

direction and guidance as implementation proceeds. The FAA intends to follow up with regulatory amendments to formalize the exception for limited recreational unmanned aircraft operations.

The guidance provided in this notice is not legally binding in its own right and will not be relied upon by the Department or the FAA as a separate basis for affirmative enforcement action or other administrative penalty. Regardless of whether you rely on the guidance in this document, you are independently required to comply with all existing laws applicable to the operation of unmanned aircraft systems. Conforming your actions with the guidance in this notice does not excuse or mitigate noncompliance with other applicable legal requirements.

Nevertheless, if your operation fails to satisfy the eight statutory conditions, as described in this notice, or if you are not operating under part 107 or other FAA authority, your operation may violate other FAA regulations and subject you to enforcement action. Additionally, if you operate your recreational unmanned aircraft carelessly or recklessly, the FAA may exercise existing authority to take enforcement action against you for endangering the national airspace system.

Please continue to check [faa.gov/uas](http://faa.gov/uas) on a regular basis for the most current direction and guidance.

Issued in Washington, DC, on May 8, 2019.

**Robert C. Carty,**

*Deputy Executive Director, Flight Standards Service.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

[FHWA Docket No. FHWA-2018-0044]

#### Surface Transportation Project Delivery Program; TxDOT Audit #5 Report

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

**ACTION:** Notice.

**SUMMARY:** The Surface Transportation Project Delivery 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 responsible and liable for carrying out the responsibilities it has assumed, in lieu of FHWA. Prior to

the Fixing America's Surface Transportation (FAST) Act of 2015, the Program required semiannual audits during each of the first 2 years of State participation to ensure compliance by each State participating in the Program. This notice finalizes the findings of the fifth and last audit report for the Texas Department of Transportation's (TxDOT) participation in accordance to these pre-FAST Act requirements.

**FOR FURTHER INFORMATION CONTACT:** Dr. Owen Lindauer, Office of Project Development and Environmental Review, (202) 366-2655, [owen.lindauer@dot.gov](mailto:owen.lindauer@dot.gov), or Mr. David Sett, Office of the Chief Counsel, (404) 562-3676, [david.sett@dot.gov](mailto:david.sett@dot.gov), Federal Highway Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

#### SUPPLEMENTARY INFORMATION:

##### Electronic Access

An electronic copy of this notice may be downloaded from the specific docket page at [www.regulations.gov](http://www.regulations.gov).

##### Background

The Surface Transportation Project Delivery Program (or NEPA Assignment Program) 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. Since December 16, 2014, TxDOT has assumed FHWA's responsibilities under NEPA and the responsibilities for reviews under other Federal environmental requirements under this authority.

Prior to December 4, 2015, 23 U.S.C. 327(g) required the Secretary to conduct semiannual audits during each of the first 2 years of State participation, annual audits during years 3 and 4, and monitoring each subsequent year of State participation to ensure compliance by each State participating in the Program. The results of each audit were required to be presented in the form of an audit report and be made available for public comment. On December 4, 2015, the President signed into law the FAST Act, Public Law 114-94, 129 Stat. 1312 (2015). Section 1308 of the FAST Act amended the audit provisions by limiting the number of audits to one audit each year during the first 4 years of a State's participation. A draft version of this report was published in the **Federal Register** on December 14, 2017, at 82 FR 59206 and was available for

public review and comment. The FHWA received one response during the 30-day public notice and comment period. The American Road and Transportation Builders Association voiced support of this program. This notice finalizes the findings of the fifth and final audit report for the TxDOT participation in the Surface Transportation Project Delivery Program.

**Authority:** Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59; Public Law 114-94; 23 U.S.C. 327; 49 CFR 1.85.

Issued on: May 9, 2019.

**Nicole R. Nason,**

*Administrator, Federal Highway Administration.*

#### Surface Transportation Project Delivery Program, FHWA Audit #5 of the Texas Department of Transportation, August 1, 2017, to August 1, 2018

##### Executive Summary

This is a report of Federal Highway Administration's (FHWA) fifth audit (Audit #5) of the Texas Department of Transportation (TxDOT) responsibilities assigned under a memorandum of understanding (MOU) effective December 16, 2014. From that date, TxDOT assumed FHWA's National Environmental Policy Act (NEPA) responsibilities assigned for the environmental review and compliance and for other environmental review laws and requirements for highway projects in Texas (NEPA Assignment Program). This report concludes with a status update for FHWA's observations from the fourth audit review (Audit #4).

