

Assignment audit report with this **Federal Register** notice.

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA-2021-0019]

Surface Transportation Project Delivery Program; Alaska Department of Transportation Fourth Audit Report

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

ACTION: Notice; request for comment.

SUMMARY: The Moving Ahead for Progress in the 21st Century Act (MAP-21) established the Surface Transportation Project Delivery Program that allows a State to assume FHWA's environmental responsibilities for environmental review, consultation, and compliance under the National Environmental Policy Act (NEPA) for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of FHWA. This program mandates annual audits during each of the first 4 years of State participation to ensure compliance with program requirements. This notice announces and solicits comments on the fourth audit report for the Alaska Department of Transportation and Public Facilities (DOT&PF).

DATES: Comments must be received on or before December 5, 2022.

ADDRESSES: Mail or hand deliver comments to Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12-140, Washington, DC 20590. You may also submit comments electronically at www.regulations.gov. All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone can search the electronic form of all comments in any of our dockets by the name of the

individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). The DOT posts these comments, without edits, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

FOR FURTHER INFORMATION CONTACT: Mr. David T. Williams, Office of Project Development and Environmental Review, (202) 366-5074, David.Williams@dot.gov, or Mr. Patrick Smith, Office of the Chief Counsel, (202) 366-1345, Patrick.C.Smith@dot.gov; Federal Highway Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

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

Background

The Surface Transportation Project Delivery Program, codified at 23 U.S.C. 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities it has assumed, in lieu of FHWA. The Alaska DOT&PF published its application for NEPA assumption on May 1, 2016; and made it available for public comment for 30 days. After considering public comments, DOT&PF submitted its application to FHWA on July 12, 2016. The application served as the basis for developing a memorandum of understanding (MOU) that identified the responsibilities and obligations that DOT&PF would assume. The FHWA published a notice of the draft MOU in the **Federal Register** on August 25, 2017, 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 DOT&PF considered comments and proceeded to execute the MOU. Effective November 13, 2017, DOT&PF assumed FHWA's responsibilities under NEPA, and the responsibilities for NEPA-related 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. The FHWA must make the results of each audit available for public comment. The FHWA published a notice regarding the third audit report in the **Federal Register** on December 7, 2020, soliciting comments for 30 days pursuant to 23 U.S.C. 327(g). The FHWA received comments on the draft report from the American Road & Transportation Builders Association (ARTBA). The ARTBA's comments were supportive of the Surface Transportation Project Delivery Program and did not relate specifically to the audit. The team has considered these comments and is finalizing the audit report. This notice announces the availability of the fourth audit report to the DOT&PF and solicits public comment on the same.

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

Stephanie Pollack,

Deputy Administrator, Federal Highway Administration.

Surface Transportation Project Delivery Program, FHWA's Audit of the Alaska Department of Transportation

April 12-16, 2021

Executive Summary

This report summarizes the results of the Federal Highway Administration's (FHWA) fourth audit of the Alaska Department of Transportation and Public Facilities' (DOT&PF) assumption of FHWA's project-level National Environmental Policy Act (NEPA) responsibilities and obligations pursuant to a 23 U.S.C. 327 Memorandum of Understanding (MOU). The DOT&PF entered the NEPA Assignment Program after more than 8 years of experience making FHWA NEPA Categorical Exclusion (CE) determinations pursuant to 23 U.S.C. 326 (beginning September 22, 2009).

Alaska's MOU became effective on November 13, 2017; and was amended on August 20, 2020. Currently, FHWA's NEPA responsibilities in Alaska include the oversight and auditing of the DOT&PF's execution of the NEPA Assignment Program and certain activities excluded from the MOU, such as the NEPA reviews of projects advanced by direct recipients other than the DOT&PF.

The FHWA audit team began to prepare for the site visit in November 2020. The audit team reviewed DOT&PF's NEPA project files, DOT&PF's response to FHWA's pre-

audit information request (PAIR), and DOT&PF's Self-Assessment Report. On April 12–16, 2021, the audit team conducted a virtual site visit for the second year due to COVID–19 pandemic safety concerns, rather than on-site visits as had been used for the first two audits.

