



THE UNIVERSITY OF TEXAS AT AUSTIN  
**CENTER FOR TRANSPORTATION RESEARCH**

**TECHNICAL REPORT 0-6866-1**

TXDOT PROJECT NUMBER 0-6866

# NEPA ASSIGNMENT IN TXDOT: ANALYSIS, REVIEW, AND TRAINING MODULES

Loftus-Otway, Lisa  
Bomba, Michael (University of North Texas)  
Garner Frey, Brianna  
McLain, Ashley (Cox|McLain Environmental Consulting)  
Miller, Brian  
Stewart, Duncan  
Welch, Elizabeth

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Technical Report Documentation Page

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Center for Transportation Research  
The University of Texas at Austin  
1616 Guadalupe, Suite 4.202  
Austin, TX 78701

<http://ctr.utexas.edu/>

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Research Supervisor: Lisa Loftus-Otway

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## **Products**

Appendix C contains P1, which is a series of NEPA Assignment Training PowerPoints and quizzes developed specifically for environmental specialists, engineers, TxDOT management, local government, consultants, and elected officials.

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## **List of Acronyms**

|          |                                           |
|----------|-------------------------------------------|
| Caltrans | California Department of Transportation   |
| CE       | Categorical Exclusion                     |
| CEQ      | Council on Environmental Quality          |
| CEQA     | California Environmental Quality Act      |
| CLUE     | Case Law Updates on the Environment       |
| DDOs     | Districts, Divisions, and Offices         |
| DEA      | Department of Environmental Affairs       |
| DEIS     | Draft Environmental Impact Statement      |
| DOJ      | Department of Justice                     |
| DOTs     | State Departments of Transportation       |
| EA       | Environmental Assessment                  |
| ECOS     | Environmental Compliance Oversight System |
| EIA      | Environmental Impact Assessment           |
| EIS      | Environmental Impact Statement            |
| ENV      | Environmental Affairs Division of TxDOT   |
| FEIS     | Final Environmental Impact Statement      |
| FHWA     | Federal Highway Administration            |
| FTA      | Federal Transit Administration            |
| GAO      | Government Accountability Office          |
| IDP      | Individual Development Programs           |
| MOU      | Memorandum of Understanding               |
| MPO      | Metropolitan Planning Organization        |
| NEPA     | National Environmental Policy Act         |
| NOIs     | Notices of Intent                         |
| PES      | Preliminary Environmental Study           |
| QA/QC    | Quality Assurance/Quality Control         |
| ROD      | Record of Decision                        |
| SAB      | Self-Assessment Branch                    |
| SWLRT    | Southwest Light Rail Transit              |
| TCEQ     | Texas Commission on Environmental Quality |

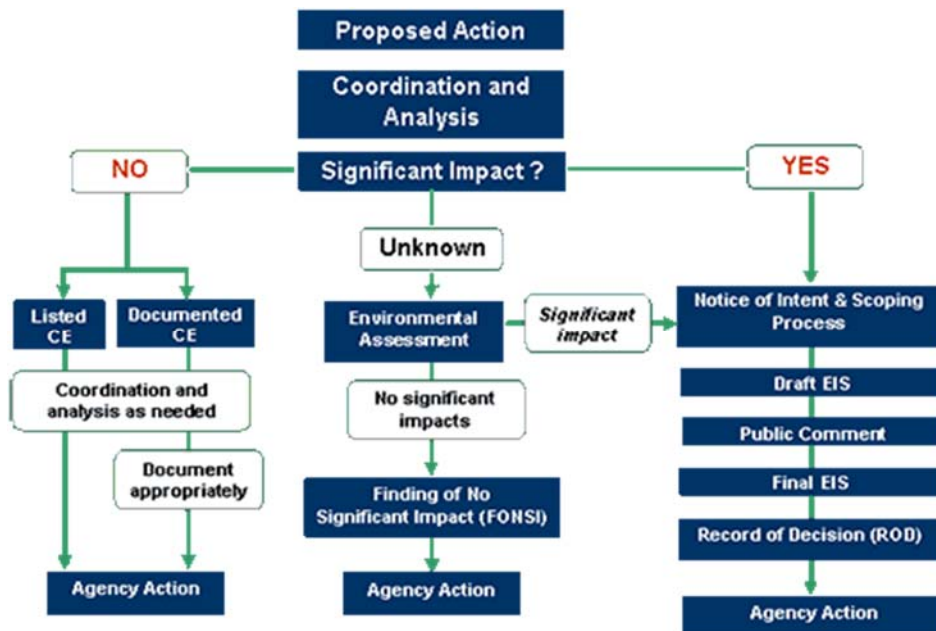
TxDOT Texas Department of Transportation  
UFS Uniform Filing System  
USACE United States Army Corp of Engineers  
USDOT U.S. Department of Transportation  
USEPA U.S. Environmental Protection Agency  
USFWS U.S. Fish and Wildlife Services

# Chapter 1. Introduction

Under the Surface Transportation Project Delivery Program created by SAFETEA-LU (23 United States Code §327(h)) and continued under the Moving Ahead for Progress in the 21<sup>st</sup> Century (MAP-21) reauthorization bill, federal transportation law has authorized delegating the National Environmental Policy Act of 1969 (NEPA) review and approval processes to state Departments of Transportation (DOTs). The Texas Department of Transportation (TxDOT) is now the second state DOT to assume this responsibility for determinations of categorical exclusions (CEs), environmental assessments (EAs), and environmental impact statements (EISs). The memorandum of understanding (MOU) between TxDOT and the Federal Highway Administration (FHWA) assigns these responsibilities to TxDOT and officially approves TxDOT's participation in the Surface Transportation Delivery Program.

## 1.1 NEPA Process

NEPA is a procedural statute and it requires that once a proposed action is developed, an agency will begin an analytical approach to determine which of three processing and environmental documentation options it will undertake: CE, EA, or EIS. The NEPA process is outlined in Figure 1.1.



Source: AASHTO, 2015

Figure 1.1: The NEPA Process

Table 1.1 briefly outlines these categories of activities.

**Table 1.1: NEPA Activity Categories**

| Type                                        | Description of Activity                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|---------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Categorical Exclusion (CE)</b>           | Activity that the agency determines does not individually or cumulatively have a significant effect on the quality of the environment. Agencies must check to ensure no extraordinary circumstances exist that can cause the proposed action to have a significant effect in a particular situation. Examples include effects to/on wetlands, endangered species or protected cultural sites. If there are no such effects, the agency can proceed with the action, after posting notice in the federal register. If the proposed activity does not fall in the CE list, the agency must prepare either an EA or EIS. |
| <b>Environmental Assessment (EA)</b>        | Required to determine the significance of the environmental effects and review alternatives that can be undertaken to achieve an agency's objective. The EA is usually a concise document and must provide sufficient analysis and evidence to determine whether it is necessary to prepare an EIS.                                                                                                                                                                                                                                                                                                                   |
| <b>Environmental Impact Statement (EIS)</b> | Required when the activity proposed is a major federal action that will significantly affect the quality of the human environment. There are multiple requirements for an EIS compared to a CE or EA. Key elements within the EIS include the purpose and need statement, identification and analysis of alternatives that could meet the purpose and need of the proposed action, and analysis of direct, indirect, and cumulative impacts.                                                                                                                                                                          |

This research assists TxDOT's Environmental Affairs Division (ENV) with its goals of shortening project review periods, developing a more robust document review process, and cutting costs where possible. Collectively, these accomplishments help TxDOT to achieve one of its strategic plan goals: "Become a best-in-class state agency." The purpose of this report is to assist ENV with the interpretation of the roles and responsibilities outlined in its current MOU with the FHWA. This report includes an analysis of the FHWA's audit findings for the California Department of Transportation's (Caltrans) implementation of NEPA Assignment. Additionally, it makes recommendations for performance measures for the NEPA Assignment program. It identifies risks for MOU non-compliance, through a case law analysis of NEPA litigation, and supports the development of preliminary audit resources for staff. Finally, the project developed six training modules for different stakeholders in the NEPA process under NEPA Assignment: environmental specialists, engineers, TxDOT management, local government, elected officials, and consultants.

## Chapter 2. The Memorandum of Understanding

TxDOT and the FHWA entered into an MOU on December 16, 2014, that approved TxDOT's application to participate in the Surface Transportation Project Delivery Program. Under this program, the FHWA assigned TxDOT the USDOT Secretary's responsibilities for environmental review and other actions required under federal environmental law. This chapter discusses the roles and responsibilities assigned and delineated in the MOU and sets out quick reference guides. The chapter also reviews changes from the previous MOU that TxDOT held for CEs. Additionally, the chapter outlines the responsibilities that are still held by federal agencies. Finally, the chapter examines the differences between the TxDOT and Caltrans MOUs.

### 2.1 MOU Roles and Responsibilities

This section discusses the roles and responsibilities assigned and delineated in the MOU with the FHWA section by section. It also includes a quick reference guide for the MOU. TxDOT's MOU with the FHWA is divided into fourteen parts, which are outlined in Table 2.1.

**Table 2.1: Outline of MOU Sections**

|                                                       |                                                 |
|-------------------------------------------------------|-------------------------------------------------|
| Part 1: Purpose of Memorandum                         | Part 8: Involvement with the FHWA               |
| Part 2: [Reserved for Future Use]                     | Part 9: Withdrawal of Assigned Responsibilities |
| Part 3: Assignments and Assumption of Responsibility  | Part 10: Performance Measures                   |
| Part 4: Certifications and Acceptance of Jurisdiction | Part 11: Audits                                 |
| Part 5: Applicability of Federal Law                  | Part 12: Training                               |
| Part 6: Litigation                                    | Part 13: Term, Termination, and Renewal         |
| Part 7: Involvement with Other Agencies               | Part 14: Amendments                             |

*Source: Full NEPA Assignment MOU, December 2014*

#### 2.1.1 TxDOT's Assumption of Environmental Responsibilities (Part 3)

Part 3 of the MOU is the first part that addresses responsibilities and roles assigned to TxDOT and the FHWA. This part assigns TxDOT "all of the USDOT Secretary's responsibilities for compliance with the National Environmental Policy Act of 1969" (FHWA Tx Division 2014, p. 2) for highway projects. Federal law also permits the assignment of railroad, transit, and multimodal projects<sup>1</sup> at the state's request. However, at this time, TxDOT has not requested nor been assigned NEPA responsibilities for these categories of projects.

In addition to NEPA duties, the MOU lists numerous federal environmental laws for which TxDOT is also responsible. Part 3.2 of the MOU lists these legal responsibilities in detail. Table 2.2 summarizes the change in assumed responsibilities following the full NEPA Assignment MOU.

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<sup>1</sup> 23 USC §327(a)(2)(B)(ii)

**Table 2.2: Federal Environmental Responsibilities Other than NEPA Assigned to TxDOT**

| Topic                                 | CE Assignment MOU                                                           | Full NEPA Assignment MOU                                                                    |
|---------------------------------------|-----------------------------------------------------------------------------|---------------------------------------------------------------------------------------------|
| Noise                                 | 23 C.F.R. 772                                                               | 23 C.F.R. 772<br>Noise Control Act of 1972, 42 U.S.C. 4901-4918                             |
| Wildlife                              | Marine Mammal Protection Act, 16 U.S.C. 1361                                | Marine Mammal Protection Act, 16 U.S.C. 1361-1423h                                          |
| Historic and Cultural Resources       | Archeological Resources Protection Act, 16 U.S.C. 470aa-11                  | Archeological Resources Protection Act, 16 U.S.C. 470aa-mm                                  |
|                                       | Native American Grave Protection and Repatriation Act, 25 U.S.C. 3001-30131 | Native American Grave Protection and Repatriation Act, 25 U.S.C. 3001-30131, 18 U.S.C. 1170 |
| Water Resources and Wetlands          | Clean Water Act, 33 U.S.C. 1251-1377 (Sections 404, 401, 319)               | Clean Water Act, 33 U.S.C. 1251-1387 (Sections 404, 401, 319, 402, 408)                     |
|                                       | Coastal Zone Management Act, 16 U.S.C. 1451-1465                            | Coastal Zone Management Act, 16 U.S.C. 1451-1466                                            |
|                                       | Safe Drinking Water Act, 42 U.S.C. 300f-300j-6                              | Safe Drinking Water Act (SDWA), 42 U.S.C. 300f-300j-26                                      |
|                                       | --                                                                          | General Bridge Act of 1946, 33 U.S.C. 525-533                                               |
|                                       | Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 401-406         | Rivers and Harbors Act of 1899, 33 U.S.C. 401-406 (all)                                     |
|                                       | Emergency Wetlands Resources Act, 16 U.S.C. 3921, <b>3931</b>               | Emergency Wetlands Resources Act, 16 U.S.C. 3921                                            |
|                                       | Flood Disaster Protection Act, 42 U.S.C. 4001-4128                          | Flood Disaster Protection Act, 42 U.S.C. 4001-4130                                          |
| Parklands and Other Special Land Uses | Land and Water Conservation Fund (LWCF) Act, 16 U.S.C. 4601-4               | Land and Water Conservation Fund (LWCF) Act, 16 U.S.C. 4601-4—4601-11                       |
| FHWA-Specific                         | --                                                                          | Planning and Environmental Linkages, 23 U.S.C. 168                                          |
|                                       | --                                                                          | Programmatic Mitigation Plans, 23 U.S.C. 169                                                |

Source: CE Assignment MOU (December 2013) and Full NEPA Assignment MOU (December 2014)

TxDOT is also responsible for ensuring that projects are consistent with various long-range transportation planning documents.

The FHWA retains responsibility for government-to-government consultation, Section 4(f) of the DOT Act approvals, air quality conformity determinations of the Clean Air Act, Section 106 of the National Historic Preservation Act, Section 7 of Endangered Species Act, and projects involving certain federal lands. These responsibilities are discussed in greater detail in Section 2.3 of this report.

### **2.1.2 Financial and Staffing Commitments (Part 4)**

In Part 4, TxDOT certifies its legal authority to accept this agreement and commits resources to carrying out the terms of the MOU. Specifically, TxDOT is responsible for maintaining both the monetary and personnel resources necessary to perform the responsibilities assigned. If the assigned resources become inadequate, TxDOT must notify the FHWA, and the FHWA may then amend the MOU to scale back the responsibilities to match available resources.