The FHWA Audit #5 team (team) was formed in October 2017 and met regularly to prepare for the on-site portion of the audit. Prior to the on-site visit, the team: (1) performed reviews of project files in TxDOT's Environmental Compliance Oversight System (ECOS), (2) examined TxDOT's responses to FHWA's pre-audit information requests (PAIR), and (3) developed interview questions. The on-site portion of this audit, comprised of TxDOT interviews, was conducted on May 21-25, 2018.

The TxDOT continues to develop, revise, and implement procedures and processes required to carry out the NEPA Assignment Program. Overall, the team found continued evidence that TxDOT is committed to establishing a successful program. This report summarizes the team's assessment of the status of several aspects of the NEPA Assignment Program, including a variety of successful practices and five observations that represent opportunities for TxDOT to improve its program. The team identified two

categories of non-compliance observations that TxDOT will need to address as corrective actions.

The TxDOT has continued to make progress toward meeting the responsibilities it has assumed in accordance with the MOU. The team finds TxDOT to be in substantial compliance with the terms of the MOU, and FHWA looks forward to working with TxDOT to renew the MOU.

### Background

The Surface Transportation Project Delivery 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 liable for carrying out these obligations in lieu of and without further NEPA related approval by FHWA.

The State of Texas was assigned the responsibility for making project NEPA approvals and the responsibility for making other related environmental decisions for highway projects on December 16, 2014.

The FHWA responsibilities assigned to TxDOT are specified in the MOU. These responsibilities include compliance with the Endangered Species Act (ESA) Section 7 consultations with the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service and Section 106 consultations with the Texas Historical Commission regarding impacts to historic properties. Some responsibilities may not be assigned and remain with FHWA. They include: responsibility for project-level conformity determinations under the Clean Air Act and responsibility for Government-to-Government consultation with federally recognized Indian Tribes.

These audits are part of FHWA's oversight responsibility for the NEPA Assignment Program. The reviews are to assess a State's compliance with the provisions of the MOU as well as all applicable Federal laws and policies. They also are used to evaluate a State's progress toward achieving its performance measures as specified in the MOU, to evaluate the success of the NEPA Assignment Program, and to inform the administration of the findings regarding the NEPA Assignment Program. In December 2015, statutory changes in Section 1308 of the Fixing America's Surface Transportation

(FAST) Act, reduced the frequency of these audit reviews to one audit per year during the first 4 years of State participation in the program. This audit is the last of the required audits.

### Scope and Methodology

The team for Audit #5 included NEPA subject-matter experts from FHWA's Texas, District of Columbia, Georgia, and Arizona Division Offices. In addition to the NEPA experts, the team included planners, engineers, and air quality specialists from the Texas Division Office. The diverse composition of the team, the process of developing the review report, and publishing it in the **Federal Register** help maintain an unbiased review and establish the audit as an official action taken by FHWA.

The scope and focus of this audit included reviewing the processes and procedures (*i.e.*, toolkits and handbooks) used by TxDOT to reach and document its independent project decisions. The team conducted a careful examination of highway project files in TxDOT's database called Environmental Compliance Oversight System (ECOS) and verified information on the TxDOT NEPA Assignment Program through inspection of other records and through interviews with TxDOT and other staff. The team gathered information that served as the basis for this audit from three primary sources: (1) TxDOT's response to a pre-Audit #5 information request (PAIR #5), (2) a review of a judgmental sample of project files in ECOS with approval dates after the execution of the MOU, and (3) interviews with TxDOT staff. In addition, TxDOT provided information in response to FHWA pre-audit questions and requests for documents and provided a written clarification to FHWA thereafter. That material covered the following six topics: program management, documentation and records management, quality assurance/quality control QA/QC, legal sufficiency review, performance measurement, and training.