The audit team appreciates DOT&PF's responsiveness to the questions regarding the status of general observations from the third audit. This report concludes with a status update for FHWA's observations from the third audit report.

The audit team finds DOT&PF in substantial compliance with the terms of the MOU in meeting the responsibilities it has assumed. This report does not identify any non-compliance observations; it does identify four general observations and three successful practices.

Background

The NEPA Assignment Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for highway projects. This program is codified at 23 U.S.C. 327. When a State assumes these Federal responsibilities for NEPA project decisionmaking, the State becomes solely responsible and solely liable for carrying out these obligations in lieu of and without further NEPA-related approval by FHWA.

The FHWA assigned responsibility for making project NEPA approvals and other related environmental decisions for highway projects to DOT&PF. The MOU documents these responsibilities. Examples of responsibilities DOT&PF has assumed, in addition to NEPA, include Section 7 consultation under the Endangered Species Act and consultation under Section 106 of the National Historic Preservation Act.

This is the last of the four required annual audits pursuant to 23 U.S.C. 327(g) and Part 11 of the MOU. The FHWA uses audits as the primary mechanism to oversee DOT&PF's compliance with the MOU and the NEPA Assignment Program requirements. This includes ensuring compliance with applicable Federal laws and policies, evaluating DOT&PF's progress toward achieving the performance measures identified in Section 10.2 of the MOU, and collecting information needed for DOT Secretary's annual report to Congress. The FHWA must present its audit results in a report and make it available for public comment in the **Federal Register**.

The audit team included NEPA subject matter experts from FHWA

Alaska Division Office, the Headquarters Office of Project Development and Environmental Review, the Resource Center, Western Legal Services Division, Office of Stewardship, Oversight and Management, and the DOT Volpe Center.

Scope and Methodology

The audit team examined a sample of DOT&PF's NEPA project files, DOT&PF responses to the PAIR, and DOT&PF's Self-Assessment Report. The audit team also conducted interviews and reviewed DOT&PF policies, guidance, and manuals pertaining to NEPA responsibilities. All reviews focused on objectives related to the six NEPA Assignment Program elements contained in the MOU: Program Management, Documentation and Records Management, Quality Assurance/Quality Control (QA/QC), Training, Performance Measures, and Legal Sufficiency.

Project File Review: To consider DOT&PF staff adherence to program procedures and Federal requirements, the audit team selected a sample of 47 individual project files for which the environmental review had been completed. The audit team evaluated DOT&PF's compliance with assumed responsibilities and adherence to their own processes and procedures for project-level environmental decisionmaking. The audit team did not evaluate DOT&PF's project-specific decisions. The sampled files included CEs, Environmental Assessments (EA), and environmental reevaluations.

PAIR Review: The audit team reviewed DOT&PF's responses to the PAIR, which consisted of 28 questions about specific elements in the MOU that DOT&PF must implement. The audit team used these responses to develop specific follow-up questions for interviews with DOT&PF staff.

DOT&PF Self-Assessment Review: The audit team reviewed DOT&PF's December 2020 Self-Assessment Report and used it to develop specific follow-up questions for interviews with DOT&PF staff. The NEPA Assignment Program MOU Section 8.2.5, requires the DOT&PF to conduct annual self-assessments of its QA/QC procedures and performance.

Interviews: The audit team conducted interviews with 17 DOT&PF employees, including staff from each of DOT&PF's 3 regional offices and the Statewide Environmental Office (SEO). The audit team invited DOT&PF employees representing a diverse range of expertise, experience, and program

responsibility to participate in interviews.

In addition, the audit team conducted interviews of two attorneys with the Alaska Department of Law and interviews with individuals at the Bureau of Land Management (BLM), the United States Forest Service (USFS), and the State Historic Preservation Office (SHPO).

Policy/Guidance/Manual Review: Throughout the document reviews and interviews, the audit team verified information on DOT&PF's NEPA Assignment Program using DOT&PF policies, guidance, manuals, and reports. These included the Environmental Program Manual (EPM), the NEPA Assignment QA/QC Plan, the NEPA Assignment Program Training Plan, and the NEPA Assignment Self-Assessment Report.