Personnel requirements specifically listed are “environmental, technical, legal, and managerial expertise,” as well as sufficient qualified staff to oversee consultant activities.<sup>2</sup> For those duties required by Section 106 of the National Historic Preservation Act, specific standards must be met. These duties must be carried out or supervised by someone who meets the Secretary of Interior’s Professional Qualifications Standards. The MOU does not list specific certifications or standards for other NEPA subject areas.

### **2.1.3 Federal Laws and Policies (Part 5)**

Part 5 specifies that TxDOT is subject to the same requirements as the USDOT Secretary when performing federal environmental duties. This includes compliance with executive orders, USDOT orders, Council on Environmental Quality (CEQ) orders, FHWA orders, and guidance from federal agencies. FHWA is responsible for making new and revised policies that are relevant to TxDOT available within 10 days.

Two specific limitations are listed in this section. First, agreements with other federal agencies may be amended in recognition of TxDOT’s role as the lead agency. However, if a third party does not update agreements to include TxDOT, TxDOT must continue to carry out the environmental duties without the benefits of the agreement. Second, TxDOT is explicitly prohibited from establishing federal policy or guidance. State policies do not supersede federal policies, even when the state DOT is performing federal duties.<sup>3</sup>

### **2.1.4 Litigation (Part 6)**

To make the MOU legally possible, the State of Texas has waived its 11<sup>th</sup> Amendment right to sovereign immunity and can be sued for decisions and approvals made while carrying out federal environmental responsibilities. Part 6 assigns all responsibility and liability to TxDOT, including all costs associated with a lawsuit, and it places no responsibility with the FHWA or USDOT. While TxDOT is the only liable party, the FHWA and the Department of Justice (DOJ) must be consulted or notified throughout the litigation process. Part 6.2 outlines the milestones and timelines when TxDOT must involve federal entities upon litigation.

### **2.1.5 Relationship to Other Agencies (Part 7)**

Part 7 requires early and appropriate coordination with federal, state, and local agencies while carrying out assigned responsibilities. The MOU requires formal documentation of a procedure for submitting documents to the United States Environmental Protection Agency (USEPA); however, no other formal agreements with agencies are specifically required in the MOU.

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<sup>2</sup> Part 4.2.2 of the TxDOT MOU

<sup>3</sup> Part 5.2 of the TxDOT MOU

### **2.1.6 Relationship to the FHWA (Part 8)**

Part 8 clarifies TxDOT's relationship to and involvement with the FHWA regarding many topics, including:

- TxDOT performance without FHWA involvement
- Quality assurance/quality control (QA/QC) planning
- Record retention
- Publishing in the Federal Register
- Resource agency reports
- Air quality conformity determinations
- Certification of compliance
- Enforcement of the MOU

TxDOT's role in the QA/QC process requires submission of a self-assessment report before each of the required audits in the MOU, as well as joint development of a QA/QC plan. TxDOT is responsible for including six elements in each self-assessment:

- 1) a description of scope,
- 2) a description of process,
- 3) a list of areas needing improvement,
- 4) corrective actions,
- 5) a statement from the ENV Director that TxDOT is compliant with the MOU, and
- 6) a summary of progress toward performance measures outlined in Part 10.

Notably, Part 8.6 of the MOU explicitly leaves air quality conformity determinations with the FHWA. TxDOT is responsible for supplying data and analyses to be reviewed by the FHWA Texas Division Office, which will then document their findings.

### **2.1.7 Performance Measures (Part 10)**

TxDOT is responsible for collecting and maintaining data necessary to assess performance for each measure outlined in Part 10.2.1 and must summarize its findings in each of its self-assessments. Measures include:

- Compliance with NEPA and other federal environmental statutes and regulations;
- Quality control and assurance for NEPA decisions;
- Relationships with agencies and the general public; and
- Increased efficiency and timeliness in completion of NEPA process.

### **2.1.8 Audits (Part 11)**

TxDOT is responsible for providing the FHWA with all information necessary to assess performance of its MOU responsibilities, including making staff and consultants available for

interviews. The process of determining which information and individuals are relevant is a shared responsibility between TxDOT and the FHWA. Each entity designates an audit coordinator to set schedules and identify necessary resources.

After the completion of the audit, the FHWA will transmit a draft document to TxDOT for review and comment. Following the TxDOT comment period, the FHWA will incorporate feedback before publishing the document for public comment. Finally, the FHWA is responsible for including comments and responses in the final document and publishing it in the Federal Register.

### **2.1.9 Training (Part 12)**

Part 12 briefly outlines the training requirement. TxDOT is responsible for ensuring relevant employees attend training provided by the FHWA regarding assumed environmental responsibilities. After this initial training period, TxDOT and the FHWA will develop and review a training plan annually. Other resource agencies may become involved in this process if appropriate.

### **2.1.10 MOU Quick Guide**

Figure 2.1 serves as a quick reference for staff; it is not inclusive of all MOU terms.

|                                                                                                                                                                                                                          |                                                                                                                                                                                                                                     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b>Part 1: Purpose</b></p> <p>This MOU officially approves TxDOT's participation in the Surface Transportation Delivery Program, and it replaces the CE Assignment MOU.</p>                                           | <p><b>Part 2: [Reserved]</b></p> <p>Reserved for future use.</p>                                                                                                                                                                    |
| <p><b>Part 3: Assignment of Responsibilities</b></p> <p>TxDOT is assigned federal responsibility for NEPA and other federal environmental requirements for highway projects. Excluded project types are also listed.</p> | <p><b>Part 4: Acceptance of Jurisdiction</b></p> <p>TxDOT commits to ensuring funding and qualified staff to carry out these duties. It accepts federal court jurisdiction, and it certifies it has the legal ability to do so.</p> |
| <p><b>Part 5: Applicability of Federal Law</b></p> <p>Other federal laws also apply to TxDOT in carrying out these responsibilities, including executive orders, USDOT orders, and other federal guidance.</p>           | <p><b>Part 6: Litigation</b></p> <p>TxDOT is solely liable and responsible for carrying out assumed responsibilities. During litigation, it must coordinate closely with FHWA and DOJ.</p>                                          |
| <p><b>Part 7: Involvement with Other Agencies</b></p> <p>Procedures and processes for interagency coordination must be formally documented to ensure proactive coordination, particularly with the EPA.</p>              | <p><b>Part 8: Involvement with FHWA</b></p> <p>FHWA will not provide assistance or intervene unless deemed necessary. Monitoring and oversight with provide a regular feedback loop. FHWA retains CAA.</p>                          |
| <p><b>Part 9: Withdrawal of Responsibilities</b></p> <p>Either TxDOT or FHWA may initiate withdrawal. Impact on projects and rationale will be examined to determine responsibilities to be withdrawn.</p>               | <p><b>Part 10: Performance Measures</b></p> <p>TxDOT must collect and maintain data to show progress toward four primary performance measures. Eight sub-measures are also listed.</p>                                              |
| <p><b>Part 11: Audits</b></p> <p>TxDOT and FHWA each have a coordinator to schedule and execute semiannual audits. Consultants as well as federal and state agencies may be invited.</p>                                 | <p><b>Part 12: Training</b></p> <p>FHWA provides initial training. TxDOT and FHWA develop and update training needs plans annually to address gaps.</p>                                                                             |
| <p><b>Part 13: Term, Termination, and Renewal</b></p> <p>The term of the MOU is five years, and may be updated per regulations at the time of renewal. Procedures for termination are also included.</p>                 | <p><b>Part 14: Amendments</b></p> <p>Amendments can be added at any time upon mutual agreement. If responsibilities beyond TxDOT's current application are requested, and a supplement is needed.</p>                               |

Source: Full NEPA Assignment MOU, December 2014

Figure 2.1: MOU Quick Guide

### 2.1.11 Signature Authority Matrix

Table 2.3 will assist TxDOT staff with determining who has appropriate signature authority per project type. This matrix should be revised as more information is released. This guide is based on a similar document produced by Caltrans, with information drawn from TxDOT environmental handbooks.

**Table 2.3: Potential Signature Authority Matrix**

|                                       |                                |
|---------------------------------------|--------------------------------|
|                                       | Federal- Assigned <sup>4</sup> |
| <b>Determining Class of Action</b>    |                                |
| CE                                    | PS                             |
| EA                                    | DEM*                           |
| EIS                                   | DEM*                           |
| <b>CE Approvals</b>                   |                                |
| Prepare Project File for Signature    | PS                             |
| Sign CE Determination Form – (c) list | Reviewer and DD                |
| Sign CE Determination Form – (d) list | Reviewer and DE/A              |
| <b>EA Approvals</b>                   |                                |
| Prepare FONSI Package                 | CT and PS                      |
| Review FONSI Package                  | PDD or E-SPS                   |
| Sign FONSI                            | ED                             |
| <b>EIS Approvals</b>                  |                                |
| Draft EIS (DEIS)                      | ED                             |
| Public Hearing                        | CT*                            |
| Final EIS (FEIS)                      | PDD or E-SPS*                  |
| Record of Decision (ROD)              | ED                             |
| Section 4(f) Approvals                | ED*; submits to FHWA           |
| <b>Reevaluation Approvals</b>         |                                |
| No additional documentation           | DD*                            |
| Additional Documentation Required     | ED*                            |

Source: TxDOT EIS Handbook (2014), EA Handbook (2014),  
FONSI Guidance (2015), CE Handbook (2015)

*\*TxDOT is still updating its toolkits to reflect NEPA assignment changes. Signature authorities with asterisks are interpretations based on Caltrans documents.*

#### **Abbreviations/Glossary:**

|                                       |                                         |
|---------------------------------------|-----------------------------------------|
| EA: Environmental Assessments         | CE: Categorical Exclusions              |
| EIS: Environmental Impact Assessments | FONSI: Finding of No Significant Impact |
| DEM: District Environmental Manager   | PS: Project Sponsor                     |
| DE/A: District Engineer/Administrator | DD: Department Delegate                 |
| PDD: Project Delivery Director        | CT: Core Team                           |
| ED: ENV Director                      | E-SPS: ENV Strategic Projects Section   |

<sup>4</sup> Projects that are not assigned by the TxDOT MOU are to be signed by the Assigned authorization but submitted to the FHWA for review and final approval.

## 2.2 Changes from Previous TxDOT MOU

### 2.2.1 Overview of 23 U.S.C. § 237

Prior to TxDOT's NEPA Assignment in late 2014, California was the only state to adopt full NEPA Assignment, starting in 2007 with the pilot program. In 2012, when the pilot program achieved permanent status under MAP-21, Caltrans entered into a 5-year agreement with the FHWA to extend the full Assignment until 2017. Currently, TxDOT maintains a 5-year agreement under MAP-21 until 2019. As of 2015, several DOTs began negotiations with the FHWA on obtaining full assignment. Alaska, Ohio, and Virginia have begun the process of 23 U.S.C. §327 Assignment applications to the FHWA. Very little public information is made available on the status of these applications.

It is important to note that the technical analysis of practices related to 23 U.S.C. §327 are limited, since the literature and research are primarily focused on the "California Experiment." The state framework and unique regulatory structure under the California Environmental Quality Act (CEQA) of 1969 has guided in-house production and approval of state environmental reviews under the guidance of the Department of Environmental Affairs (DEA) and the *Standard Environmental Reference* manual (CEQ, 2015).

CEQA has been a key point of discussion with both Caltrans and the FHWA and is attributed to the department's "successful" performance in the pilot program (FHWA, 2010 (a) and (b)). Furthermore, the transition from SAFTEA-LU to MAP-21 only guaranteed the permanency of 23 U.S.C. §326 provisions while full NEPA Assignment still retains "pilot" status.

In December 2013, TxDOT entered into an MOU assigning federal responsibility for CE determinations only.<sup>5</sup> The current MOU, signed in December 2014, assigns TxDOT all of the NEPA responsibilities of the USDOT Secretary for highway projects that require FHWA approvals.<sup>6</sup> The scope of assigned responsibilities has increased substantially following assignment under the new MOU. A summary of key differences is located in Table 2.4. This table is not exhaustive, but it is intended to serve as a basis for understanding the shift in responsibilities (FHWA 2013, 2014).

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<sup>5</sup> under 23 U.S.C. 326

<sup>6</sup> under 23 U.S.C. 327

**Table 2.4: Key Differences between MOUs**

| Topic                            | 326 MOU                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | Changes in 327 MOU                                                                                                                                                                                                                                                                          |
|----------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Assigned Responsibilities</b> | <b>I(A):</b> Determination of CEs                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | <b>3.1.1:</b> All of the USDOT Secretary's NEPA responsibilities                                                                                                                                                                                                                            |
| <b>Commitment of Resources</b>   | <b>IV(D):</b> Financial resources, technical, environmental, and managerial expertise                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | <b>4.2:</b> Addition of legal expertise and sufficient qualified staff to oversee consultant work                                                                                                                                                                                           |
| <b>Conflict Resolution</b>       | <b>II(D):</b> Make good faith efforts to identify and resolve conflicts with other agencies, tribes, and the public                                                                                                                                                                                                                                                                                                                                                                                                                                                           | <b>6.3:</b> Comply with any requirements of USDOT or FHWA conflict resolution, including those under 23 CFR 139(h)                                                                                                                                                                          |
| <b>Relationship to FHWA</b>      | <b>XI:</b> FHWA will not intervene in issues involving other agencies, unless 1) it believes the state is not complying with the MOU or 2) the issue is an emerging national policy issue                                                                                                                                                                                                                                                                                                                                                                                     | <b>8.1.3:</b> Addition of a third circumstance for intervention: 3) upon request by either TxDOT or third-party agency                                                                                                                                                                      |
| <b>Monitoring and Oversight</b>  | <b>IV(F)(2):</b> Submit a performance report twice during MOU period identifying areas of improvement and corrective actions                                                                                                                                                                                                                                                                                                                                                                                                                                                  | <b>8.2.5:</b> Submit a self-assessment report one month before each audit including 6 specific elements                                                                                                                                                                                     |
| <b>Audits</b>                    | <b>IV(F)(5-6):</b> FHWA will review performance following submission of the self-assessment report. It may review records and interview staff, and it is not prevented from using other monitoring tactics                                                                                                                                                                                                                                                                                                                                                                    | <b>11:</b> FHWA and TxDOT will coordinate semiannual audits. FHWA may interview consultants and personnel from other agencies to assess performance in addition to TxDOT staff                                                                                                              |
| <b>Performance Measures</b>      | <b>23 USC 326, Section 6004:</b> <ol style="list-style-type: none"> <li>1. CE decisions are appropriately and timely documented.</li> <li>2. CE decisions are factually and legally supportable at the time the decision is made.</li> <li>3. CE decision-making procedures comply with NEPA, 23 CFR 771.117, and the MOU.</li> <li>4. The State has met staffing and quality control requirements of MOU.</li> <li>5. The State has complied with other Federal and State legal requirements.</li> <li>6. The State has complied with recordkeeping requirements.</li> </ol> | <b>10.2.1:</b> <ol style="list-style-type: none"> <li>A. Compliance with NEPA and other environmental regulations</li> <li>B. Quality control and assurance for decisions</li> <li>C. Relationships with agencies and the public</li> <li>D. Increased efficiency and timeliness</li> </ol> |
| <b>Training Requirements</b>     | <b>IV(E)(3):</b> State must provide needed training and notify FHWA of identified training needs                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | <b>12:</b> FHWA provides initial training. A joint training plan will be created and updated annually                                                                                                                                                                                       |

*Source: CE Assignment MOU (2013) and Full NEPA Assignment MOU (2014)*

TxDOT's resource commitments have increased with the addition of new responsibilities. Legal staff and sufficient managerial staff to oversee consultant work have been added as explicit

requirements. TxDOT will also be held to a higher standard for conflict resolution in its role as the lead federal agency. This, too, may require additional staff expertise.