This review also assessed the State's performance in carrying out the selected and identified procedures established for NEPA Assignment including compliance with transportation planning procedures in regard to funding eligibility requirements for placing TxDOT projects on the Statewide Transportation Improvement Program (STIP) and for Metropolitan Planning Organizations placing projects in the Metropolitan Transportation Plan (MTP)/Transportation Improvement Program (TIP) (MOU stipulation 3.3.1). Interviews with TxDOT's Finance

Division (Letting Management Office) and Transportation Planning and Programming Division personnel were included in Audit #5.

The intent of the review was to check that TxDOT overall has the procedures in place to implement the responsibilities assumed through the MOU, ensure that the staff is aware of those procedures, and that staff implements the procedures to achieve compliance with NEPA and other assigned responsibilities. The review did not evaluate project-specific decisions, as such decisions are the sole responsibility of TxDOT. The team focused on whether the procedures TxDOT followed complied with all Federal statutes, regulation, policy, procedure, process, guidance, and guidelines. In some cases, procedures within TxDOT cross multiple divisions (and 25 districts) and require close coordination amongst all parties internal to TxDOT to ensure compliance under the MOU.

The fifth audit: (1) evaluated whether TxDOT's NEPA process and procedures (both Federal and State) used for project decisionmaking and other actions comply with all the responsibilities it assumed in the MOU and (2) determined the status of observations in the Audit #4 report, as well as required corrective actions (see summary at end of this report). The NEPA approvals included categorical exclusion (CE) "d-list" approvals, findings of no significant impacts (FONSI), re-evaluations of environmental assessments (EA), Section 4(f) decisions, approvals of a draft environmental impact statement (DEIS), re-evaluations of EISs, and records of decision.

The team defined the timeframe for highway project environmental approvals subject to this fifth audit to be between February 1, 2017, to January 31, 2018. The population of project approvals selected for review derived from 12 TxDOT-certified lists of NEPA approvals reported monthly. The project file review effort was divided into approvals made during Round 1 (Feb 1, 2017—July 31, 2017) and Round 2 (Aug 1, 2017—Jan 31, 2018). Round 1 of our ECOS Review initially consisted of 14 project FONSI, 12 EA re-evaluations (Re-Evals), 3 EIS Re-Evals, 16 CE determinations of actions not listed in regulation (Open-ended d-list CEs), 1 final EA, and 1 c-28 CE (for a rail project) for a total of 47 projects. Round 2 of our ECOS Review consisted of 4 FONSI, 6 EA Re-Evals, 2 EIS Re-Evals, 17 Open-ended d-list CE, and 1 final EA. The FHWA's Compliance Assessment Program (CAP) conducts a review of project files independent of

this audit. Two projects from CAP were considered in this review bringing the total to 32 projects that were initially reviewed. The total number of projects that were initially reviewed for the Audit #5 ECOS Review totaled 79 projects.

The interviews conducted by the team focused on TxDOT's leadership and staff at the Environmental Affairs Division (ENV) Headquarters in Austin and staff in six of TxDOT's Districts. The team conducted face-to-face interviews of TxDOT District staff in the San Angelo, Abilene, Wichita Falls, Fort Worth, Houston, and Lufkin Districts. The TxDOT staff from the Transportation Planning and Programming (TPP) Division and the Finance Division (FIN) were also interviewed. The team used the same ECOS project document review form to document findings related to projects. The team updated interview questions for districts and ENV, TPP, and FIN with new focus areas to gather relevant data to draw conclusions.

### Overall Audit Opinion

The TxDOT continues to make progress in the implementation of its program that assumes FHWA's NEPA project-level decision authority and other environmental responsibilities. The team acknowledges TxDOT's effort to refine, and when necessary, establish additional written internal policies and procedures. The team found evidence of TxDOT's continuing efforts to train staff, clarify the roles and responsibilities of TxDOT staff, and educate staff in an effort to assure compliance with all of the assigned responsibilities.

The team identified non-compliant observations in this audit that TxDOT will need to address through corrective actions. These non-compliance observations come from a review of TxDOT procedures, project file documentation, and interview information. This report also identifies several observations and successful practices that the review team recommend be expanded upon. The team finds TxDOT to be in substantial compliance with the terms of the MOU and FHWA looks forward to working with TxDOT to renew the MOU.