Overall Audit Opinion

This report identifies four observations and three successful practices. The audit team finds DOT&PF is substantially in compliance with the provisions of the MOU, has carried out the environmental responsibilities it assumed through the NEPA Assignment Program, and has taken steps to address observations identified in the third audit.

Non-Compliance Observations

The audit team did not make any non-compliance observations in the fourth audit.

Observations and Successful Practices

This section summarizes the audit team's observations of DOT&PF's NEPA Assignment Program implementation and DOT&PF's successful practices. "Observations" are items the audit team would like to draw DOT&PF's attention to, which may benefit from revisions to improve processes, procedures, or outcomes, if such steps have not already been taken. "Successful practices" are those that FHWA would like to commend DOT&PF on developing. These may include ideas or concepts that DOT&PF has planned, but not yet implemented. Successful practices and observations are described under the six MOU topic areas: Program Management, Documentation and Records Management, QA/QC, Training, Performance Measures, and Legal Sufficiency.

This audit report provides an opportunity for DOT&PF to take further actions to improve their program. The FHWA will consider the status of areas identified for potential improvement in this audit's observations as part of the scope of future monitoring events.

DOT&PF will continue to be able to describe program improvements in their annual Self-Assessment reports.

Program Management

Program Management includes the overall administration of the NEPA Assignment Program. The audit team noted the following successful practices and observations related to Program Management.

Successful Practice #1: Business Program Management (BPM) System

Interviewees overwhelmingly responded positively to questions regarding the development and implementation of the BPM system. They acknowledged the efforts by the developers and SEO to include the following: virtual training sessions and demonstrations, creation of a user's manual, PowerPoint handouts, and beta testing with Regional Environmental Managers to work through "bugs" in the system.

Observation #1: Permitting Dashboard Reporting Procedures

Section 5.1.1 of the MOU subjects DOT&PF to the same procedural requirements and substantive requirements that apply to the DOT Secretary including, but not limited to Federal statutes or FHWA policy. Per 23 U.S.C. 139 and Memorandum from Deputy Assistant Secretary for Transportation Policy, *Federal Permitting Dashboard Reporting Standard*, December 28, 2018, EA and Environmental Impact Statement (EIS) project information is required to be entered in the Federal Infrastructure Permitting Dashboard. The Permitting Dashboard Reporting Standards require EIS's and EA's permitting timetables to be entered in the dashboard: (1) within 90 days after the issuance of a Notice of Intent for an EIS, or (2) the class of action determination for an EA initiated after June 2016. Based on interviews, only one project has been entered into the Permitting Dashboard, which FHWA verified. Based on DOT&PF records, three projects should have been entered into the Dashboard. The FHWA understands that DOT&PF does not have written procedures regarding how to carry out these responsibilities. Written procedures would provide opportunities for consistent, timely, and compliant reporting of the projects required to be in the dashboard.

Documentation and Records Management

Documentation and Records Management includes maintaining project files and other recordkeeping

(whether hardcopy or electronic) pertaining to the DOT&PF's discharge of the responsibilities it has assumed under the 23 U.S.C. 327 Program. From November 1, 2019, through October 31, 2020, the DOT&PF made 228 project decisions. Through employing both random and judgmental sampling procedures, the audit team identified 47 project decisions to review.

Successful Practice #2: Tracking

Interviews with Section 106 Professionally Qualified Individuals (PQI) revealed the use of an Excel database in at least one DOT&PF region to track and manage Section 106 information for projects. Tracking information on consultation letters, determinations of eligibility, effect findings, SHPO concurrence, etc. allows the PQI to stay on top of required tasks and ensure work is completed. Once Section 106 consultation is completed, the PQI enters this data into the SEO Access database tracking system that is used for the Section 106 Programmatic Agreement monitoring and annual reporting.