The December 2014 MOU has expanded the ability of the FHWA to assess performance through monitoring and oversight. Previously, the CE MOU permitted FHWA to interview state staff during audits.<sup>7</sup> The full NEPA Assignment MOU has expanded this provision to include consultants and other relevant non-TxDOT personnel.<sup>8</sup> TxDOT's audit coordinator will assist in making external personnel available for interviews. The FHWA may also invite other federal or state agencies to participate in audits, and it will notify TxDOT of its decision to do so.<sup>9</sup>

Success will be measured differently under the full NEPA Assignment MOU. Both sets of performance measures relate to timely and defensible environmental determinations. However, the specific objectives have changed to reflect the increased scope of decisions. TxDOT is now responsible for collecting and maintaining data for four new categories of performance measures, with eight sub-measures.<sup>10</sup>

## **2.3 Responsibilities Retained by Federal Agencies**

While TxDOT has assumed most of the USDOT Secretary's NEPA responsibilities under the current MOU, the FHWA has reserved some responsibilities regarding environmental decisions, government-to-government consultation, outside agency mediation, and legal issues. TxDOT may amend its application at any time to request the addition or withdrawal of projects, classes of projects, or environmental review responsibilities consistent with federal law.

### **2.3.1 Projects Excluded from MOU**

The FHWA retains responsibility for two of the most complex decisions: Section 4(f) determinations of the DOT Act and air quality conformity determinations made under the Clean Air Act. After completing analysis, TxDOT must consult the FHWA and receive approval for a Section 4(f) use determination.<sup>11</sup> Conformity determinations for air quality non-attainment areas must be made by the FHWA;<sup>12</sup> federal law specifically prohibits the assignment of this responsibility to state DOTs. The FHWA Texas Division Office is limited to reviewing only the data necessary to perform the air quality conformity analysis, and TxDOT must make this information available.

The geography of a project may also exclude it from assignment to TxDOT. Projects that cross state boundaries or that are adjacent to international boundaries remain in the FHWA's jurisdiction.<sup>13</sup> Projects on federal land or tribal land might not be assigned to TxDOT depending on the funding source. Projects funded by the Tribal Transportation Program, Federal Lands

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<sup>7</sup> Section IV(F)(5) of the CE MOU

<sup>8</sup> Part 8.2.2 of the TxDOT MOU

<sup>9</sup> Part 11.3.1 of the TxDOT MOU

<sup>10</sup> Part 10.2.1 of the TxDOT MOU

<sup>11</sup> Part 3.2.8 of the TxDOT MOU

<sup>12</sup> Part 3.2.4 of the TxDOT MOU

<sup>13</sup> Land is "adjacent to international boundaries" if a Presidential Permit from the U.S. Department of State is required (Part 3.3.2(B))

Transportation Program, or Federal Lands Access Program<sup>14</sup> are excluded from assignment unless TxDOT is designing and constructing the project.<sup>15</sup>

Any responsibility not explicitly assigned in the MOU remains the responsibility of the USDOT Secretary.<sup>16</sup> The FHWA is still responsible for environmental laws not listed in subpart 3.2.1 unless assignment is agreed upon through an amendment to the current MOU.

### **2.3.2 Government-to-Government Consultation**

The FHWA will continue to conduct government-to-government consultation with Indian tribes. While TxDOT is not currently assigned this responsibility, a future agreement between a tribe, FHWA, and TxDOT may allow the state agency to administer consultation duties with that tribe. However, the FHWA will retain legal responsibility for government-to-government consultation.

### **2.3.3 Relationships with Other Federal Agencies**

Generally, FHWA will not act as an intermediary between TxDOT and federal agencies. However, TxDOT or another agency may request FHWA intervention in “extraordinary circumstances.”<sup>17</sup> Agencies are also permitted to notify the FHWA of concerns about TxDOT’s execution of the MOU. In this case, the FHWA would notify TxDOT of the potential compliance issue and assist in its resolution.<sup>18</sup>

### **2.3.4 Roles during Litigation**

While TxDOT is solely liable and responsible for the responsibilities assigned under the MOU, the federal government plays a significant role in navigating the legal process. In the event that a lawsuit regarding TxDOT’s performance of duties is filed, a conference call will be held between TxDOT, the FHWA, and the DOJ to discuss the complaint and strategies for addressing it. If the FHWA and the DOJ determine that the case is one of “federal interest,” TxDOT must consult with the federal entities before settling the case. Whether or not a case is one of “federal interest,” TxDOT must notify the FHWA throughout the litigation process.<sup>19</sup>

## **2.4 MOU differences between TxDOT and Caltrans**

### **2.4.1 Negotiated Agreements between FHWA/State**

The negotiated MOUs with Caltrans and TxDOT differ based on the timeframe for each agreement. The Caltrans MOU was enacted under SAFETEA-LU and outlines a higher degree of collaboration directly with Federal Agencies. TxDOT’s agreement, on the other hand, was enacted under MAP-21 and focuses more on state accountability and procedural applications with interagency affairs (TxDOT, 2014). This difference accounts not only for the timeframe but rather the lessons learned from trial and error under Caltrans’ pilot performance.

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<sup>14</sup> 23 U.S.C. 202, 203, or 204, respectively

<sup>15</sup> Part 3.3.2 of the TxDOT MOU

<sup>16</sup> Part 3.4.2 of the TxDOT MOU

<sup>17</sup> Part 8.1.3 of the TxDOT MOU

<sup>18</sup> Part 8.1.4 of the TxDOT MOU

<sup>19</sup> Part 6.2 of the TxDOT MOU

In general, research and language pertaining to the MOUs indicates a critical need for better clarification on the differing responsibilities and roles between a DOT headquarters and its internal departments. This is most evident in the length of the TxDOT MOU as compared to Caltrans.

#### **2.4.2 Interagency Clarification on Full Assignment and Need for Public Involvement**

Part 3 of the MOU regarding “Assignments and Assumptions of Responsibility” differs between the two states with particular provisions covering transmitting environmental documents between corresponding districts, divisions, and offices (DDOs) and the general public (FHWA, 2007 and 2014). Part 3.1.2 was introduced in the TxDOT MOU and requires that a standard clause regarding the agreement to assume signature authority be conspicuously placed for all readers. Part 3.1.3 was added to the MOU to ensure that TxDOT extended this clause to all NEPA-related public involvement procedures, including any notices of intent (NOIs) or scoping meeting notices. This clause states:

The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried-out by TxDOT pursuant to 23 U.S.C. §327 and a Memorandum of Understanding dated December 16, 2014, and executed by FHWA and TxDOT (FHWA, 2014).

The Caltrans MOU lacks this subpart. Chapter 38 of the Caltrans *Standard Environmental Reference* (SER) states that this clause should be placed upon all environmental documents related to NEPA Assignment. However, in three specific audits, the FHWA noted that environmental documents with interagency agreements, particularly with the U.S. Fish and Wildlife Service (USFWS) on Section 7 consultation and coordination, lacked identification of responsibilities assumed by Caltrans despite the SER’s explicit instructions (FHWA 2008(c), 2010(c), 2012(c)). The FHWA noted that this lack of supervisory direction led to several critical errors by DDO personnel in tracking, billing, and transmitting environmental documents between the appropriate project managers and project billing codes (FHWA 2010(c)).

Adjustments in Part 3 of the MOU under TxDOT relate directly to challenges of clarifying Assignment responsibilities among agencies and the public. In contrast to Caltrans, Part 3 of the TxDOT MOU outlines the need for a more robust public engagement program. The CEQ, in a recent memo dated January 25, 2015, made a priority recommendation that “Agencies [should] refine and develop their NEPA management and public engagement IT tools by leveraging existing tools and working collaboratively across the Federal Government to ensure compatibility” (CEQ 2015).

#### *Consistency with Regional Plans and Local Level Agencies*

Part 3.3, “Highway Projects,” of the TxDOT MOU outlines the state’s responsibility for ensuring that any proposed project and environmental review be consistent with regional and local-level plans. This item was not included in the Caltrans MOU. Throughout Caltrans’ audits during the first four years of assignment, the FHWA found that the agency continued to have inconsistencies resulting from omissions and errors on quarterly reports listing approvals and decisions (FHWA 2011(c), 2012(c)).

These errors on quarterly reports resulted in the FHWA’s inability to comprehensibly monitor Caltrans’ performance. The introduction of Part 3.3 in TxDOT’s MOU correlates to continual processing errors at DDO levels. This item is explored in this report’s Section 3.4.2, Time/Cost Savings on Environmental Document Processing.

### *Litigation and Conflict Resolution*

MOU Part 6 regarding litigation differs between each State in that the TxDOT MOU contains further clarification on the procedural steps required in the event of legal actions or notices taken against the Agency. The language is particularly unique between both MOUs, as Caltrans' agreement authorizes the Agency to collaborate closely with U.S. DOJ and the California FHWA Division in the event of a complaint or notice to sue under NEPA. Conversely, TxDOT's MOU contains the addition of subparts 6.2.7 to 6.2.9, which provide direct clarification on step-by-step legal procedures to be taken post-settlement (TxDOT, 2014).

Caltrans in 2011 reported throughout the pilot program that the Agency received on average one NEPA-related lawsuit per year—a trend seen prior to the pilot program (Caltrans, 2011). However, as seen in *Biodiversity v. Caltrans*, the courts have brought to light the failures of state-level agency cooperation and sequential disagreements resulting from a lack of full clarification between subject matter experts and district-level coordinators. The FHWA and TxDOT introduced a stipulation that, in the event of disagreement between the agencies, Federal action will be undertaken by CEQ for determining any pre-decision referrals (FHWA, 2014). This includes CEQ's involvement in all environmental review responsibilities that TxDOT has assumed under Assignment (FHWA, 2014).

### **2.4.3 Monitoring and Oversight**

Part 8 of the MOUs regarding program monitoring highlights important changes to the NEPA Assignment resulting from deficiencies found in Caltrans QA/QC procedures. In general, the structure and timeframe of FHWA audits and self-assessments are similar. However, Part 8 in TxDOT's MOU is substantially longer; this section of the MOU concerns coordination with the FHWA for incorporating findings and corrective actions among interagency operations. In particular, Part 8 indicates the need for a higher quality of monitoring on behalf of DOTs.

It is important to note that the FHWA makes explicit that “federal agencies may raise concerns regarding compliance with this MOU by TxDOT and may communicate these concerns to FHWA” (FHWA, 2007, 2014). Enforcement by DOTs under Assignment requires the department to better assess vulnerabilities and limitations resulting from projects involving external parties. Training and delegated responsibilities should be clarified and updated regularly by DOT Headquarters.

Prior to the Agency's fourth year of implementation—in which the program matures into the Monitoring phase under federal renewal—the FHWA is, in effect, one of the many entities in charge of monitoring NEPA Assignment stewardship and Agency compliance. Resource agencies and other outside entities that work with TxDOT, such as the United States Army Corps of Engineers (USACE) and the Texas Parks and Wildlife Department (TXPWD), will assist in surveying and guiding the Agency's technical performance. The program will require close identification of interagency performance standards for monitoring beyond those established under FHWA Texas Divisions' authority, and those under existing DOT authority.

Throughout Caltrans pilot program, best practices of internal training and quality assurance were seen at the District level, as opposed to Division headquarters. Several audits have noted that these Districts helped improve Agency compliance with control procedures for high-quality local agency/consultant prepared documentation. However, the FHWA noted that these practices have not been adequately outlined in the Caltrans literature and will require further investigation with corresponding project development teams.

## **Chapter 3. Selected Audit Findings**

This chapter discusses audit findings from TxDOT's first two FHWA audits and the six formal audits conducted on Caltrans under NEPA Assignment. This chapter provides recommendations for TxDOT's consideration as it moves into its second year of NEPA assignment.

Under the MOUs for NEPA Assignment, the FHWA regularly conducts audits to review a DOT's compliance with the MOU.<sup>20</sup> As the first and only state DOT to undergo full implementation of NEPA assignment, Caltrans was chosen as the baseline example for assessing the presence of issues over an 8-year period. Key findings were selected from six individual audits conducted by the FHWA, as well as from seven program self-assessments carried out by Caltrans between 2007 and 2013. The most common issues identified by both Caltrans and FHWA are discussed in the sections below, as well as summarized in Table 3.1.

The range of NEPA-related issues cited in the audits correlate with core requirements and responsibilities described in both the TxDOT and Caltrans' MOUs. NEPA Assignment is not a static set of processes and procedures. The MOUs require continual modifications to remain in compliance with the letter and spirit of the law. The early recognition of issues and red flags under NEPA Assignment will assist TxDOT with targeting key areas where additional staff training may be needed. As TxDOT's NEPA Assignment program matures, its processes and organizational capacities are expected to mature, in some cases significantly. Thus, assessing issues identified by the FHWA during its Caltrans audits is a strategic approach to ensure that TxDOT is successful in adapting and complying to its MOU with minimal disruptions to its activities.

### **3.1 FHWA's Formal Auditing**

Section 11 of the TxDOT MOU outlines the key requirements for six formal audits to be conducted by FHWA over four years. The audits are to occur semiannually in the first two years (2015, 2016) and then annually the third and fourth years (2017, 2018). Formal audits are the primary mechanism used by the FHWA to evaluate 1) TxDOT's compliance with responsibilities outlined in the MOU, 2) TxDOT's progress in meeting performance measures, and 3) compliance with environmental documentation and records as "needed for the USDOT Secretary's annual report to Congress" (FHWA, 2014). Furthermore, the scope of FHWA's audit includes a review of staff knowledge on processes and procedures (including documentation requirements) used to reach project decisions in compliance with MOU Part 3.2.

