed openly, and for Districts to learn about statewide NEPA Assignment Program issues. To date, the NEPA Chat has proven to be an effective vehicle to disseminate relevant NEPA information quickly and selectively to the TxDOT District Environmental Coordinators. Lastly, based on interviews and the response to the pre-audit information request, almost all the ENV and District staff feels there is sufficient staff to deliver a successful NEPA Assignment program. This is further supported by ENV's willingness

to shift responsibilities to better align with the needs of the NEPA Assignment program. After interviewing the various Districts, they indicated that ENV is available to assist the Districts when they need help.

The SAB fosters regular and productive communication with District staff. Based on reviews of project documentation, the SAB staff prepares and transmits a summary of their results, both positive and negative, and follows up via telephone with the District Environmental Coordinator responsible for the project. They provided this feedback within 2 weeks of their review, which results in early awareness of issues and corrective action, where necessary; as well as positive feedback when the project files appear to be in order. The creation of the pilot "Risk Assessment" tool (a "smart pdf form") for environmental documents is a successful, but optional procedure. When used, it helps Districts understand the resources to be considered, what resources should receive further analysis and documents District decisions. Even though this tool is not currently integrated within ECOS, it can be uploaded when used. The TxDOT noted that it had recently developed a Quality Assurance/Quality Control (QA/QC) Procedures for Environmental Documents Handbook (March 2015), and it is used by the Core Team to develop EA and EIS documents. Through its response to pre-audit questions and through interviews with various staff, TxDOT has demonstrated that it has provided a good base of tools, guidance, and procedures to assist in meeting the terms of the MOU and takes pride in exercising its assumed responsibilities.

The team considers three observations as sufficiently important to urge TxDOT to consider improvements or corrective actions to project management in their NEPA Assignment Program.

#### Observation #1

The CE review completed in August resulted in expectations to implement important updates to ECOS. The team found, however, that TxDOT has been slow to implement updates to ECOS. These improvements would ensure that TxDOT's project records are complete and correct, utilizing the appropriate terms as cited in the MOU, law, regulation, or executive order. The team's ECOS related observations for improvement come from information provided by TxDOT and through interviews. Beginning with the monitoring review of CE projects completed in August 2014 the team identified the many accomplishments

made by TxDOT to ensure ECOS meets the needs of users of this information. However, we also noted areas where necessary ECOS improvement had not yet happened. The team was told that due to outsourcing of many of TxDOT's IT services, the State was unable to complete improvements, due to other perceived priorities in the Department. The TxDOT interviewees indicated that a contract will soon be executed to accomplish needed changes, based on the CE monitoring report. Given the importance of ECOS as TxDOT's official file of record (for projects under implementation of the MOU) for the NEPA Assignment Program, and since obtaining IT contracting resources appears to be a challenge, the team urges TxDOT leadership to support timely and necessary updates to the ECOS system. The team recommends that the statement of work for the IT contract be sufficiently broad to implement all the required and necessary changes identified in both reviews.

#### *Observation #2*

The team would like to draw the attention of TxDOT to issues and concerns arising from interaction with resource and regulatory agencies, especially in ways for TxDOT to address possible disputes and conflicts early and effectively. During interviews with both the TxDOT staff and resource agency staff, the team learned that there have been no conflicts between TxDOT and agencies. Despite no reported conflicts, agency staff reported issues of concern that they believed TxDOT was not addressing. Examples include: being kept in the loop on the decisions made by TxDOT, occasional quality concerns for information provided by TxDOT, and occasionally feeling rushed to review and process TxDOT projects. The team recognizes that good communication is a shared responsibility among the parties and suggests TxDOT consider ways to recognize and address disputes, issues, and concerns before they become conflicts.