### Non-Compliance Observations

Non-compliance observations are instances where the team found TxDOT was out of compliance or deficient in proper implementation of a Federal regulation, statute, guidance, policy, the terms of the MOU, or TxDOT's own procedures for compliance with the NEPA process. Such observations may also include instances where TxDOT

has failed to maintain technical competency, adequate personnel, and/or financial resources to carry out the assumed responsibilities. Other non-compliance observations could suggest a persistent failure to adequately consult, coordinate, or consider the concerns of other Federal, State, Tribal, or local agencies with oversight, consultation, or coordination responsibilities. The FHWA expects TxDOT to develop and implement corrective actions to address all non-compliance observations.

The MOU (Part 3.1.1) states that "[p]ursuant to 23 U.S.C. 327(a)(2)(A), on the Effective Date, FHWA assigns, and 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 Secretary's responsibilities for compliance with the National Environmental Policy Act of 1969 (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 1500-1508, DOT Order 5610.1C, and 23 CFR 771 as applicable." Also, the performance measure in MOU Part 10.2.1(A) for compliance with NEPA and other Federal environmental statutes and regulations commits TxDOT to maintaining documented compliance with requirements of all applicable statutes and regulations, as well as provisions in the MOU. The following non-compliance observations address categories associated with procedures specified in Federal laws, regulations, policy, or guidance and the State's environmental review procedures.

**Non-Compliance Observation #1:** Section 5.1.1 of the MOU requires the State to follow Federal laws, regulations, policy, and procedures to implement the responsibilities assumed. The following is a list of the procedures and the instance where the team found the TxDOT to be non-compliant.

a) Logical termini and independent utility

The TxDOT approved a project to add capacity with project limits based on county lines. Using county lines to establish project limits is inconsistent with FHWA policies and guidance on establishing a project's logical termini because it sets an arbitrary boundary. (23 CFR 771.111(f); The Development of Logical Project Termini, FHWA guidance (November 5, 1993)).

b) Plan consistency prior to NEPA approval

Section 3.3.1 of the MOU requires that prior to approving any CE determination, FONSI, final EIS, or final EIS/ROD, TxDOT ensure and document that the project is consistent with the current TIP, Regional Transportation Plan (RTP), or MTP. The team identified three projects where TxDOT made NEPA approval without meeting the MOU consistency requirement. This recurring deficiency was also identified for a project file in Audit #4.

c) Public Involvement

The FHWA's regulation at 23 CFR 771.119(h) requires a second public notification to occur 30 days prior to issuing a FONSI for an action described in 23 CFR 771.115(a). The team reviewed a project file where TxDOT approved a FONSI for an action described in 23 CFR 771.115(a) (new controlled access freeway) without evidence of a required additional public notification. The TxDOT acknowledges this requirement in their updated public involvement handbook. This recurring deficiency was also identified in Audits #3 and #4.

d) Section 4(f) *de minimis*

The TxDOT determined Section 4(f) is required for a project without completing the required Section 4(f) *de minimis* determination (MOU 3.2.1 and 23 CFR 774).

e) Certification of NEPA compliance missing at Project Construction Authorization

In two instances TxDOT requested, and received, construction authorization for a Federal-aid project without ensuring the completion of NEPA. (Section 8.7.1 of MOU). Section 8.7.1 of the MOU requires TxDOT to certify to FHWA, for Federal-aid funded projects, that TxDOT has fully carried out all responsibilities assumed under the MOU prior to the execution of any Federal-aid project agreement for physical construction. The TxDOT is aware of these instances and had implemented corrective action to address this issue by the time Audit #5 was in process.