Observation #2: Documentation of Public and Agency Comments in CE

In 6 of 21 (28 percent) CE project files reviewed, there was inadequate documentation of public and/or agency comments and resolution of the comments. This is not in accordance with Chapter 4 of the DOT&PF Highway Preconstruction Manual, which requires that CE Forms "list the issues raised by the public and agencies and the manner in which they were resolved." In addition, this observation appears to be inconsistent with data reported in Section 9.2.2. (*Maintain completeness and adequacy of documentation of SEO records for projects done under the program*) of DOT&PF's 2020–2021 Self-Assessment Report.

Interview responses to questions about public involvement requirements for CEs were varied. Some interviewees responded that they follow the guidance in the Environmental Procedures Manual. Several interviewees spoke to responding directly to commenters via emails or letters and the potential for controversy to affect the class of action decision. However, none specifically mentioned the need to document comments and/or controversy and DOT&PF's responses to them on the CE forms. The FHWA recommends that DOT&PF incorporate procedures for documenting public involvement for CEs when appropriate into the EPM.

Quality Assurance/Quality Control

Under Section 8.2.4 of the MOU, DOT&PF agreed to carry out regular QA/QC activities in accordance with the MOU and DOT&PF procedures established to implement the NEPA Assignment Program. Based on the information evaluated by the audit team, DOT&PF continues to carry out regular QA/QC activities in accordance with the MOU. The FHWA believes the BPM system provides more opportunity to augment data collection and reporting for continued program improvement.

Observation #3: The State's Commitment of Adequate Resources and QA/QC Performance

Sections 4.2.1 and 4.2.2 of the MOU outline the requirements for the State's commitment of adequate resources to carry out NEPA Assignment successfully. Moderate to high staff turnover has been a recurring issue. This has been documented in Audit #1 report Observation #3 and Audit #2 report Observation #3. In the January 2020 Self-Assessment Report, DOT&PF acknowledged the issue and indicated that they will continue to track staffing impacts on the program through the QA/QC process. During Audit #4, FHWA documented comments from multiple DOT&PF staff in some of the regions concerning workload, staffing, and turnover issues affecting QA/QC processes and observed a downward trend in QA/QC performance (*i.e.*, more errors and omissions in NEPA approvals relative to the previous audit performance period). In addition, interviews with SHPO suggested some of the Section 106 challenges, such as incomplete applications during Section 106 consultations, may be due to workload issues at DOT&PF. Despite these observations, FHWA found that DOT&PF's implementation of the 327 Program was in substantial compliance with the MOU. The FHWA encourages DOT&PF to continue to assess how workload, staffing, and turnover issues might affect the level of compliance with the 327 MOU, organizational performance for carrying out NEPA Assignment and overall program delivery, and consider using tools like the BPM system, resource sharing, increased use of consultants, and other approaches to help address workload and staffing issues raised by some regions as well as the QA/QC performance issues indicated in the most recent self-assessment and observed by the audit team.

Training

Under Sections 12.1 and 12.2 of the MOU, the DOT&PF committed to implementing training necessary to carry out the environmental responsibilities assumed under the NEPA Assignment Program. The DOT&PF also committed to assessing its need for training, developing a training plan, and updating the training plan on an annual basis.

Observation #4: Training Needs Assessment

Considering ongoing staff turnover, as discussed in Observation #2, FHWA encourages DOT&PF to conduct a detailed statewide training needs assessment of all environmental staff. This will help DOT&PF allocate resources more efficiently to identify skill and knowledge gaps. The FHWA also encourages DOT&PF to explore cross training opportunities with other agencies (e.g.: SHPO, BLM, USFS) and engage them in development of their annual training plan.

Performance Measures

The FHWA and DOT&PF mutually established a set of performance measures to evaluate DOT&PF's performance in assuming NEPA Assignment Program responsibilities. The DOT&PF continues to collect, maintain, and develop data towards monitoring its performance as required by Section 10.1.3 of the MOU. The audit team noted the following observation related to Performance Measures.