#### *Observation #3*

The team found indications from interviews that local public agency (LPA) projects do not receive the same scrutiny as TxDOT projects, despite TxDOT's project development and review process applying uniformly to all highway projects. Several District staff confirmed that LPA projects were reviewed no differently from TxDOT projects; others did not, which means TxDOT may need to consider ways to ensure its procedures are consistently

applied, regardless of project sponsor. The team found the approach to developing and providing training for LPA sponsored projects to be a lower priority than for TxDOT projects.

#### **Documentation and Records Management**

The team relied completely on information in ECOS, TxDOT's official file of record, to evaluate project documentation and records management. The ECOS is a tool for information recordation, management, and curation, as well as for disclosure within TxDOT District Offices and between Districts and ENV. The strength of ECOS is its potential for adaptability and flexibility. The challenge for TxDOT is to maintain and update the ECOS operating protocols (for consistency of use and document/data location) and to educate its users on updates in a timely manner.

Based on examination of the 76 files reviewed, the team identified 4 general observations (#4, #5, #6, and #7) about TxDOT record keeping and documentation that could be improved or clarified. The team used a documentation checklist to verify and review the files of the 76 sampled projects.

#### *Observation #4*

The team was unable to confirm in 11 of the projects where environmental commitments may have needed to be recorded in an Environmental Permits Issues and Commitments (EPIC) plan sheet, that the commitments were addressed. All environmental commitments need to be recorded and incorporated in the project development process so they are documented and implemented when necessary. If required environmental commitments are not recorded in an EPIC, those commitments would not be implemented. The TxDOT should evaluate whether its procedures to ensure that environmental commitments are both recorded and implemented is appropriate.

#### *Observation #5*

The team found 7 of the 57 CE projects reviewed to lack sufficient project description detail to demonstrate that the category of CE action and any related conditions or constraints were met, in order to make a CE approval. The team performing the CE monitoring review completed in August 2014 made a similar observation where TxDOT indicated it would take corrective action. The particular project files included actions that could not be determined to be limited to the existing

operational right-of-way (CE c22), or an action that utilizes less than \$5 million of Federal funds (CE c23) or an action that met six environmental impact constraints before it could be applied (CEs c26, c27, c28). The documented compliance with environmental requirements prepared by TxDOT needs to support the CE action proposed and that any conditions or constraints have been met. The TxDOT should evaluate whether changes in ECOS and/or their procedures are necessary to ensure that project descriptions are recorded in sufficient detail to verify the appropriate CE action was approved.

#### *Observation #6*

The team at times encountered difficulty finding information and found outdated terms in project files. Several project files included CE labels that are no longer valid (blanket categorical exclusion, BCE), but approvals for those project identified the appropriate CE action. Other files indicated that certain coordination had been completed, but the details of the letters or approvals themselves could not be located. In reviewing project records, the team occasionally encountered difficulty finding uploaded files because information occurred in different tabs within ECOS. Another source of confusion for the team was inconsistency in file naming (or an absence of a file naming convention) for uploaded files. Because of these difficulties the team could not determine whether a project file was incomplete or not. The audit team urges TxDOT to seek ways to establish procedures and organize ECOS to promote project records where information may be identified and assessed more easily.

#### *Observation #7*

The team notes that most ECOS project records are for CEs, which may be difficult to disclose to the public. Based on interviews with TxDOT staff the team wondered how TxDOT would disseminate information, such as technical reports, from ECOS as part of Public Involvement procedures. The ENV management has since explained that information will be provided upon request or at public meetings/hearings for a project.

#### **Quality Assurance/Quality Control**

The team considers the QA/QC program to be generally in compliance with the provisions of TxDOT's QA/QC Plan. However, TxDOT has yet to apply the SAB program-level review for EA and EIS projects and the lack of data from these types of projects means the

team at this time cannot fully evaluate the effectiveness of the program for these types of projects. The team learned that TxDOT's SAB is still developing standards and training for implementation.