**Non-Compliance Observation #2:** Section 7.2.1 of the MOU requires the State to develop State procedures to implement the responsibilities assumed. This review identified the following examples of deficient adherence to these State procedures.

a) Noise Policy

One project did not follow the TxDOT Noise guidelines (Guidelines for Analysis and Abatement of Roadway Traffic Noise, 2011) by not addressing critical noise comments made by ENV prior to project approval. The TxDOT noise guidelines identifies procedures for compliance with 23 CFR part 772.

b) Required TxDOT ENV Class of Action Pre-approval Process

A TxDOT district approved a project that was not on the “c” or “d” list and the district did not receive the required pre-approval from ENV to process the project as an open-ended d-list CE.

### Successful Practices and Other Observations

This section summarizes the TxDOTs practices that the team believes are successful as well as observations about issues that TxDOT may consider as areas to improve. Further information on these successful practices and observations is contained in the following subsections that address these six topic areas: program management; documentation and records management; QA/QC; legal sufficiency; performance management; and training.

Throughout the following subsections, the team lists observations that FHWA recommends TxDOT consider in order to make improvements. The FHWA’s suggested implementation methods of action include: corrective action, targeted training, revising procedures, continued self-assessment, improved QA/QC, or some other means. The team acknowledges that, by sharing the preliminary draft audit report with TxDOT, TxDOT has begun the process of implementing actions to address these observations to improve its program prior to the publication of this report.

#### 1. Program Management

##### *Successful Practices and Observations*

The team applauds TxDOT-ENV willingness to continue to engage in quarterly partnering meetings with FHWA that started in 2016. The exchange of information between FHWA and TxDOT has enhanced FHWA’s understanding of TxDOT’s program and has led to cooperation that has resulted in improved TxDOT processes and procedures. This will assist in making monitoring a success as well. District staff interviewed described the positive interaction that occurs among the District Transportation and Planning Director and the Environmental Coordinator (EC) with district designers and engineers to discuss projects being developed and discuss issues and revise schedules, if needed.

Observation #1: Planning consistency at the time of NEPA approval

Section 3.3.1 of the MOU requires that prior to approving any CE determination, FONSI, Final EIS, or

final EIS/ROD, TxDOT will ensure and document that the project is consistent with the current TIP, RTP, or MTP. The TxDOT’s use of Develop Authority (DA) in some project files as a basis for planning consistency satisfies this requirement so long as TxDOT has provided FHWA with a DA financial plan. The team encourages TxDOT to provide FHWA with the financial documentation to support the use of DA.

#### Observation #2: TxDOT inter-division coordination

The team learned through interviews that staff from divisions other than ENV (Transportation Planning and Programming, Finance, Right-of-way, and Rail) who support environmental reviews and decisions were unaware of their part they played in NEPA reviews. The team encourages TxDOT ENV to discuss needs and procedures for delivering compliant NEPA approval for Federal-aid projects with these other divisions. The TxDOT is aware of this issue and has implemented procedures to address it.

#### 2. Documentation and Records Management

##### *Successful Practices and Observations*

The team learned that ECOS continues to improve in download speed and compatibility. The team learned from interviews that ECOS continues to improve reliability, download speeds, and has fewer technical problems. The phased ECOS updates continue to roll out. The team observed continued success in that overall ECOS has provided a consistent repository for better documentation and is enhanced by staff use of a new naming convention per discipline. The EA checklist is working well in conjunction with the CORE Team concept.

The team relied on information in ECOS, TxDOT’s official file of record, to evaluate project documentation and records management practices. Many TxDOT toolkit and handbook procedures mention the requirement to store official documentation in ECOS. The ECOS is also a tool for storage and management of information records, as well as for disclosure within TxDOT District Offices. The ECOS is how TxDOT identifies and procures information required to be disclosed to and requested by the public. The ECOS is being upgraded and there are more phased upgrades planned over time. The most recent work includes Expedited C-List (22), an automated process to add a Control Section Job

number to an existing environmentally cleared project and automated business rules to prevent incorrect project associations in ECOS.

#### 3. Quality Assurance/Quality Control (QA/QC)

##### *Successful Practices and Observations*

The team observed continued successful practices from previous audits in QA/QC. These successful practices include the use of NEPA Chats, increased Subject Matter Expert (SME) interactions with district staff after review of files, and the CORE Team concept (items described in previous audit reports). The TxDOT District Office environmental staff continues to do peer reviews of environmental decisions to double check the quality and accuracy of documentation.