### **3.2 The First TxDOT Audits**

Since receiving Assignment authority in December 2014, TxDOT has undergone two FHWA audits: in April 2015 and September 2015. The results of the second FHWA audit have not been posted in the Federal Register in draft or final form. However, the final audit report from the April 2015 audit was posted in November 2015.

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<sup>20</sup> Pursuant to 23 CFR 771.1, 'formal' reviews are conducted by FHWA on a required basis deemed in Section 11 of the TX-MOU. "Informal" auditing or reviews are in-house, self-assessments done by the Agency HQ or District staff on a less routine and ad-hoc basis.

### **3.2.1 Preparing for Audit 1: April 13–17**

In January 2015, the FHWA audit team was formed to prepare for the first audit of TxDOT's performance, scheduled to occur within six months of assignment. Three resources were used during the audit to assess TxDOT's capacity and preparedness to carry out roles and responsibilities assigned in the MOU:

- TxDOT's response to a pre-audit questionnaire
- A review of a randomly selected project files approved since NEPA Assignment
- Interviews with TxDOT, the Texas Historical Commission, and the USFWS

In future audits, the FHWA will evaluate TxDOT's four performance measures identified in the MOU. However, baseline and testing data was being accrued at the time of the first audit, so analysis would not prove to be beneficial. In lieu of evaluating the four performance measures, a pre-audit questionnaire was used during the first audit to evaluate TxDOT's efforts to adapt to NEPA Assignment during the first six months of the MOU. The questionnaire related to six topics to be addressed in the FHWA audit report:

- Program Management
- Documentation and Records Management
- QA/QC
- Legal Sufficiency Review
- Performance Measurement
- Training Program

The audit outcomes and comments from the FHWA are summarized in Section 3.2.2.

In preparation for the first audit and ongoing NEPA Assignment responsibilities, TxDOT created and refined critical documents and plans, including the DOT's training plan, QA/QC plan, and reference materials such as toolkits and handbooks. The training plan describes how training needs are identified and lists recent training provided by TxDOT and by the FHWA (TxDOT, 2015a). The QA/QC plan provides an overview of the QA/QC program, including early project stages, environmental document development, public involvement, and final approval. This document also includes process flow charts, checklists, and a table of the metrics selected by TxDOT to demonstrate progress in the four performance measures defined in the MOU (TxDOT, 2015b). These plans both fulfill MOU requirements and aim to improve TxDOT's project delivery.

A series of toolkits and handbooks were also updated to reflect NEPA Assignment, from tools for determining a project's classification to detailed guides on project development for each class of action. In 2015, TxDOT added twelve guides related to CEs and EAs, six related to QA/QC, three for conducting re-evaluations, and numerous overarching tools such as the suite of Best Practice guides (TxDOT, 2015c, 2015d, 2015e, 2015f, 2015g).

These materials have been continuously updated in preparation for the second audit, which occurred in September of 2015.

### 3.2.2 Major Findings of the First Audit

The draft of the first audit document was published for comments on August 15, 2015. No public comments were received, and the final audit report was published in the Federal Register on November 19, 2015 (Federal Register, Aug. 2015, Federal Register Nov. 2015).

The audit report prepared by the FHWA identifies two instances of non-compliance in TxDOT's administration of NEPA roles and responsibilities. It also provides comments on strengths and observations for improvement in six categories:

- Program Management
- Documentation and Records Management
- QA/QC
- Legal Sufficiency Review
- Performance Measurement
- Training Program

#### *Non-Compliance Observations*

The FHWA defines non-compliance observations as “instances of being out of compliance with a Federal regulation, statute, guidance, policy, TxDOT procedure, or the MOU.” Both findings had been addressed by TxDOT before the publication of the final audit report, and the FHWA planned to review follow-up actions during the second audit (Federal Register, Nov. 2015).

The first observation of non-compliance was related to the requirement to incorporate mitigation efforts into the project action being mitigated.<sup>21</sup> A noise abatement barrier was needed to mitigate the impacts of a larger project, but it was not incorporated into the larger project. Instead, the barrier was processed as a separate project classified as a CE. The TxDOT noise guidelines approved by the FHWA in 2011 do not have provisions for processing mitigation efforts as separate projects, and as such TxDOT cannot approve the project as an independent action. The FHWA recommends knowledge and application of FHWA policy and regulations before approving any NEPA decision document (Federal Register, Nov. 2015).

The second instance of non-compliance was in violation of the FHWA's policy to coordinate compliance with all environmental requirements under the umbrella of the NEPA process.<sup>22</sup> TxDOT staff provided conditional approval to a project that was not correctly listed in the Statewide Transportation Improvement Program (STIP)<sup>23</sup> and did not yet have a required air quality conformity determination. Conditional approval violates the FHWA's policy by allowing projects to advance in development before meeting environmental requirements under the umbrella of NEPA (Federal Register, Nov. 2015).

#### *Program Management*

The FHWA audit team found four primary strengths at TxDOT in the area of program management: highly qualified staff, strong communication between ENV and districts, strong efforts to create tools and guidance, and district ownership and pride in environmental decision-

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<sup>21</sup> 23 C.F.R. 771.105(d)

<sup>22</sup> 23 C.F.R. 771.105

<sup>23</sup> As required by the NEPA Assignment MOU, Part 3.3.1

making. Supporting these strengths, the FHWA specifically commented on the many opportunities for feedback available to district staff, such as reviews by the Self-Assessment Branch (SAB), NEPA Chats, and the development of the Core Team.

The weaknesses identified in program management are not substantial enough to warrant audit findings, but could lead to findings in the future. Interviews with resource agency staff revealed that while agencies had no formal complaints, there were concerns about communication between TxDOT and agencies. Specifically, agencies were unsure that they were being “kept in the loop” on project decision-making and felt that there was pressure from TxDOT to rush through the agency’s review process. Interviewees also expressed “occasional quality concerns” related to information provided by TxDOT (Federal Register, Nov. 2015,). The audit team recommended improved communication protocols to address potential disputes before they escalate to conflicts.

The audit team also found that districts were not consistent in their treatment of local public agency projects. Some districts confirmed that local projects were reviewed using the same processes as TxDOT projects. However, others felt that local projects received lower priority than TxDOT sponsored projects (Federal Register, Nov. 2015). Since this audit, TxDOT has published handbooks and standard operating procedures for locally sponsored EAs that will improve standardization across districts (TxDOT, 2015).

### *Documentation and Records Management*

TxDOT uses an environmental project database for NEPA referred to as ECOS (Environmental Compliance Oversight System). The audit team found ECOS to be a theoretically adaptable and flexible system to meet evolving needs under Assignment. However, the team noted that the benefits gained from flexibility may be lost in the inability to ensure consistency of use across the department. The FHWA found that the state of project files in ECOS in April 2015 made it difficult to determine whether environmental commitments were made and kept, whether CEs were applied appropriately, whether all necessary documentation was attached to the ECOS file, and how TxDOT would be able to disseminate project information to the public using the system.

Most importantly, the review team was unable to determine whether the constraints relevant to certain CEs were met through the documentation in ECOS,<sup>24</sup> similar to a finding in the August 2014 audit of TxDOT’s CE Assignment. This observation may have been exacerbated by concerns from the audit team that project documentation was difficult to find due to complexity in ECOS and the absence of a file naming convention (Federal Register, Nov. 2015). However, if the rationale behind selecting a specific CE is in fact absent from the project file, the decision will be vulnerable to legal action. The audit team “urged” TxDOT to improve the organization and accessibility of files in ECOS so that it is easier to determine the completeness of the file of record (including by internal actors working on the project).

### *Quality Assurance/Quality Control*

The FHWA identified four successful QA/QC practices in place at TxDOT. Notably, the QA/QC measures identified span efforts from ENV, districts, and across both. The creation of the SAB and the Corrective Action Team (CAT) provides timely feedback to districts regarding environmental documents and to ENV regarding forms, guidance, and handbooks. District-led QA/QC processes such as smart PDFs and peer review programs permit innovation based on the

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<sup>24</sup> Specifically, whether c(22)s would take place entirely within the operational right-of-way, c(23)s would not exceed \$5 million in federal funds, and c(26-28) would meet all of the requirements in 23 C.F.R. 771.117(e).

resources available in a certain district. The Core Team established for each project has one member from ENV and one from the district. This team uses checklists and toolkits to allow standardized review across the department.

Despite creative efforts from both ENV and the districts, the audit team found that the strategy for reviewing documents was inadequate to monitor and improve the quality of products. No clear sampling strategy had been identified at the time of the audit, and the depth of reviews had changed leading up to the audit. For example, beginning in February of 2015, the SAB was only reviewing one form related to CEs and none related to EAs or EISs. These shortcomings led the audit team to make the following statement on TxDOT's QA/QC efforts:

The team was unable to determine whether TxDOT had a basis to assert that its process was working as intended and that they could adequately identify areas needing improvement (Federal Register, Nov. 2015.)

### *Legal Sufficiency Review*

The audit team did not perform analyses of legal sufficiency during the first audit of TxDOT's Assignment. It was noted that TxDOT has four attorneys available for legal reviews and additional capacity at the Office of the Texas Attorney General. TxDOT will not finalize certain environmental documents until a legal sufficiency review has been completed, including Final EISs (FEIS), individual Section 4(f) evaluations, Notices of Intent, and 139(l) Notices (Federal Register, Nov. 2015).

### *Performance Measurement*

TxDOT did not begin reporting on the four performance measures identified in the MOU until the second audit in September 2015. During the first audit, baseline and testing data were being gathered. After reviewing TxDOT's planned performance measures, the FHWA audit identified gaps in two of the four performance areas: QA/QC and relationships with other agencies and the public.

In its February 2015 plans for monitoring compliance with TxDOT's QA/QC standards, the DOT stated that it would report percent of EAs and EISs with completed document review checklists, but it did not list CEs, Section 4(f) evaluations, re-evaluations, or other important documents in the environmental process (TxDOT, 2015d). The auditors urged TxDOT to examine a broader range of decisions. A similar recommendation was made during this project, which can be found in Section 4.4 of this report.

The FHWA audit identified methodological shortcomings in measuring relationships with other agencies and with the public. The February performance measure proposal establishes a polling method to gauge agency satisfaction with TxDOT's execution of responsibilities under the MOU; however, the audit team expressed concern that the content of the polls had not been developed yet. Public satisfaction was set to be measured by the number of complaints received. The FHWA determined that this method was too narrow and did "not appear to be appropriate for gauging effectiveness at this time" (Federal Register, Nov. 2015). The same limitation of this measure was identified during Task 4 of this project and can be found in Section 4.4 of this report.

### *Training Program*

The audit team found TxDOT's annual Environmental Conference to be an effective way to provide training and information related to a wide range of topics to NEPA professionals in both

the public and private sectors. TxDOT's NEPA Chats webinars were praised as being "versatile, flexible, and responsive" and valuable to improving statewide consistency under NEPA Assignment (Federal Register, Nov 2015).

The audit team commented that TxDOT's adopted training model may not be appropriate for the state, the online training offerings were outdated, and the plan is unclear and uncoordinated in light of NEPA Assignment. The training model was adopted from Caltrans, the only other state operating under full NEPA Assignment. However, auditors expressed concern that the differences in culture and regulatory frameworks between the two states rendered the Caltrans model inappropriate for Texas.<sup>25</sup> Interviews revealed that existing online training resources were outdated, referring to topics and sessions that are no longer offered. Finally, the training plan was found to be unclear on which topics were mandatory for different roles, resulting in inconsistent interpretations of requirements across districts. The audit team suggested providing clarification in light of NEPA Assignment in the form of a "progressive training plan" (Federal Register, Nov. 2015).

### *Summary*

In summary, the FHWA audit report found that TxDOT had made progress during the first months of assignment and clearly demonstrated its commitment to establishing a successful program. Improvements suggested by the audit team were actionable suggestions ranging from necessary changes that were "urged" to suggestions for paths to improvement.

## **3.3 Breakdown of Selected Caltrans Audit Findings by MOU Section**

Table 3.1 outlines selected findings of issues throughout Caltrans' pilot program that occurred on more than one occasion and required the agency to take corrective action. Inconsistencies identified through Caltrans self-assessments and audit findings serve as a source to identify training needs. For a full list of all areas covered in the audits, see Appendix B.

The findings suggest that as TxDOT's NEPA Assignment matures, routine process improvements will be necessary for existing NEPA guidance. Outlining and clarifying the expected changes by Headquarters to DDOs and NEPA practitioners before they are enacted is especially important given the increasing resource demands associated with managing more complex and controversial projects during the first years of NEPA Assignment.