The team recognized four areas of successful practices in TxDOT's approach to QA/QC. First, TxDOT's use of a Core Team and its development and usage of QA/QC checklists and toolkits are effective and appear to result in a more standardized internal review process. The TxDOT QA/QC Plan states that a Core Team, composed of a District Environmental Coordinator and one individual from ENV, will be formed for every EA and EIS project. The QA/QC Plan states that Toolkits, Administrative Completeness Reviews and Determinations, Review for Readiness, and Certification forms will be utilized to ensure quality documents and compliance with NEPA laws and regulations.

Second, the team learned through interviews that TxDOT's SAB review process has resulted in very timely and helpful feedback to District staff. The team was told that feedback from SAB team reviews is generally communicated within 2 weeks of the NEPA documentation completion date. District staff said that they appreciate the feedback that helps to ensure they are following procedures and guidelines. The TxDOT also established a "Corrective Action Team" (CAT) that aids in the SAB team's effectiveness. The CAT is responsible for determining if findings from SAB reviews are systematic or confined to a certain area or individual. The CAT is in place to ensure issues found by SAB review are resolved.

Third, the team was told that some District staff developed their own QA/QC tools and processes for CE projects (*i.e.* smart PDF forms, peer reviews, and a two signature approval process) that have led to fewer errors.

Fourth, TxDOT's SAB and CAT recently implemented peer reviews for forms, guidance, and handbooks that should lead to the reduction of improper documentation and need for revisions. The SAB and CAT team work together with ENV subject matter experts to update forms, guidance, and handbooks in three locations (ENV internal server, internal ENV Web page, and external TxDOT Web site). The ENV has strongly encouraged the Districts to go to the appropriate location before starting a new document to ensure they are using the most up to date version of all forms. The end result of the form peer review process should result in

fewer errors and more consistency in NEPA documentation.

The team considers three observations as sufficiently important to urge TxDOT to consider improvements or corrective actions to their approach to QA/QC.

#### *Observation #8*

The team learned through interviews that no EA or EIS projects had been reviewed by the SAB and there was no agreed upon timeline for the completion of SAB guidelines or standards. This is due to the standards for SAB reviews of EA and EIS documents not yet being established, and to the fact only four FONSI's were made on EAs at the time of the team's ECOS project file review. The team acknowledges that TxDOT conducts QA/QC for EA and EIS projects and urges TxDOT to complete and apply their SAB approach in a timely manner.

#### *Observation #9*

The team learned through interviews that there is no established project sampling methodology for self-assessing TxDOT's effectiveness of their standards and guidance. While TxDOT employs sampling, the team could not find information that described how TxDOT assessed that they evaluated a sufficient number of projects. Through our interviews with SAB staff the team learned that there have been several approaches to conducting reviews of the CEs completed since the NEPA Assignment Program. Before the NEPA Assignment Program began, the SAB team reviewed 100 percent of CE files. Then between December 2014, and February 2015, SAB reviews were a grab sample of 11 files each week. Eight were partial project reviews that focused on certain project types. The remaining three reviews were of complete project files for new CE categories (c22 and c23's). Since February 2015, the SAB team has reviewed only the CE Documentation Form in project files. The team was unable to determine whether TxDOT staff had a basis to assert that its process was working as intended and that they could adequately identify areas needing improvement. The TxDOT needs to better assess the effectiveness of its QA/QC approach (a performance measure that it must report on) by clarifying its review approach, recording justifications for decisions TxDOT makes on how often project records are evaluated, and what specifically is reviewed.

#### *Observation #10*

The team learned that TxDOT District staff does not have a clear and consistent understanding of what

distinguishes "quality assurance" and "quality control" and "self-assessment" with regards to expectations for reviews necessary to reach a NEPA decision versus feedback once a decision was made. From interviews with District and ENV staff, the team found staff was unclear about the role and responsibility of the SAB and the CAT. Several District managers said that they had not seen the QA/QC feedback on projects in their District and were not sure if their staff had received comments from the SAB or the CAT. The TxDOT should evaluate whether they need to clarify expectations for receiving review comments before and after NEPA decisionmaking to District staff.