The team learned through interviews that approved open-ended d-list projects were reviewed by Program Review Section (PR) as part of a thorough review of NEPA class of action. District staff said in interviews that they feel they can reach out to ENV staff and PR to ask questions to assist in the preparation of compliant and quality documents. The ENV SME’s, we were told in interviews, are reaching out to the district staff with corrections and resolution of issues in documents, which is viewed as an improved way to relate and resolve issues found in file reviews. These communications often result in improvements in guidance/checklists as well as a noted decrease in corrective actions from PR reviews. Interviewees told us that ECOS continues to improve and is perceived to be easier to use and that updates have resulted in fewer substantive errors. The team considers that self-assessments conducted by ENV for Section 4(f) and Public Involvement resulted in positive changes and improvements in quality documents by using established checklists and certifications and the CORE Team concept.

Observation #3: TxDOT monthly lists of NEPA approvals

The review team identified a few projects listed on the monthly list incorrectly, projects missing from the list, and projects added on after submittal to FHWA. The TxDOT is aware of this problem and is taking steps to address it.

Observation #4: QC for re-evaluations

The team noted in project file reviews that re-evaluation recordkeeping was inconsistent, especially for consultation re-evaluations. Because re-evaluations are not reviewed by TxDOT’s PR, the

team would urge TxDOT to subject at least a sample of re-evaluations to quality assurance review.

#### 4. Legal Sufficiency Review

The team did not identify any observations and only presents a summary of TxDOT's approach to legal review. The General Counsel Division (GCD) currently has five lawyers on staff (lead attorney and four staff) plus outside counsel. After the lead attorney, the staff has between 6-months and two and half years of experience with GCD. Reviews are done primarily by the lead attorney and two staff with the other two assisting on an as needed basis such as the development of the administrative record and quick turnaround required for a DEIS. Additional assistance is provided by an outside law firm and a consultant attorney who has delivered environmental legal assistance to ENV for several years. The GCD assistance continues to be guided by ENV's Project Delivery Manual Sections 303.080 through 303.086. These sections provide guidance on conducting legal sufficiency review of FHWA-funded projects and those documents that are to be published in the **Federal Register** such as the Notice of Intent to prepare an EIS, Statute of Limitation (139(l)), and Notice of Availability of EIS.

During the last year GCD had a very large effort to address the MOPAC lawsuit particularly in developing the administrative record. They used their staff along with the Attorney General, consultant staff and outside staff. Another significant effort was a lawsuit on an EA/FONSI that required a very quick turnaround by the entire staff to a request for a preliminary injunction. The TxDOT was served notice of the lawsuit on March 27, 2017, and notified FHWA Chief Counsel, the U.S. Department of Justice, and the FHWA Texas Division Office on the same day as required by the MOU.

The FHWA Office of Chief Counsel provided legal sufficiency training to GCD in August 2017. The TxDOT would like to have the same training provided on a periodic basis. Recent staff training included a legal sufficiency course provided by FHWA Office of Chief Counsel, ENV self-developed courses, the TRB Summer Seminar in July 2017 in Salt Lake City, and Advanced Administrative Law Seminars held in Austin.

Based on interviews noted above and information provided in the PAIR, TxDOT's current process is legally sufficient and the team considers that the requirements for legal sufficiency under the MOU continue to be fulfilled.

#### 5. Performance Measurement

##### *Successful Practices and Observations:*

The TxDOT continues to successfully monitor its metrics to measure performance. The TxDOT's summary of its performance measures was described in their self-assessment summary report. Completion of checklists for project QC continue to be an important measure of overall QC. The TxDOT draws a sample from the population of completed CE project files to assess their completeness and accuracy. A separate study focused on documentation from 21 EAs. The TxDOT lists the missing or deficient information from project files that serves as a basis for taking corrective actions. What results is continuous improvements based on corrective actions taken. Developments in ECOS have largely eliminated substantive error resulting from flawed Categorical Exclusion Determination Forms (CEDFs). In previous self-assessments, these CEDF errors were a common source of non-compliance.