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<sup>25</sup> Idaho, Michigan, North Dakota, Ohio, and Wyoming were identified as potential alternative models for adoption

**Table 3.1: Ongoing and Common Errors Evident in Program Implementation**

| <b>MOU Section</b> | <b>Topic/Heading</b>                                                                        | <b>Noted Issues by FHWA Present in Caltrans Audits</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
|--------------------|---------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1.1.1              | Purpose and Responsibilities                                                                | <ul style="list-style-type: none"> <li>• General confusion over appropriate signature authorities at Local, District, and Agency level. Most commonly seen with new staff and consultants.</li> <li>• General confusion on signature authority for projects initiated pre-NEPA Assignment compared with those initiated post-MOU/NEPA Assignment</li> </ul>                                                                                                                                                                                                                                                                             |
| 3.1.1,<br>3.1.2    | Assignments and Assumptions of Responsibilities to Comply with Federal Laws other than NEPA | <ul style="list-style-type: none"> <li>• Incorrect determination of CEs due to lack of clear definitions and experience with new categories</li> <li>• Incorrect use of project reevaluations and project recertification procedures resulting in time-delays and conflict.</li> </ul>                                                                                                                                                                                                                                                                                                                                                  |
| 4.2.1,<br>4.2.2    | State Commitment of Resources and Training                                                  | <ul style="list-style-type: none"> <li>• NEPA Assignment training program could not keep up with demand for on-line training.</li> <li>• Staff competency levels varied between districts. Agency HQ unable to accurately assess and track individual improvements over time.</li> </ul>                                                                                                                                                                                                                                                                                                                                                |
| 5.1.1,<br>5.1.4    | Procedural and Substantive Requirements                                                     | <ul style="list-style-type: none"> <li>• Project errors and lack of knowledge with Section 7 (ESA), Section 4(f), and Section 106 procedures and requirements</li> <li>• General confusion over delegated signature authorities and sequential steps (includes 7.1.1 and 7.2.1)</li> <li>• Limited scope of self-assessment and program reviews. Reviews must be encompassing and Agency must provide documentation proving improvement.</li> </ul>                                                                                                                                                                                     |
| 8.2                | MOU Monitoring and Oversight                                                                | <ul style="list-style-type: none"> <li>• Confusion over expected roles for coordination, consultation, and collaboration (includes 5.1.4)</li> <li>• Incorrect QA/QC procedures and missing forms. Most commonly evident with Local Assistance projects.</li> <li>• Production of Quarterly Reports contained inaccuracies, missing information, and missing files</li> </ul>                                                                                                                                                                                                                                                           |
| 8.3.1,<br>8.3.2    | Record Retention and Project Files                                                          | <ul style="list-style-type: none"> <li>• Required project files missing from the Administrative record, or had wrong signatures and dates. Most notably, staff were not saving electronic e-mails or correspondence related to the Administrative Record</li> <li>• District methods varied when transmitting project files between staff. Noted lack of process by DDOs for ensuring completeness of project file transmittals.</li> <li>• Districts used different tracking sheets, rather than utilizing a single document to track project status</li> <li>• Noted lack of training plan for outside NEPA-practitioners.</li> </ul> |

**3.3.1 Procedures and Substantive Requirements**

Part 5.1 of both the Caltrans and the TxDOT MOUs mandates that the state DOT is responsible for carrying out procedural and substantive requirements that apply to the USDOT

Secretary for conducting NEPA reviews. Compliance with procedural and substantive requirements in this area concerns all applicable environmental laws (state and federal), executive orders, policies, regulations, and interagency agreements.

During Caltrans' implementation of NEPA Assignment, the FHWA remarked on 26 separate occasions when Caltrans staff had incorrectly adhered to the requirements set forth in Part 5.1.4 of their MOU. The FHWA noted, over the course of 3 years, that District- and local-level staff expressed general confusion regarding compliance with these newly assumed responsibilities. This issue primarily concerns projects with third-party consultation on Section 7, Section 404, Section 4(f) technical evaluations, as well as procedural and regulatory requirements for consulting with state and federal resource agencies.

### **3.3.2 Section 7 Consultation**

Federal statute and guidance by CEQ does not mandate a method for interagency consultation. Under NEPA Assignment, the state DOTs serve as lead agencies and must assume the FHWA's role in determining project requirements and thresholds for project consultation and collaboration (Caltrans, 2010-2013). The FHWA noted a variation in staff competency with Section 6002, "Efficient Environmental Review Process" requirements. Despite numerous efforts by Caltrans' Headquarters (Department of Environmental Affairs or DEA) to increase awareness of Section 6002 of SAFTEA-LU the following errors were observed in the audits:

- Failure to issue letters of invitation for collaboration and cooperation with required resource agencies, including early efforts for coordination.
- Failure to retain all coordination plans, letters of invitation, electronic correspondence, and documents (as mandated by resources agencies and federal regulations).
- Failure to incorporate newly issued/revised requirements and regulations, such as Section 7 and Section 4(f) guidance, into environmental review protocols.
- Failure to meet requirements to collaborate with participating agencies on appropriate methodologies, and level of detail for alternatives analysis.
- Failure to correctly adhere to individual agency responsibilities in project duration and proper sequencing of the environmental review process under NEPA Assignment.

In addition to Section 7 approvals, Caltrans noted there was general lack of overall staff competency on Section 404-related procedures. The most common mistakes observed were the lack of appropriate documentation of coordination plans, their use of invitation letters to request consultation and collaboration with resources agencies, and inadequately responding to comments by resource agencies and the public in a timely fashion.

### *Recommendation*

Under TxDOT MOU Part 3.2.2, the Agency is responsible for complying with the requirements of any applicable environmental law. Based upon the criticism of the Caltrans audits by the FHWA, it is recommended that TxDOT review the specifications defined in 23 USC 139, so that it can be sure it can effectively carry out the responsibilities required

### 3.3.3 Section 4(f) and 106 Evaluations and Consultation

Upon interviewing district staff throughout California, the FHWA noted that District staff seemed generally knowledgeable of when Section 4(f) applies, but did not understand the substantive requirements and purpose under 23 CFR 774. The most common irregularity observed in projects requiring Section 4(f) evaluations was confusion over the appropriate use of individual and programmatic evaluations when preparing a *de-minimis* finding. Additionally, the FHWA noted multiple occasions statewide in which staff did not know, or were unclear, of changes made under SAFETEA-LU and MAP-21 linking Section 4(f) and Section 106 processes. Particularly, compliance with *de-minimis* determinations made under Section 106 evaluations for both Section 4(f) and Section 106 resources.

Overall, the FHWA noted that beyond basic knowledge of Section 4(f) and Section 106 resources, clarifications of procedural requirements should address requirements set under 23 CFR 774 for determining the level of documentation required, by Resource Agencies and Caltrans, for determining *de-minimis* findings with Section 4(f) and Section 106 resources.

#### *Recommendation*

It is strongly recommended that a working plan and tracking sheets be developed by ENV for standard use by TxDOT Districts responsible for third-party coordination with resource agencies or with projects requiring local assistance. The Central Region Districts of Caltrans were noted by the FHWA for standardizing such practices to ensure that all projects are entered into the system and tracked appropriately. Spreadsheets include data validation features such as color-coded items to identify upcoming deadlines and responsibilities by performing parties (FHWA, Audits in 2010 and 2011).

Additionally, it is recommended that TxDOT conduct a general Section 4(f) and Section 106 district-wide survey as early as possible in program implementation in order to:

- Reiterate the importance of Sections 106 and Section 4(f) linkages for expediting approvals and permits
- Ensure generalists are able to access proper guidance on pre-emptively assessing resource impacts for early determination of project class
- Identify issues inherent to project typology and sensitive issues that could trigger an automatic escalation in the project review
- Provide necessary individual staff experience through active training and certification (i.e., “*training a NEPA generalist to become a NEPA subject matter expert*”).

### 3.3.4 Project Reevaluations

Reevaluations can arise at any point in the NEPA process. Throughout the pilot program, Caltrans saw reevaluations steadily rise as the top reason for NEPA-related project delays—with many delays stemming directly from simple omissions and missing documentation. Overall, the general nature of FHWA comments were that staff lacked clarification on appropriate signature authorities under NEPA Assignment, as well as the procedural steps for revalidating projects initiated pre-NEPA Assignment (FHWA Audits of Caltrans 2009 through 2011).

Caltrans noted that revalidations forms were often not compliant because documentation routinely omitted key project changes and major approvals occurring at each NEPA milestone

(Caltrans, 2011). Furthermore, many of the environmental documents containing project changes did not identify or indicate whether original portions of the environmental documents remained valid or not (Caltrans, 2011).

### *Recommendation*

Lessons learned from the first year of Caltrans' pilot program indicate that the Agency must address general confusion on whether a project undergoes a re-evaluation following the expiration of its technical studies and the appropriate steps required (FHWA, 2009 (a)). For example, FHWA noted instances with Caltrans in which staff did not comply with the revised Reevaluation Certification Checklist under CFR 771, but rather followed pre-delegation procedures. To prevent such segmentation and errors from occurring, it is recommended that clarification be issued on:

- Identifying and flagging pre-NEPA Assignment projects under review or not assigned a classification. Particularly, clarifying and reiterating procedures for pre-MOU CEs:
  - Re-classification procedures for unassigned CEs under NEPA Assignment
  - Re-validation procedures for re-classified CEs containing idle technical studies
  - Required steps for peer reviews and signature authority for D-list CEs
- Documentation requirements of the reevaluation process at each major milestone for all project classifications. Specifically, determining and documenting whether a portion or all of original environmental documentation remains valid for projects initiated pre-MOU.

### **3.3.5 Internal Monitoring and Oversight**

Section 12.1.2 of both MOUs requires that a training plan be updated annually throughout program implementation of NEPA Assignment. In addition, Section 4.2.2 requires that Agency Headquarters maintain adequate organizational and staff capacity to effectively carry out the responsibilities it has assumed under Section 3 of the MOU. As evidenced by Caltrans, the varying levels of competency among District personnel presents a challenge for effectively documenting the improvements made over time and staff's ability to carry out the assigned responsibilities assumed under the MOU.

Effective and strategic methods for assessing and addressing individual program gaps can be initiated at the project-level. For example, on large projects, once the Preliminary Environmental Study (PES) form has been completed by Caltrans staff, environmental staffers perform joint field reviews with the local agencies and their consultants. FHWA commended Caltrans for initiating this extra requirement as this provides Caltrans and local agency staff the opportunity to discuss the NEPA process requirements. Other strategies, such as the use of Individual Development Programs (IDPs), proved to be effective for developing and improving Caltrans' NEPA training processes because it allowed Senior Environmental Planners to regularly check individual progress in order to guide and track staff training.

### *Recommendation*

As TxDOT continues to assess and address staff training needs during the first year of NEPA Assignment, it is important that the agency monitor 1) how District staff training needs are

being assessed and 2) the method for demonstrating consistency among and within Districts in the delivery of training. ENV should provide a clear method for standardizing the tracking of programmatic training among Districts to prescribed staff training in order to carry out responsibilities under the MOU.

Furthermore, it is recommended that TxDOT consider adopting a formal NEPA Assignment-specific training plan for local agencies and NEPA practitioners. Given the very large number of local assistance projects in some Districts, and the typically high staff turnover within local agencies, an ongoing training plan is necessary to ensure that practitioners and local agency program staff can carry out the responsibilities under the TxDOT MOU and work with the local agencies and consultants to ensure compliance with statewide procedures and Federal requirements assumed by TxDOT (ASHHTO, 2014).

### **3.3.6 QA/QC Programs and Internal Certification**

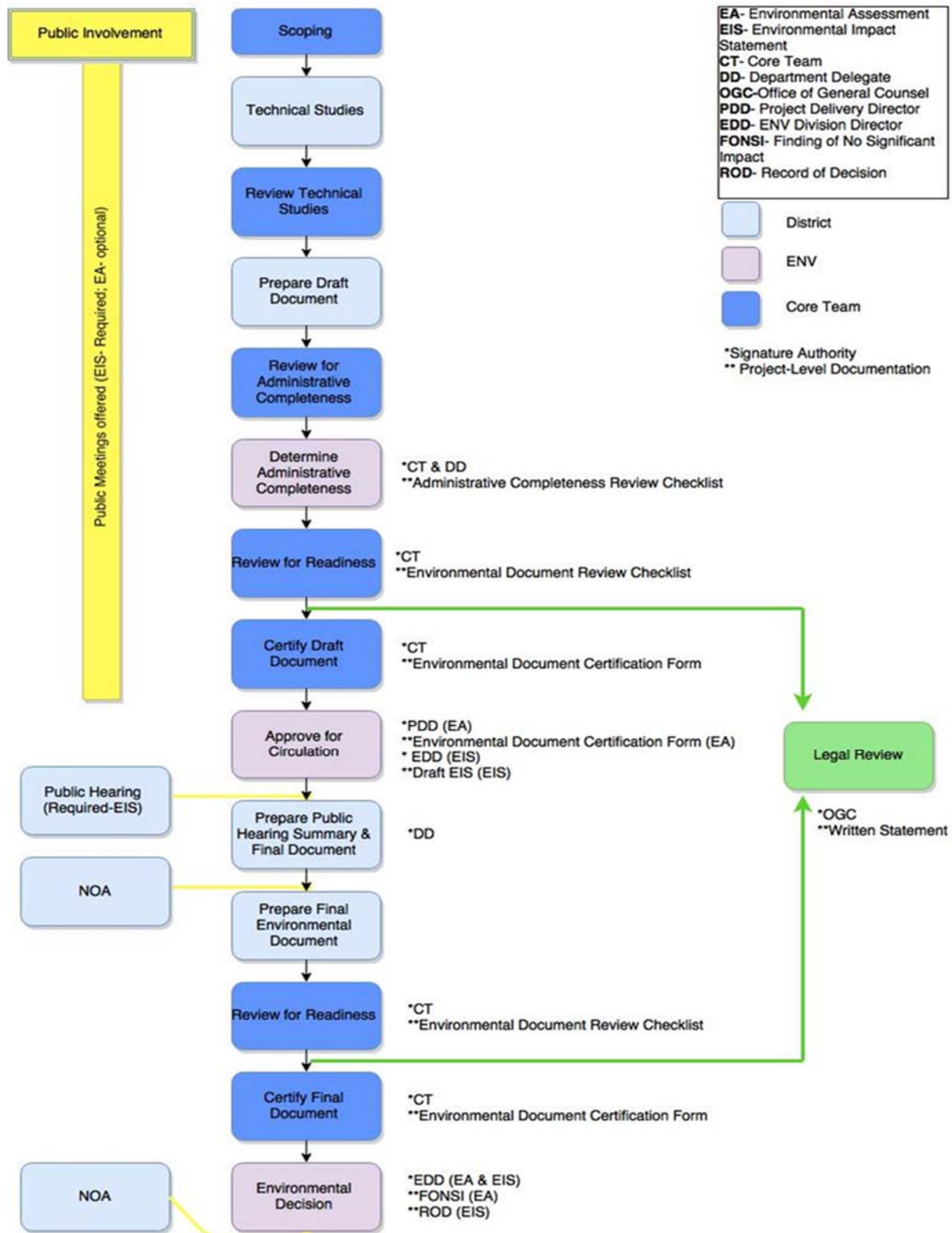
On a total of 27 separate occasions, throughout the six Caltrans audits, FHWA remarked that the QA/QC processes and procedures needed either improvement or were considered deficient (FHWA, Audits of Caltrans from 2008–2011). The most frequent findings were that internal QC forms were either incomplete, filled out incorrectly, not signed, or signed by the wrong person. Despite continued efforts on a monthly basis to address such simple errors and numerous resources and toolkits available to their staff, the problems remained.

The audits noted a general lack of understanding on the purpose of Internal Certification assumed by Caltrans. The FHWA continually criticized Caltrans for incomplete and incorrectly completed QC certification forms identified during each audit. Furthermore, during the first year of its NEPA delegation, the FHWA recounted eight instances with QC certification containing the wrong signatures (FHWA, Audits of Caltrans in 2008, 2009, and 2011). The FHWA reported that staff did not understand the overall reasoning and logic for the sequential progression of reviews as required for signatures and certification forms (FHWA, 2009).