#### **Legal Sufficiency Review**

During this audit period FHWA attorneys delivered a legal sufficiency training for the benefit of the TxDOT attorneys. The team did not perform analyses of this topic area during this audit. However, the team noted that TxDOT developed a set of Standard Operating Procedures for Legal Sufficiency Review. The process is also described in ENV's Project Delivery Manual, an internal document of processes and procedures used by project delivery staff. The TxDOT's Office of General Counsel tracks legal review requests and their status by keeping a log.

According to TxDOT's project delivery manual, four attorneys are available for legal reviews. Additional legal assistance may be requested by TxDOT to the Transportation Division of the Office of the Texas Attorney General. These attorneys would, as part of their review responsibilities, provide written comments and suggestions (when necessary) to TxDOT ENV to help ensure a document's legal sufficiency. They would also be available to discuss questions or issues. Once the reviewing attorney is satisfied that staff has addressed his or her comments/suggestions to the maximum extent reasonably practicable, the reviewing attorney will provide TxDOT ENV with written documentation that the legal sufficiency review is complete.

The TxDOT ENV has indicated it will not finalize a Final EIS, individual Section 4(f) evaluation, Notice of Intent, or 139(l) Notice before receiving written documentation that the legal sufficiency review is complete. The team was informed that, at the discretion of TxDOT ENV, EAs may be reviewed for legal sufficiency. If additional reviews are needed, the type and scope of an additional review would be determined by TxDOT ENV on a case-by-case basis.

## Performance Measurement

The purpose of performance measures is explained in the MOU (Part 10). Four performance measures were mutually agreed upon by FHWA and TxDOT so that FHWA can take them into account in its evaluation of TxDOT's administration of the responsibilities it has assumed under the MOU. These measures provide an overall indication of TxDOT's discharge of its MOU responsibilities. In collecting data related to the reporting on the performance measures, TxDOT monitors its overall progress in meeting the targets of those measures and includes this data in self-assessments provided under the MOU (Part 8.2.5). The four performance measures are: (1) Compliance with NEPA and other Federal environmental statutes and regulations, (2) quality control and assurance for NEPA decisions, (3) relationships with agencies and the general public, and (4) increased efficiency and timeliness in completion of the NEPA process.

The TxDOT is gathering performance baseline data and testing data collection techniques designed to inform the performance measure metrics that will be reported. The TxDOT intends, according to information provided in their response to pre-audit information questions, to begin reporting on performance measures with the submittal of the next self-assessment summary report. This report is expected in September 2015.

Developing baseline measures is an important part of establishing a performance measure program. The team learned in interviews that TxDOT's QA/QC process includes procedures to ensure that each performance measure has begun with the careful vetting (by following up with individuals in Districts) of data used to develop the baseline measures for performance timeliness. This process should contribute to the validity of the measures. The TxDOT staff explained in interviews that the primary sources of information for overall performance measure baselines are District records and ECOS records.

The TxDOT staff stated that they are considering a variety of performance measurements in addition to measures identified in their response to the pre-audit information request. The audit team recognizes that developing meaningful measures for this program is difficult. However, the audit team encourages TxDOT staff to continue to explore innovative ways to measure performance. (For example, one interviewee described statistical and

visual methods to report the performance measure of timeliness this way: "We will calculate all the statistical numbers. We will look at median and look at cluster around the median. It will likely result in a visual analysis of the data (box plot with outliers, measures of central tendency).")

### Observation #11

The TxDOT reports in their response to the pre-audit information request that the QA/QC measure for NEPA decisions focuses only on EA and EIS projects, but not decisions related to CEs and other specific NEPA-related issues. Many decisions are tied to NEPA including important ones such as decisions on Section 4f (identification of properties, consideration of use, consideration of prudent and feasible avoidance alternatives) and re-evaluations (whether the outcome was adequately supported and is still valid). In applying this performance measure, the team urges TxDOT consider evaluating a broader range of decisions.