The effectiveness of TxDOT's assumption of NEPA responsibilities on timeliness of EA decisionmaking was a focus of the TxDOT self-assessment summary report. Their thoughtful analysis states that start-to-finish comparisons of EAs prior to and after NEPA assignment suggest improvements in timeliness. Median and average EA project completion terms for pre-assignment projects suffer from long-duration project outliers that are absent from the set of assigned EA projects. Average time frames for EA completion post assignment were identified and were determined to be statistically valid. While timeliness for EA decisionmaking has been documented for the 4 years of NEPA assignment, it is also true that this trend fits neatly into a national trend of falling median time frames once long-duration outliers have been eliminated.

##### *Observation #5: Audit #4 corrective actions*

The team noted through the self-assessment summary report that as part of the measure of implemented corrective actions, because of the delay in finalizing the Audit #4 report, TxDOT had not yet identified or implemented corrective actions for that audit result. TxDOT should consider developing and implementing reasonable corrective actions whenever TxDOT becomes aware of deficiencies in their program. Since the completion of the interviews for this audit review TxDOT has implemented corrective actions (see Status of Non-compliance observations below).

#### 6. Training Program

##### *Successful Practices and Observations:*

Looking back over the last 4 years, TxDOT's training program has shown trends of: (a) increased reliance on developing and delivering training by TxDOT staff compared with FHWA Resource Center staff or others, (b) increased organization and efficiency in available training as well as training tracking, and (c) greater clarity in basic and continuing training requirements (linked to the Texas Administrative Code).

Through an interview, the team learned that a new hands-on training workshop in biology consisting of a class room lecture and a field component to identify species (mussels, birds) has been delivered in west Texas (Junction) that engaged USFWS staff. These workshops were received well and spin off workshops have occurred in east Texas and coastal Texas.

The TxDOT informed the team through an interview that through an annual survey to TxDOT staff and resource agencies, it identified needs for new training. As a result, TxDOT has developed or is developing the following courses: (a) a basic NEPA training class that for local government staff and consultants that follows a 1.5-day general training class that targets local government staff, and (b) a NEPA class that bridges the NEPA 101 class and environmental SME classes training for non-environmental professionals.

The team also learned through an interview that there is an interest from at least one transportation and planning director for a class in risk management on environmental decisionmaking. Now that TxDOT staff have experience in the range of NEPA decisionmaking challenges, the team suggests that TxDOT's training plan consider NEPA decisionmaking training. Since the completion of the interviews for this audit review TxDOT has begun developing new training for non-environmental professionals to introduce them to environmental review topics.

##### **Status of Non-Compliance Observations and Other Observations From Audit #4 (September 2018)**

##### *Audit #4 Non-Compliance Observation #1:*

a) Project scope analyzed for impacts differed from the scope approved

The TxDOT developed an update for their Scope Development Tool over the past 16 months and recently implemented those changes. For specific issues such as this one, TxDOT

PR conducts a debrief among the project core team members and the Deputy Division Director.

b) Plan consistency prior to NEPA approval

The TxDOT continues to follow their NEPA approval procedures that include procedures to determine planning consistency. The TxDOT was asked to provide the documented financial plan for the use of "Develop Authority" to ensure that this approach complies with planning consistency. The TxDOT has provided a draft of this documentation.

c) Public Involvement

The FHWA's regulation at 23 CFR 771.119(h) requires a second public notification to occur 30 days prior to issuing a FONSI for an action that normally would require the preparation of an EIS. The TxDOT acknowledges this requirement and has updated their public involvement handbook.

d) Timing of NEPA approval

One project file lacked documentation for Section 106 compliance prior to TxDOT making a NEPA approval. The regulation at 23 CFR 771.133 requires compliance with all applicable requirements or reasonable assurance that all requirements will be met at the time of NEPA approval. The TxDOT PR conducted a debrief among the project core team members and the Deputy Division Director. The TxDOT is preparing changes to ECOS to address this issue.