Other critical, project-level issues identified were that QA/QC checklists, peer reviews, and the final environmental documents were completed and signed outside of the proper procedural sequence of the Agency's QA/QC process (FHWA, Audits of Caltrans in 2008, 2010, and 2011). Both the FHWA and Caltrans determined that legal sufficiency reviews were happening too early using limited documentation, or Caltrans staff was not fully clear on when the legal sufficiency reviews were necessary or not required per class of action (FHWA, 2010 (a) and (b)). In addition, peer reviewers were often found to not meet certification requirements or team formation requirements set forth in Caltrans' *Standard Environmental Reference* (FHWA, 2009).

#### ***Recommendation***

To better assess the level of TxDOT's staff competency regarding QA/QC provisions under NEPA Assignment, it is recommended that all TxDOT staff receive regular staff training on TxDOT's QA/QC process and up-to-date audit materials be created in an easy-to-read and understandable format. Figure 3.1 outlines a recommended augmented QA/QC chart for TxDOT under NEPA Assignment.



Source: TxDOT QA/QC Draft Guidance; CE, EA, and EIS Handbooks

Figure 3.1: QA/QC Process for EAs and EISs

### **3.3.7 Administrative Record and Project Files**

MOU Parts 8.3.1–8.3.4 for both MOUs requires that DDOs follow a standard guide for retaining all relevant project documents, correspondence, and reports. In addition, under NEPA Assignment, these files must conform to specifics of the Uniform Filing System (UFS).

Despite numerous checklists and annotated documents, required project documentation and signatures continued to be missing from Caltrans' project files, which resulted in multiple project delays due to the corrective actions required for approvals to proceed—specifically from USACE and USFWS (FHWA, 2008, 2009).

The FHWA noted varying opinions among districts, as some believed the record should include only the main documents that were actually used by the decision-maker, while others thought that the record should contain only the minimum requirements set by headquarters (FHWA, 2009). Based on findings compiled by FHWA during their evaluation of program implement, the most common examples of missing documents, by order of frequency, included:

1. Signed final environmental documents
2. Noise abatement decision report;
3. Historic Properties Survey Report
4. Environmental Commitment Records
5. Internal and external QC certification forms (many signed but undated)
6. Signed copies of the Preliminary Environmental Analysis Report/Preliminary Environmental Scoping forms
7. Section 4(f) supplemental reports and studies

#### *Recommendation*

It is important that TxDOT clarify the necessary procedures for projects or related technical studies, which had been initiated to the authorization of NEPA Assignment. NEPA Assignment requires files be checked and re-checked throughout the environmental process at each milestone, in order to ensure that all relevant documents are present. This requires a dedication of Agency resources to track and ensure that documents are circulated at key milestones of the review process, and that the transmittal of required project files across DDOs is consistent and uniform.

More importantly, it is recommended that ENV work in tandem with TxDOT's General Counsel Division to issue guidance and information on inherent risks associated with the Administrative Record. It is important that staff recognize the legal implications and necessity of compliance with the Administrative Record. Apparent internal inconsistencies in the Administrative Record should be identified by TxDOT prior to formal audits and, if possible, the documents that explain these inconsistencies have to be located and included in the Administrative Record.

### **3.3.8 Quarterly FHWA Reports**

Parts 8.2.5 and 8.2.7 of both MOUs require that TxDOT and Caltrans submit all records related to approvals and decisions to the FHWA on a quarterly basis. As recorded in the program audits, Caltrans' listings of all approvals and decisions under the Pilot Program were incomplete and consistent. Quarterly reports received by the FHWA have been revised and resubmitted by Caltrans to address reporting data gaps. A total of seven Caltrans districts submitted revisions to four or more quarterly reports during the pilot. The FHWA concluded that the processes for

developing Quarterly Reports did not align with approvals and decisions reported to Caltrans HQ by the District offices.

Among the errors discovered were reporting errors related to incorrectly characterizing projects and omissions associated with untimely reporting of project approvals and decisions by district staff. The different approaches used by each district to collect project information for each report was found to be variable and this was a key contributor to continued reporting inaccuracies.

### *Recommendation*

The FHWA recommends the implementation of an environmental database system on a statewide basis to assist in the developing of a comprehensive database of environmental projects and milestones to improve the accuracy of the information reported in the quarterly reports. ECOS provides an opportunity to link DDOs, but further investigation is required by TxDOT to better address mitigation strategies specific to any related reporting errors.

## **3.4 NEPA Assignment Findings from Caltrans**

### **3.4.1 Improving Project Delivery and Agency Innovation**

Findings from California's experience with full Assignment indicate that NEPA Assignment offers benefits beyond streamlined project delivery and efficiency. Collaborative and innovative modifications to the NEPA process under Assignment provide greater positive externalities in the form of expedited project delivery, as well as increased accountability over project-related expenditures and taxpayer's resources.

As part of the Agency's shift from process-oriented documentation to a more concise, referenced, streamlined method of documentation, ENV should focus improvements on department flexibility, and position itself as national leader for high-quality project performance, delivery, and accountability through Assignment-specific innovations for process adaptability. Strengthening, clarifying, and reasserting NEPA's central role in project planning and delivery allows for uniformity among districts and precludes any possible corrective actions by FHWA. Furthermore, TxDOT initial performance in 2015 can establish an industry and national standard for enhanced services and responsibilities in government sponsored environmental stewardship under NEPA (CEQ, 2014).

To date, literature and self-assessments provided by Caltrans on processing EAs, EISs, and FONSI have shown that the MOU should be treated internally as a living document focused on improved Agency standards and practices, while also sustaining State responsibility over resource conservation for future generations (Caltrans, 2007, 2009, and 2011). As such, NEPA Assignment should be viewed as a "work in progress" due to unforeseen changes coming from shifting regulatory and political environments. This can be enhanced through process adaptability and proactive QC/QA modifications following the Agency's first year under Assignment.

Achieving unanimity among staff expertise with NEPA requires that State DOT Divisions, in general, move beyond traditional oversight roles and focus on integrating QA/QC and NEPA documentation procedures *horizontally* among state and neighboring DDOs (Elkind et al., 2015).

In 2012, the FHWA concluded that the highly decentralized nature of operations across all of Caltrans' 12 districts continued to be a major contributing factor to variations and deficiencies observed throughout the pilot program (FHWA, 2012). In this particular audit, the FHWA remarked: "as a result [of the organizational structure], Caltrans Headquarters [DEA] must provide clear, consistent, and ongoing oversight over [each individual] Districts' implementation of

program and responsibilities” (FHWA, 2012). This is a central concern that all regulatory agencies (state and federal) must take into consideration during program implementation and strategic operations.

General guidance provided to date by the FHWA and USDOT will not meet the specificity of NEPA Assignment responsibilities. It will require further assessment of differing practices and discussions at the state and national levels. It will also require further investigation of new effective and feasible public outreach strategies and discussions with key advocacy groups. The findings presented thus far, of Caltrans’ performance and adjustments to the *Standard Environmental Reference*, indicate substantial (and continual) process modifications pertaining to internal and external monitoring, QA/QC measures, staff training and certification, resource allocation, and quality environmental documentation/record keeping (AASHTO, 2014).

### **3.4.2 Time/Cost Savings on Environmental Document Processing**

Table 3.2 outlines the report findings for the total median time savings in environmental document approvals by Caltrans from 2007 until 2014. It should be noted that the comparative analysis does contain limitations due to the uniquely small sample size of complex documents processed during the first year of the pilot program. As such, careful consideration must be taken when juxtaposing the findings with TxDOT’s Assignment performance to-date.

While FHWA Authority has played a significant role in overall project delivery time savings of NEPA-related processes in California, it is impossible to isolate the direct and indirect effects that the pilot program has had on overall project delivery (Caltrans, 2007). A number of non-quantifiable factors have unknown and incalculable effects on the time that it takes to deliver projects to construction. Furthermore, complex environmental documents are inherently different due to project design and sensitive issues, and therefore require intensities that may often be considered “outliers” when reviewing the overall range and averages of Agency time savings (Caltrans, 2007, 2009, and 2011). Furthermore, Caltrans’ comparable analyses and QA/QC procedures—compared to TxDOT’s non-sequential procedures under Assignment—do not take into account the time loss from the sequential steps of joint CEQA-NEPA document preparation and approval (Caltrans, 2011).

### **3.4.3 Project Delays and Nature of Delays in NEPA Assignment**

Table 3.3 outlines the top reasons for project delays in processing EAs/FONSIs and EISs from the 2007, 2009, and 2011 Caltrans self-monitoring reports. The delay factors noted by Caltrans correlate directly with general program deficiencies reported by the FHWA, Federal Transit Administration (FTA), USEPA, and USDOT in yearly audits (CA-OPR and CEQ, 2015).

In particular, there are increasingly consistent trends in project approval delays due to modifications to project design and revisions to environmental documents post-quality assurance and during quality certification (Caltrans, 2007, 2009, and 2011). These delays are commonly seen in project files prepared at the local and district levels by environmental coordinators and local consultants (Caltrans, 2007 and 2011).

**Table 3.2: 2007–2014 Median Times Savings\* for Environmental Approvals under the Caltrans NEPA Assignment Program**

| NEPA Process Milestones                                                                                                                                                                                                                     | Pre-Assignment (Months) | Documents Processed | Assignment (Months) | Documents Processed | Total Savings (Months) |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------|---------------------|---------------------|---------------------|------------------------|
| <b>Begin Studies to Draft EA Approval</b>                                                                                                                                                                                                   | 42.3                    | 31                  | 31.6                | 156                 | 10.7                   |
| <b>Begin Studies to FONSI</b>                                                                                                                                                                                                               | 54.1                    | 31                  | 43.1                | 135                 | 11.0                   |
| <b>NOI to DEIS Approval</b>                                                                                                                                                                                                                 | 69.9                    | 8                   | 41.1                | 18                  | 28.8                   |
| <b>NOI to FEIS Approval</b>                                                                                                                                                                                                                 | 193.9                   | 5                   | 58.3                | 11                  | 135.6                  |
| <b>USFWS/NMFS Coordination to Section 7</b>                                                                                                                                                                                                 | 11.0                    | 25                  | 5.9                 | 97                  | 5.1                    |
| *Median time for all documents prepared by Caltrans, consultants, and local agencies from July 2007 through December 31, 2014. Data provided by the DEA, Caltrans, California State Legislature (Sec. 820.1), and FHWA-California Division. |                         |                     |                     |                     |                        |

**Table 3.3: Top Project Delays and Nature of Delays in Environmental Review Process as Reported by Caltrans**

| 2007-2008                                                                                                                                                                                                                                       |                                                                               | 2009-2010                                                                   | 2011-2012                                                                   |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------|-----------------------------------------------------------------------------|-----------------------------------------------------------------------------|
| Frequency of Occurrence                                                                                                                                                                                                                         | 1 Section 7 consultation and coordination                                     | Section 7 consultation and coordination                                     | Modifications to project design                                             |
|                                                                                                                                                                                                                                                 | 2 Revisions and coordination to local agency or consultant prepared documents | Modifications to project design                                             | Revisions and coordination to local agency or consultant prepared documents |
|                                                                                                                                                                                                                                                 | 3 Modifications to project design                                             | Revisions and coordination to local agency or consultant prepared documents | Section 7 consultation and coordination                                     |
|                                                                                                                                                                                                                                                 | 4 Incomplete draft project reports for public circulation                     | Funding-related delays                                                      | Extensive Agency or public comments on documents                            |
|                                                                                                                                                                                                                                                 | 5 Coordination with agencies for approval on project specifics                | Section 404 NEPA integration                                                | Coordination with agencies for approval on project specifics                |
| Data compiled from First, Second and Third Reports to the California Legislature Pursuant to Section 820.1 of the California Streets and Highways Code, Caltrans, and Governor’s Office of Planning and Research: January 2007, 2009, and 2011. |                                                                               |                                                                             |                                                                             |

As such, time delays mostly occur when both modifications to project design and revisions to consultant-prepared environmental documents occur sequentially and during the last of the QC phases (“review for readiness”). Agencies will need to increase and modify the intensity of existing training and process certifications, as well as clearly defined DDO responsibilities and roles, to

catch these errors early during project scoping and document preparation phases. Caltrans has initiated programs for online certification, as well as the required annotated documents, but modifications to project design continue to rise as the DEA finds that the final “review for readiness” QA/QC measure is often neglected at the district or local level (U.S. CEQ and OPR, 2014).

Under the MOUs, the FHWA maintains a strong interest in the Agency’s success in both aspects of NEPA Assignment (i.e., 23 U.S.C. §326/§327). Yet new federal authority delegated to eligible states under 23 U.S.C. §327 require stronger measures to be stipulated by the offices of strategic projects and development to highlight the costs associated with noncompliance and a lack of general oversight (U.S. CEQ and OPR, 2014). Time delays and general trends occurring at the QA/QC levels indicate that the performance at district levels substantially impacts the overall performance of the State. Additionally, they put the Agency at risk of litigation that could arise from the decision-making process (Caltrans, 2011).

The FHWA found that district-level staff held differing levels of understanding and compliance with NEPA procedures under full Assignment. It was the FHWA’s conclusion that this error ultimately led to improper use of documentation and simple style errors for serving another purpose rather than the intended project evaluation (FHWA, 2012(c)). This consequently led to a re-evaluation of project documentation. Furthermore, the FHWA found several divisions re-evaluating approved CE documentation for the purposes of increasing scope to EA/FONSI; FHWA procedures under NEPA do not allow for this approach as it breaches the scope of authority granted to environmental program coordinators (FHWA, 2012(c)).

#### **3.4.4 Best Practices**

Despite the lack of sufficiency and maturity of the program, there are a variety of practices noted by FHWA for further investigation and adoption:

- Expanding the scope of self-assessments to include a review of pilot program areas identified by environmental coordinators’ DEA headquarters (FHWA, 2012(c)).
- Staff training on environmental commitments identified in project environmental reviews (GPO, 2011).
  - A dedication of Agency resources to track commitments and to ensure that commitments are being met at key stages in project cycle and post-completion (2011). Environmental commitments included long-term public-private mitigation and site management strategies and programmatic agreements pertaining to inter-jurisdictional Assignment-related functions.
  - Training and administrative guidance for TxDOT consultants and the General Counsel Division legal staff regarding the integration of environmental commitments and contractual responsibilities under NEPA Assignment and the State assumption of related FHWA authorities.
  - Formal and informal environmental awareness training and Agency certification requirements for construction personnel prior to start of project delivery and during the planning and scoping phases (GPO, 2011, 2012(c)).