### Observation #12

The team recognizes that TxDOT is still in the very early stages of applying its performance measures. Based on information gained in the pre-audit request and through interviews, more information on performance measures and their verification may need to be presented before the utility of such measures can be evaluated for audit purposes. The performance measure for compliance with NEPA and other Federal requirements for EA and EIS projects have yet to be fully defined. The performance measurement plan indicated that TxDOT would conduct agency polls to determine the measure for relationships with agencies and the general public, but little detail was provided as to what polls would be conducted and verified. The team also was concerned that the measure for the TxDOT relationship with the public may be too limited by focusing on the number of complaints. Such "negative confirmation" monitoring tends to be used when the underlying system or process under evaluation is known to have low levels of errors or problems. Given that NEPA assumption is new to TxDOT, such practice does not appear to be appropriate for gauging effectiveness at this time.

## Training Program

The team reviewed TxDOT's initial training plan provided in the response to the pre-audit information request and evaluated its contents and adequacy through interviews of ENV and District

staff. Based on information gained, TxDOT staff should consider the following issues and questions in preparing the annual update of their training plan, as required in the MOU. The team found the training plan compliant.

The team recognizes two successful practices. First, FHWA recognizes that TxDOT's largest venue for training is its annual environmental conference. This annual gathering of Federal, State, and local agency employees as well as consultants, in a context of fellowship (400+ attendees), addresses a wide array of environmental topics that reinforce existing and new environmental policies and procedures. The presentations at the conference are usually no longer than 1 hour per topic, but on some occasions does provide more in depth training. The team encourages the continuation of the conference.

Second, the "NEPA Chat" is a monthly ENV-led web-based learning/exchange opportunity for TxDOT environmental employees statewide. It is a venue for them to receive updated news and announcements, exchange ideas and is a forum for routine communication among Districts and ENV. This informal training venue is versatile, flexible, and responsive to the need to communicate information that should improve the consistency of statewide NEPA Assignment practices.

The team considers four observations as sufficiently important to urge TxDOT to consider improvements or corrective actions to their approach to the training program. The FHWA recognizes that TxDOT's assumption of Federal environmental responsibilities and liabilities is new and involves tasks not previously performed or familiar to its staff. This is the reason why training is a component of a State's qualifications and readiness to assume FHWA's responsibilities and is addressed in a separate section in the MOU (Part 12).

### Observation #13

The team identified a concern about TxDOT's approach to training and its training plan. Information gained in interviews indicated that the initial TxDOT training plan relied heavily on a training model employed by the California Department of Transportation (Caltrans), because Caltrans is the only State that has assumed NEPA responsibilities for the entire highway program. The FHWA does not believe the Caltrans training model can replicate its current form to meet the needs of TxDOT, because TxDOT has fewer NEPA staff, State environmental laws that differ in scope, and a different



business “culture.” There are other States (Idaho, Michigan, North Dakota, Ohio, and Wyoming) that have established training plans that TxDOT could draw upon as examples. These examples may benefit TxDOT and TxDOT should consider evaluating components of these State’s training plans in their future annual updates of their own training plan.

#### Observation #14

The team found evidence that some aspects of training tasks were either unattended and/or appear to have been forgotten based on the training plan information provided to the team. The TxDOT has a section of their Web site devoted to training, that the team learned from interviews, is out of date. Some courses are no longer taught and several classes are in need of updating, all of which provided for training of non-TxDOT staff (*i.e.* local governments and consultants). The team urges TxDOT to assess whether the proposed training approach for non-TxDOT staff (relying heavily upon the annual environmental conference) is adequate and responsive enough to address a need to quickly disseminate newly developed procedures and policy.