#### *Audit #4 Non-Compliance Observation #2:*

a) Reporting of approvals made by TxDOT

The MOU section 8.7.1 requires the State to certify on a list the approvals it makes pursuant to the terms of the MOU and Federal review requirements so FHWA knows which projects completed NEPA and are eligible for Federal-aid funding. The FHWA identified a project whose approval was made pursuant to State law and therefore should not have been on the certified list of projects eligible for Federal-aid funding. The TxDOT continually works to assure that only Federal projects are present on the monthly approval list. At the time, the monthly report is prepared, only projects with NEPA approvals are present on the list. The TxDOT suggests that instances where a project's funding changes after the certified list is prepared could account for discrepancies between being federally funded and State funded at the time FHWA reviews the list.

b) Noise workshop timing

One project did not follow TxDOT noise guidelines. The TxDOT is in the process of updating their Noise Policy

and Guidelines and is seeking FHWA approval for those changes. This specific issue has been highlighted and discussed at the Environmental Coordinators Conference in September 2018.

c) Endangered Species Act Section 7 Training efforts by TxDOT are ongoing. The TxDOT is aware of the concern for Section 7 compliance.

d) Indirect & Cumulative Impacts  
The TxDOT hosted a FHWA Resource Center training in February 2018 regarding this topic and a more common-sense approach to performing the required analyses.

e) Federal approval request for a State funded project

The review team reviewed a project file where TxDOT followed State environmental laws and then requested Federal-aid to purchase right-of-way. The TxDOT has removed Federal funds from the Right of Way portion of this project as corrective action.

#### *Audit #4 Observations*

1. Noise procedure clarification:

The TxDOT ENV is currently in the process of proposing an update to their Noise Policy for FHWA approval in 2018 and will update their accompanying Noise Guidelines as well.

2. Section 7 of the Endangered Species Act

The TxDOT continues to train staff on its revised ESA handbook and standard operating procedures. In certain districts with sensitive habitats (e.g., karst) or the possibility of a species present (e.g., a salamander), ENV managers plan to review a project's information in addition to the district's and/or ENV biologists. This enhanced review process is currently limited only to two districts and could be expanded to include instances where such bias may occur.

3. Project description and logical termini:

A project contained a description of the proposed project as the project's purpose. Another proposed added capacity project's description indicated a longer terminus compared to a schematic. The TxDOT is aware of these instances and discussed these matters with the parties involved.

4. Record keeping integrity:

There were several project files where the team identified instances of missing information or information was not consistently linked or uploaded. The ECOS is being upgraded currently with phase three, and there are two more phased upgrades planned over time.

5. Effectiveness and change in QA/QC:

The TxDOT has reorganized its Self Assessment Branch and is now called

Program Review Section (PR). Their approach to QA feedback to TxDOT staff relies on SMEs to communicate results of QA reviews.

6. Performance measure awareness and effectiveness:

The team noted through interviews of TxDOT District Office staff that many were unaware of TxDOT performance measures and their results to encourage continuous improvement. The TxDOT provided status on this observation in their response to for this audit that included one NEPA chat, and meetings with districts who participated in the May 2017 audit. The TxDOT District staff now have access to the 2016 and 2017 Self-Assessment reports via SharePoint.

7. Additional outreach on improvements:

This observation relates to informal training to implement TxDOT procedures changes in its handbook. As part of information collected for Audit #5, TxDOT indicated that they include handbook changes on endangered species procedures were a topic briefed at a June 2017 NEPA Chat.

8. FAST Act training:

At the time of Audit #4, TxDOT had neither developed nor delivered training to its staff concerning new requirements for the FAST Act for environmental review. Since that time TxDOT indicated a FAST Act briefing was provided by FHWA Headquarters staff at TxDOT's annual Environmental Conference in September 2017. The TxDOT also posted a guidance document entitled "Avoiding Migratory Birds and Handling Potential Violations" in the Natural Resource Management toolkit in January 2017 that provides high level guidance on FAST Act provisions related to swallow species on at-risk bridges. The TxDOT's natural resources management (NRM) section reviewed this guidance with districts at one of the bimonthly district/NRM coordination meetings.

#### **Finalization of Report**

The FHWA received one response to the **Federal Register** Notice during the public comment period for this draft report. The American Road and Transportation Builders Association voiced support of this program. This report is a finalized draft version of this report without substantive changes.

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