Successful Practice #3: Relationships With Agencies

The audit team found that DOT&PF has very good and positive relationships with BLM, USFS, and SHPO. The FHWA has interviewed resource agencies in previous audits and found that overall, they had good working relationships with DOT&PF. The audit team decided to interview staff from BLM and the USFS during Audit #4 since Federal Land Management Agencies had not been interviewed in past audits and they were included in DOT&PF's May 2020 agency poll. The team also chose to interview SHPO since they had not been interviewed since Audit #1. The individuals interviewed from these three agencies indicated that overall, their working relationships with DOT&PF were very good and positive. This information correlates well with the overwhelmingly positive responses DOT&PF received to their agency poll.

Legal Sufficiency

Since 2017, the same attorney from the Alaska Attorney General's Office, Transportation Section, has been assigned to the NEPA Assignment Program. The assigned attorney has significant experience with Federal-aid highway projects and the Federal environmental process. The attorney works directly with DOT&PF staff on project environmental documents. Based on the interviews, the attorney becomes involved early in project development, normally reviewing a NEPA document before receiving a formal request for a legal sufficiency review. During the audit period, the attorney did not review an environmental impact statement or a Section 4(f) evaluation requiring a legal sufficiency review. Although a legal sufficiency review is not required for EAs, the attorney reviewed two EAs during the audit period. The review process for an EA is like the review process for an EIS.

Department of Law Management stated during the interviews that while one attorney is currently assigned to the program, should workload increase significantly another attorney could be assigned to NEPA work or litigation, likely through the utilization of outside counsel per 23 U.S.C. 327(a)(2)(G).

The audit team finds that DOT&PF meets the legal sufficiency determination and staffing requirements set forth in the DOT&PF Environmental Procedures Manual.

Status of Observations From Audit #3 Report (April 2020)

This section describes the actions DOT&PF has taken in response to observations made during the third audit.

Observation #1: Self-Assessment Procedures

The DOT&PF's 2018 NEPA Assignment Program Self-Assessment Procedures require that SEO develop the preliminary and final Self-Assessment report through coordination with, and input from, the Regional Environmental Managers (REMs). During Audit #3 interviews, the audit team found that DOT&PF did not develop the January 2020 Self-Assessment report in accordance with their procedures, nor distribute the final report to the regions. For Audit #4, DOT&PF indicated in their responses to the PAIR that the draft December 2020 Self-assessment was sent to the REMs for review and comment according to their procedures. Comments were received and addressed in the final Self-Assessment report, which was then shared with the regions.

Observation #2: Assessing Resource Agency Communication

Section 10.2.1 C. of the MOU requires DOT&PF to "Assess change in communication among DOT&PF, Federal and State agencies, and the public resulting from assumption of responsibilities under this MOU". The MOU allows DOT&PF to determine the method it will use to assess this change. The DOT&PF selected to use an annual resource agency poll. The DOT&PF identified this measure in its *DOT&PF NEPA Assignment Program Performance Measures* document located on its website. At the time of Audit #3, DOT&PF had not yet used a resource agency poll, and FHWA recommended that DOT&PF consider changing the method for reporting this measure.

In May 2020 (prior to Audit #4), DOT&PF conducted an agency survey to assess changes in communication among DOT&PF, State, and Federal resource agencies. As described in DOT&PF's Self-Assessment Report, the survey consisted of six questions distributed via an online platform to a representative cross section of State and Federal resource Agency staff. Twenty-four responses were received from 11 different resource agencies. The DOT&PF asked the question: "Has the level of communication improved, declined, or remained the same since the MOU became effective?" Eleven of the responses indicated that there had been an improvement in communication and the remaining responses indicated there had been no change.

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: El Paso County, Texas

AGENCY: Texas Department of Transportation (TxDOT), Federal Highway Administration (FHWA), Department of Transportation.

ACTION: Federal notice of intent to prepare an Environmental Impact Statement (EIS).

SUMMARY: FHWA, on behalf of TxDOT, is issuing this notice to advise the public that an EIS will be prepared for a proposed transportation project to study the effects of the project on Interstate Highway 10 (I-10), known as the Downtown 10 project. The limits of the proposed project are from Executive