#### Observation #15

The TxDOT training plan is currently silent on whether certain subjects and topics are mandatory or required for certain job responsibilities. The TxDOT staff told the team they would be developing a “progressive training plan” that will identify the range of training necessary for each job classification. District Environmental Coordinators, and particularly District managers who allocated training resources, indicated in interviews that they needed to know which training was required for various TxDOT job categories, to set budgeting priorities. The team recognized the important connection between getting District staff trained and a clear statement whether training was required for a certain job. Due to the connection potentially being tenuous, this may explain the inconsistency the team heard in interview responses to questions on training commitments from District managers. The team suggests that the progressive training plan clearly identify training required for each job classification.

#### Observation #16

From the perspective of the MOU, training planning and implementation is a partnership effort amongst TxDOT, FHWA, and other agencies. Training should be an ongoing task that follows

an up-to-date and mid-to-long range training plan. The current training plan includes mostly TxDOT self-identified training needs and addresses those needs. The MOU (Part 12.2) allows for 3 months after the MOU is executed, to develop a training plan in consultation with FHWA and other agencies. The TxDOT has committed in the MOU to consider the recommendations of agencies in determining training needs, and to determine with FHWA, the required training in the training plan MOU (Part 12.2). The TxDOT considered and will address the specific comments from the U.S. Army Corps of Engineers in the current training plan. However, the team learned through interviews that individuals responsible for training planning were unaware of the coordination between TxDOT subject matter experts and other agencies related to training. It may be useful for the TxDOT training coordinator to be fully involved and aware of the range of coordination other TxDOT staff performs so that the training plan benefits from this coordination.

#### Finalization of Report

The FHWA received no comments during the 30-day comment period for the draft audit report. The FHWA has finalized the draft Audit #1 report previously published in the **Federal Register** without substantive changes.

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**BILLING CODE 4910–22–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA–2015–0111]

#### Notice of Buy America Waiver

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Notice of Buy America waiver.

**SUMMARY:** This notice provides NHTSA’s finding with respect to a request to waive the requirements of Buy America from the North Carolina Governor’s Highway Safety Program (GHSP). NHTSA finds that a non-availability waiver of the Buy America requirement is appropriate for the purchase of a Nikon prismless total station using Federal highway traffic safety grant funds because there are no suitable products produced in the United States.

**DATES:** The effective date of this waiver is December 4, 2015. Written comments

regarding this notice may be submitted to NHTSA and must be received on or before: December 4, 2015.

**ADDRESSES:** Written comments may be submitted using any one of the following methods:

- **Mail:** Docket Management Facility, M–30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

- **Fax:** Written comments may be faxed to (202) 493–2251.

- **Internet:** To submit comments electronically, go to the Federal regulations Web site at <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- **Hand Delivery:** West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

**Instructions:** All comments submitted in relation to this waiver must include the agency name and docket number. Please note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. You may also call the Docket at 202–366–9324.

**FOR FURTHER INFORMATION CONTACT:** For program issues, contact Barbara Sauers, Office of Regional Operations and Program Delivery, NHTSA (phone: 202–366–0144). For legal issues, contact Andrew DiMarsico, Office of Chief Counsel, NHTSA (phone: 202–366–5263). You may send mail to these officials at the National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:** This notice provides NHTSA’s finding that a waiver of the Buy America requirement, 23 U.S.C. 313, is appropriate for North Carolina’s GHSP to purchase a Nikon Nivo 5M Plus and its accessories for \$8,995 using grant funds authorized under 23 U.S.C. 402. Section 402 funds are available for use by state highway safety programs that, among other things, reduce or prevent injuries and deaths resulting from speeding motor vehicles, driving while impaired by alcohol and or drugs, motorcycle accidents, school bus accidents, and unsafe driving behavior. 23 U.S.C. 402(a). Section 402 funds are also available to state programs that encourage the proper use of occupant protection devices and improve law enforcement services in motor vehicle accident prevention, traffic supervision, and post-accident procedures. *Id.*

Buy America provides that NHTSA “shall not obligate any funds authorized