- Additional training and administrative guidance for project-level staff to incorporate environmental commitments into project plans, specifications, and implementation strategies (GPO, 2011; FHWA 2012(c)).
- Proactive strategies for collaboration and service provisions under interagency project streamlining. This will require coordination with federal and state legislative officials to monitor the national regulatory “pipeline” for program initiatives, similar to 23 U.S.C. §326/§327, and environmental funding priorities under Federal Railroad Administration, FTA, and other USDOT divisions and partners (CEQ, 2015).

As TxDOT currently undergoes program implementation, environmental coordinators at ENV should be cognizant of environmental issues and concerns raised by stakeholders at all levels of engagement. High-quality documentation requires that the Agency not only adopt FHWA’s role as administrative review, but also regularly clarify organizational procedures to maintain a high degree of NEPA certification among staff (NHCRP, 2014). Implementation of a robust oversight program will help foster the exchange of information and the sharing of best practices and resources among districts and will put the entire organization in a better position to more fully implement all assumed responsibilities and go above and beyond commitments outlined the MOU (FHWA, 2012(c)).

Lastly, one essential attribute with NEPA Assignment participation is that *TxDOT personnel will eventually become NEPA experts unto themselves*. While TxDOT currently retains the expertise needed to ensure high-quality documentation and Assignment performance, staff knowledge of process management and IT-related procedures should be distributed consistently across all districts. Training and compliance measures should reflect the level of intensity required in areas of concern. As such, modifications to program training should be steadfast and frequent to meet constant change under mandated NEPA and environmental planning statutes (AASHTO, 2014).

### 3.5 Caltrans Interagency Relationship Survey and Findings

In order to evaluate progress and improvement of NEPA Assignment, the FHWA relies heavily upon the opinions and observations made by state and federal resource agencies. Thus, monitoring relationships with these agencies is vitally important for ensuring successful attainment of program performance measures. The following section provides a brief overview of seven surveys conducted by Caltrans conducted each year (2009–2013) with federal and state resource agencies involved in NEPA-related projects and programs.<sup>26</sup>

Each report lists an average rating for each survey question and a comparison is made from the previous report’s average ratings. It is important to note that the survey does not report each agency’s rankings separately, which the FHWA suggested would produce a more accurate assessment of individual relationships with federal and state agencies. For a full outline of the survey, please see Appendix A.

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<sup>26</sup> Survey Methodology: A total of 10 questions were provided and the results of each survey were compared with a baseline Gallup Organization poll, conducted in 2006, of Caltrans’ relationships with the resource agencies. The response choices for question #1 ranged from very capable (rating of “5”) to very incapable (rating of “1”). Questions #2 through 7 ranged from strongly agree (rating of “5”) to strongly disagree (rating of “1”). Questions #8 through 10 ranged from excellent (rating of “5”) to poor (rating of “1”).

The focus of the survey results, which monitor the changes in relationships following assumption of NEPA Assignment, indicate that most agencies agreed that Caltrans was capable of handling full delegation. The results showed a marked improvement—from 60 percent agreeing the Agency was capable in 2006 to 70 percent in 2013. However, there were variations in responses over this time frame. For example, during the first year the survey was administered, 90 percent of the agencies responded that the Agency was very capable. The downward trend by 2013 suggests that resource agencies' confidence fell during implementation; however, there is no information provided by the Agency to explain this downward trend.

Furthermore, the survey results indicate that many resource agencies feel that Caltrans is not listening as well as the FHWA did. In 2009, 30 percent of respondents felt that Caltrans was not doing as well as it should, with that number rising to 50 percent by 2013. The initial goal set forth by Caltrans in improving its standard of performance with resource agencies was targeted at 95 percent compliance. However, the survey of implementation and pilot performance suggests that this target may have been set too high.

### *Recommendation*

In addition to regular self-assessments, it is recommended that TxDOT create a similar internal self-assessment survey to evaluate annual communication between resource agencies.

## **3.6 Conclusions from Audit Experiences**

In conclusion, TxDOT's initial audit under the Surface Transportation Delivery Program identified many successes and vulnerabilities in the NEPA Assignment program. As TxDOT works to build off of strengths and correct shortcomings, the long audit history from Caltrans can serve as a guide for enhancing TxDOT's program before the FHWA identifies needs in an audit. The two agencies operate differently, but both face the challenge of continuously educating staff in the face of changing responsibilities and evolving roles of the state DOT.

The next chapter analyzes performance metrics that have been developed within the MOU and which TxDOT is evaluated against in administering the responsibilities it assumed, and makes recommendations for tweaks to the performance measures as TxDOT continues its NEPA Assignment duties.

## **Chapter 4. Performance Measures**

To judge the success of NEPA assignment, the FHWA and TxDOT mutually established a set of performance measures for TxDOT to evaluate its administration of federal NEPA roles and responsibilities. ENV Division collects and maintains all necessary and appropriate data related to meeting the performance measures and monitors its own progress toward meeting them.

### **4.1 Performance Measurement Literature Review**

The following section provides a brief summary of contemporary literature and practice on monitoring program performance under MAP-21. In particular, this section discusses the gap between current practice and guidance on program level monitoring for NEPA Assignment by State DOTs and includes:

- A review of domestic and international published literature;
- A review of NEPA assignment environmental performance measurement practices from Caltrans and TxDOT, with observations from Agency Districts and FHWA Divisions;
- A review of selected guidance materials and policy memorandums issued by state DOTs, metropolitan planning organizations (MPO), and environmental resource agencies known to be actively measuring and tracking environmental performance to evaluate trends and achieve established goals; and
- A synthesis of the resulting environmental performance measure information into examples and recommended implementation guidelines.

The FHWA and the USDOT have offered very little in the way of guidance or insight into how to identify, implement, and refine measures specifically related to NEPA assignment under 23 USC 326/327. Currently, no models exist outside of California and much of the research is limited to lessons learned from this 7-year pilot experience. As more state DOTs apply for NEPA assignment (such as the Ohio Department of Transportation), research and guidance on NEPA assignment program management should develop more quickly. In general, ENV should anticipate future changes, as the FHWA continues to train more state DOTs during TxDOT's program implementation phase.

#### **4.1.1 Federal Programs and Regulations**

A key feature of MAP-21 is the requirement that state DOTs develop a performance- and outcome-based program for transportation performance management. The FHWA defines transportation performance management as a strategic approach that uses system information to make investment and policy decisions to achieve national performance goals. MAP-21 introduces a number of statutory requirements for state DOTs that utilize performance-based approaches, rather than strictly outcome-based, for surface transportation system programs.

MAP-21 links funding to performance by requiring states to take corrective action if progress toward certain program targets is insufficient and to spend a specified portion of their annual federal funding to improve program performance if conditions fall below minimum standards set by MAP-21, the FHWA, or the MOU. Performance management in transportation

planning and environmental programs requires metrics and indicators that can demonstrate progress towards a desired, but high reaching, outcome (e.g., performance result to be sought after), rather than an ultimate endpoint or objective of the program (e.g., a number of projects completed by 2017). Thus, the performance measures must set flexible but manageable targets that take into account the differing long-term goals and visions established by districts and local governments throughout Texas.

Under MAP-21, state DOTs and federal agencies must align their programs and campaigns with national goals in exchange for federal highway-aid. The objective of this performance and outcome-based program is for states to invest resources in projects that collectively will make progress toward the achievement of seven key national goals. For NEPA assignment, two of these national goals (environmental stewardship and a reduction in project delivery timeframes) correspond directly with efforts to shorten review timeframes while ensuring long-term environmental stewardship.

Guidance offered for NEPA assignment is intentionally vague and provides tremendous room for improvement when refining programmatic goals. This flexibility allows ENV the opportunity to test and refine existing metrics and indicators before the FHWA ends its support and TxDOT enters into the monitoring phase. To overcome limitations and better estimate and identify practices that may be used by TxDOT, the research incorporated the framework and principles for performance management under MAP-21 with those listed by the US Government Accountability Office (GAO) in Table 4.1.

This framework focuses on program outcomes, not simply program outputs, and utilizes the basic criteria listed in Table 4.1 for selecting appropriate measures. The five GAO principles focus on modernizing traditional program evaluation practices, commonly associated with strategic performance-based budgeting, to more streamlined practices aligned with the Office of Management and Budget's 2010 Government Performance and Results Modernization Act. Under the Modernization Act, the focus of program operations is on the results, rather than the process itself. By focusing on results, environmental decisions at federal, state, and district and local levels become more responsive to the interest of the stakeholders in the process.

**Table 4.1: Principles and Philosophy for Developing Performance Measures**

| Criteria         | Description and Features of Performance Measures                                                                                                                                                                                             |
|------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| External Focus   | Measures should relate to users and the long-term impacts of projects and programming; not strictly to monitor internal procedures by DDOs.                                                                                                  |
| Truly Measurable | Measures should gauge the cumulative successes and failures of a program, and indicate whether performance is improving, deteriorating, or staying the same. These should also be transparent and enlightens user about program performance. |
| Outcome-Based    | Measure service delivery to stakeholders and project sponsors; not just measuring solely within the agency. Connected to the goals, objectives, and priorities of the agency and to the needs of external stakeholders.                      |
| Significant      | Feedback and reporting on measurements should encompass the full scope of program operations within the department and across the agency. This addresses the important operational aspects of program performance                            |
| Manageable       | The total number of measures, indicators, and metrics should be no greater than what is already needed to cover the scope of program operations.                                                                                             |

*Sources: US Government Accountability Office (GAO), 2011 and Texas State Auditor's Office (SAO), 2011*

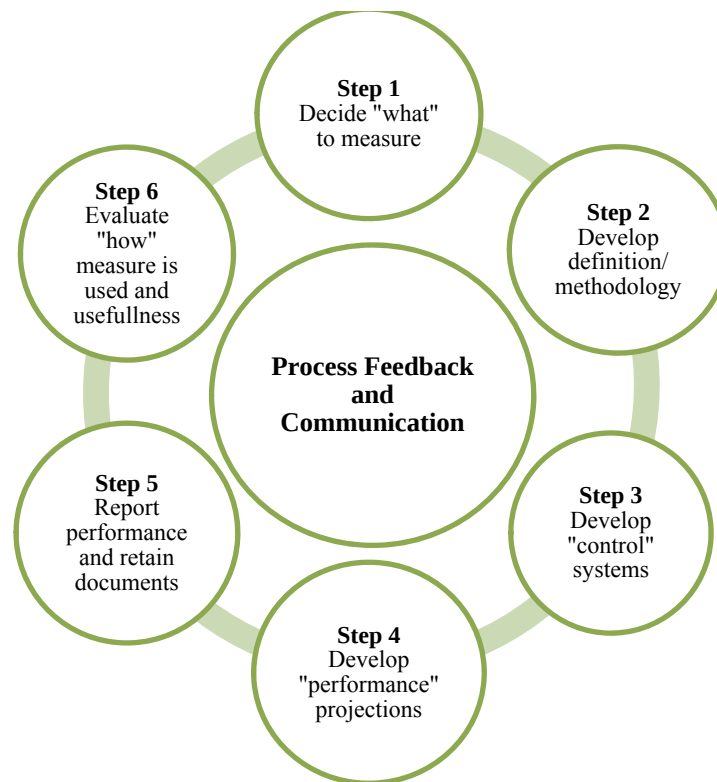
#### **4.1.2 State and DOT NEPA Performance Measures**

New rulemaking in MAP-2 ties federal funds to broad goals such as improved safety, system reliability, and project delivery, providing further impetus for DOTs to review their organizational structure and manage outcomes in new ways. In Texas, state agencies typically follow the model of strategic performance-based budgeting and planning issued by the Legislative Budget Board and the Governor's Office of Budget, Planning, and Policy. This approach uses performance management to improve agency performance by highlighting existing and potential problems (Mikesell, 2011).

Procedural and organizational changes resulting from NEPA assignment should be championed at the highest level and steps must be taken to integrate these changes into each process at every level of review so that stakeholders, practitioners, and the public understand their role. Already, ENV has instituted a comprehensive and concise environmental review toolkit to provide up-to-date guidance and practices for practitioners and DDOs through monthly 'NEPA Chats' (TxDOT website). However, ENV staff and district staff still report a misunderstanding of the importance of their new roles and activities under NEPA assignment, resulting in deviations from expected procedure or performance (FHWA, 2014 and 2015).

A performance-based approach to NEPA assignment is designed to evaluate improvement over time by assessing the level of resources and staffing committed to program operations at multiple layers of review and governance. The FHWA has adopted this framework as a means to demonstrate understanding among all staff of a program's desired outcome and what actions are necessary to make progress toward identified goals (FHWA, 2013). It also helps to improve the nimbleness of an agency; changes in high-level goals and performance measures will quickly filter down to the districts and local partners if staff and practitioners are able to directly relate their performance to the overall program mission (AASHTO, 2013).

Figure 4.1, provided by the Texas State Auditor's Office, shows this cyclical process of defining performance measures. This process recommends that feedback loops be used to improve self-evaluation and to check the validity of assumptions about improved project delivery. The targeted outcome of this process is to verify whether project sponsors and the public are satisfied; whether planning and environmental principles are being met; and whether commitments strategies are in effect (AASHTO, 2013).



Source: Texas State Auditor's Office, March 2012.

Figure 4.1: Maintaining, Developing, and Using Performance Measurement Information

Performance measurement for NEPA assignment should adapt to evolving goals, changes to district staff roles and responsibilities, and project data availability, among other factors (FHWA, 2010 (b)). **A performance measurement system, therefore, needs to be periodically refined through evaluation and feedback.** It is important to note that this process is cyclical so that audits and self-assessments provide the framework for the ongoing refinement of program goals. For NEPA assignment, this feedback cycle is critical to effectuating incremental improvements in district performance management, and should be agreed upon by all districts, stakeholders, and agencies prior to adoption or consideration by the FHWA (FHWA, 2014).

The FHWA has been keen to note delays in identifying corrective actions and their resolution among the operating agency and its district staff in Caltrans audits (FHWA, 2009 Audits a through c). For NEPA assignment, the FHWA strongly recommends that identification of areas for improvement come from an internal feedback loop, rather than from prescriptive guidance, in order to accommodate program needs across districts and to establish a standard timeframe for implementing new guidance and procedures (FHWA Audits of Caltrans in 2008 and 2012). Meaningful communication throughout the process of assessing performance and measurement systems or developing new indicators and metrics in line with measures can significantly enhance program quality and longevity.

Goals and projections are also important tools to improve and test performance measures. They can also be used as guideposts to assess whether districts are improving time savings for reaching desired milestones while remaining compliant with the roles, requirements, and responsibilities listed in the NEPA assignment MOU. In this regard, performance projections

should be challenging but achievable. For example, Caltrans set its first-year targets for NEPA assignment too high, with the standard set at 95 percent attainment of goals. Rather than providing time to implement changes to meet these goals, the performance measures were not calibrated to accurately monitor stakeholder expectations, and it was difficult for the FHWA to determine whether satisfaction levels had actually improved (FHWA, Audits of Caltrans in 2008, 2009, and 2012).

#### **4.1.3 Regional, District, and Local Program Monitoring**

Under the existing MOU, TxDOT is required to conduct a program-level review in order to prepare annual self-assessment reports to the FHWA in preparation for a statewide audit. The program review is required annually by the FHWA during the implementation phase of NEPA assignment. As the complexity of projects increase with maturation of the NEPA assignment program, variability will become more distinguished among districts.

Monitoring district performance requires careful tracking of agency resources in order for the FHWA to accurately determine whether these resources are sufficient to meet district and local needs. More importantly, linking resources to district performance demonstrates consistent improvement. However, resource tracking is a particular area of growing concern for the FHWA because it was found in Caltrans' audits, on multiple occasions, that districts and local agencies were inaccurately determining the length of time related to program activities or incorrectly charging time to program activities (FHWA, Audits of Caltrans in 2009, 2010, and 2011). In particular, when conducting interviews with local agency staff in California, the FHWA found that staff expressed ongoing frustration regarding the amount of work to be accomplished by staff in the districts.

Concerns were frequently expressed regarding inadequate staffing, lack of timeliness in filling vacant positions, and the difficulty of coping with the pressure to advance projects in a timely manner and on schedule. As made evident with Caltrans, this often is unreported and impacts overall time saving reports and data reliability (FHWA, Audits of Caltrans in 2009, 2010, and 2011). Further, even with full resources on hand, district staff will still need extra time for "learning by doing" whenever a performance measure is implemented or modified.

## **4.2 NEPA Assignment Performance Measures**

### **4.2.1 Monitoring and Performance Measures: Caltrans Pilot Program**

The FHWA conducted six audits of Caltrans' MOU compliance between 2007 and 2013. Many issues cited in the audits will be relevant to the responsibilities and expectations TxDOT has assumed since its NEPA assignment in 2014. The FHWA's key assessments of Caltrans' performance measures are shown in Table 4.2. Although there were no substantial changes to or departure from Caltrans' performance measures as listed in the MOU, Caltrans made continual modifications to their NEPA assignment program structure based on suggestions from the FHWA during regular program audits and the agency's own findings from self-assessments.

The most notable improvements to Caltrans performance measures, indicated in both audits and program self-assessments, were:

- Improvement in the scope of self-assessment and how the agency chose to evaluate their baseline measures and target goals; and

- Introduction of new protocol to measure the improvement of interagency communication and public outreach to include external opinions on internal operations (e.g., Caltrans' perspective and the resource agency's perspective on an issue).

Although the FHWA recognizes these changes as improvements, it continues to identify issues and call for further improvements. Other issues identified, however, continue to arise annually for every district office.

Overall, findings from Caltrans suggest that procedural deficiencies stemming from a lack of understanding of the NEPA process indicate a need for stronger oversight and performance monitoring by the operating agency. Broadly defined measures, in this case, must extend beyond district boundaries and be focused on ensuring long-term compliance with NEPA assignment responsibilities defined in the MOU. They must also demonstrate the organization's environmental stewardship and create a greater awareness of environmental performance across all departments, which can help improve overall management and promote cooperation (NHCRP, 2013).

**Table 4.2: Summary of Caltrans NEPA Assignment Audits and Performance Evaluations (2007–2012)**

| NEPA Assignment Performance Measures          |                                                                                                            | Nature of Comment | FHWA Monitoring Comments and Findings                                                                                                                                                                                                                                             |
|-----------------------------------------------|------------------------------------------------------------------------------------------------------------|-------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>1.) Compliance</b>                         | Document compliance with procedures and processes set forth in the MOU for environmental responsibilities. | Monitoring        | Corrective actions, as listed in Caltrans’ program self-assessments, did not include follow up after reported to FHWA.                                                                                                                                                            |
|                                               |                                                                                                            |                   | Program self-assessments are limited in scope and do not include areas for improvement over time. Monitoring should include local agency involvement. (FHWA, 2008, 2009, 2011).                                                                                                   |
|                                               | Compliance with all applicable Federal statutes and regulations.                                           | Reevaluation      | Districts and local agencies continually misuse the re-evaluation process and check lists.                                                                                                                                                                                        |
|                                               |                                                                                                            | Conformity        | District and local agencies failed to follow process requirements for air quality conformity and re-evaluations.                                                                                                                                                                  |
| <b>2.) QC/QA</b>                              | Legal sufficiency determinations made by counsel.                                                          | Procedural        | Document reviews by District Staff were taken out of order and did not follow procedural guidelines pursuant to the MOU, environmental review toolkit, and project roles. This led to delays from the legal sufficiency team as corrective actions were implemented. (FHWA, 2009) |
|                                               | Compliance with environmental document content standards and procedures.                                   | Procedural        | Sections and documents found in QC reviews to be out of order; steps taken out of order; and incorrect reviewers identified. (FHWA, 2010 (a) and (b))                                                                                                                             |
|                                               |                                                                                                            | Omissions         | Documents often found to be incomplete with no signature or wrong signature. Simple omissions were observed, but most improved over time with “learning-by-doing.”                                                                                                                |
|                                               |                                                                                                            | Consistency       | Documents did not contain correct QC forms and required checklists and forms. (FHWA, 2009)                                                                                                                                                                                        |
|                                               | Completeness and adequacy of project records.                                                              | Consistency       | Project records and UFS tabs are not uniform across districts and local agencies. This is present with every evaluation and continues to be problem across state DOTs (FHWA, 2015)                                                                                                |
|                                               |                                                                                                            | Omissions         | Documentation and required sections were missing and not located in central file. (FHWA, 2009-2011)                                                                                                                                                                               |
| <b>3.) Interagency &amp; Public Relations</b> | Assess change in communication with resource agencies and the public                                       | Stewardship       | Agency has no clear protocol to evaluate and address changes in communication                                                                                                                                                                                                     |
|                                               |                                                                                                            | Procedural        | Confusion over consultation, collaboration, and coordination on Section 7 and 4(f).                                                                                                                                                                                               |
|                                               |                                                                                                            | Monitoring        | Survey method is ineffective, only provides insight on DOT’s perspective. (GPO, 2011, FHWA 2012)                                                                                                                                                                                  |
|                                               | Effective response to comments received.                                                                   | Monitoring        | Agency does not incorporate the view of the public effectively or in a timely manner (GPO, 2011).                                                                                                                                                                                 |
|                                               |                                                                                                            | Stewardship       | Long standing conflicts and disagreements between Agencies are not addressed in a concise or strategic manner. Survey does not tackle internal, unforeseen issues (FHWA, 2012)                                                                                                    |
| <b>4.) Efficiency &amp; Timeliness</b>        | Compare time of approvals before and after assumption of Assignment                                        | Monitoring        | Median timeframe approach is too limited to assess or encourage program improvements.                                                                                                                                                                                             |
|                                               |                                                                                                            | Procedural        | Existing approach is limited because of the small sample size of available projects.                                                                                                                                                                                              |

## **4.3 TxDOT NEPA Assignment Performance Measure Matrix**

### **4.3.1 Methodology and Scope**

The following Performance Measure Recommendation Matrix (Tables 4.3 through 4.6) is composed of qualitative observations and recommendations for refining TxDOT's existing NEPA assignment performance measures, outcomes and goals, process indicators, and individual metrics. Included in the matrix are direct applications of findings described in the literature review on performance management. The intended goal for the matrix is to identify simple, effective modifications to existing performance measures that would enable TxDOT to demonstrate incremental improvements over time.

An interdisciplinary approach was used for broadening the scope of relevant monitoring strategies for NEPA assignment. Practices from outside of environmental planning, such as independent performance evaluations by schools districts, were analyzed in order to provide a better understanding of process evaluations and program performance management. To ensure consistency with recommendations and their feasibility, observations were vetted according to the selective criteria provided by the GAO and the FHWA as well as federal and state policy. Special attention was directed to how non-transportation organizations are using performance measurements, and the direction in which environmental performance measurement practices are evolving under NEPA assignment.

Overall, the team recommends that the existing performance measures be used in the short-term as implementation tools. The current model is not directly applicable to TxDOT's NEPA assignment due to its focus on Caltrans' operations from nearly a decade ago. Research and current practice point to the need for measures that project long-term performance goals capable of adapting to unforeseen risks inherent to NEPA assignment. Measures should include information that helps district managers and NEPA practitioners measure the incoming workload and gain insight into causes of outcomes for future risk-reduction. As such, performance measurement expresses the intent of TxDOT's goals during NEPA assignment and how that strategy connects with everyday operations across DDOs. Such systems create an essential feedback and learning mechanism in support of key management decisions.

**Table 4.3: Performance Measure Matrix: Compliance with NEPA and All Other Environmental Statutes and Regulations**

| Existing TxDOT Performance Measure                               |                                                                                                                                               |                                                                         | Recommendations and Suggested Approaches for Performance Measure Refinement                                                                                                                          |                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
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| Desired Outcome                                                  | Indicator                                                                                                                                     | Metric and Evaluation                                                   | Desired Outcome                                                                                                                                                                                      | Indicator                                                                                                                                                                                                                                                      | Metric and Evaluation                                                                                                                                                                                                                                                                                                                           | Rational and Additional Comments                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| TxDOT performs self-assessments as required by the existing MOU. | Program Compliance Review report submitted to FHWA.                                                                                           | Program Compliance Review report submitted to FHWA.                     | <ul style="list-style-type: none"> <li>TxDOT performs formal self-assessments as required by the MOU and incorporates feedback for improvement.</li> </ul>                                           | <ul style="list-style-type: none"> <li>Program Compliance Reviews completed on time and reports are submitted to FHWA and for public review.</li> </ul>                                                                                                        | <ul style="list-style-type: none"> <li>Program Compliance Review reports submitted to FHWA shows a complete, well-reasoned analysis for each assessment measure.</li> </ul>                                                                                                                                                                     | <ul style="list-style-type: none"> <li>Components of desired outcomes, tools and metrics for performance measures may evolve. One element of each Compliance Review should address any need for change to a measure seen during the period.</li> <li>Pre- and post-delegation projects should be identified and separate guidance provided on procedural requirements not required by MOU.</li> </ul>                                                                                                                                                                                                                                                                                 |
| TxDOT implements corrective actions as necessary.                | List of corrective actions that result from TxDOT's self-assessments and FHWA's audits as identified in the Program Compliance Review report. | Percentage of identified corrective actions that are fully implemented. | <ul style="list-style-type: none"> <li>TxDOT develops lists of corrective actions resulting from self-assessments and FHWA audits broken down by districts and timeframes for completion.</li> </ul> | <ul style="list-style-type: none"> <li>Provide complete list of individual process improvements and corrective actions for DDOs that result from TxDOT's self-assessments and FHWA's audits, as identified in the Program Compliance Review report.</li> </ul> | <ul style="list-style-type: none"> <li>Percentage of identified process improvements and corrective actions that are fully implemented.</li> <li>Percentage of process improvements and corrective actions meeting goals and timeframes.</li> <li>Schedules are included for procedural/process improvements and corrective actions.</li> </ul> | <ul style="list-style-type: none"> <li>Metrics, percent values, are appropriate for reporting to FHWA. Internally, each district's totals (i.e., "3 out of 4") are recommended, recognizing the huge differences in scale of work, geographies and resources between rural, urban and metro districts.</li> <li>Indicators and measures should have realistic targets and goals with special consideration given to changes staffing and resources resulting from NEPA Assignment.</li> <li>Tracking corrective actions and timeframes should include goals and expectations for desired outcomes and timeframes. Self-assessments should include review goals among DDOs.</li> </ul> |

| Existing TxDOT Performance Measure                                                                                               |                                                                                                                                                    |                                                                                                                                             | Recommendations and Suggested Approaches for Performance Measure Refinement                                                                                                                                                              |                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
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| Desired Outcome                                                                                                                  | Indicator                                                                                                                                          | Metric and Evaluation                                                                                                                       | Desired Outcome                                                                                                                                                                                                                          | Indicator                                                                                                                                                                                                                                               | Metric and Evaluation                                                                                                                                                                                                                                                                                                                                                       | Rational and Additional Comments                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| 100% of final environmental documents contain evidence of compliance with Section 7, Section 106, and Section 4(f) requirements. | Self-assessment review to determine if final environmental documents contain evidence of compliance with Section 7, Section 106, and Section 4(f). | Percent of final environmental documents that contain evidence of compliance with requirements of Section 7, Section 106, and Section 4(f). | <ul style="list-style-type: none"> <li>100% of final environmental documents contain evidence of full compliance with requirements of Section 7, Section 106, Section 4(f) and all other applicable statutes and regulations.</li> </ul> | <ul style="list-style-type: none"> <li>Self-assessment review to determine if final environmental documents contain evidence of full compliance with Section 7, Section 106, Section 4(f) and all other applicable statutes and regulations.</li> </ul> | <ul style="list-style-type: none"> <li>Percent of final environmental documents that contain evidence of compliance with requirements of Section 7, Section 106, Section 4(f) and other applicable statutes and regulations. Schedules are included for corrective actions still in work.</li> <li>Percent of projects containing evidence of early coordination</li> </ul> | <ul style="list-style-type: none"> <li>Metrics, percent values, are appropriate for reporting to FHWA. Internally, each district's totals (i.e., "3 out of 4") are recommended, recognizing the huge differences in scale of work, geographies and resources between rural, urban and metro districts.</li> <li>All environmental regulations should be listed in toolkits (including local and regional)_</li> <li>Internally, metrics should include District-level and local-level environmental requirements and commitments (i.e. watershed issues for projects located on the Edwards Aquifer recharge zone)</li> <li>Metrics should be developed for District-level monitoring of Local Assistance during internal assessments.</li> </ul> |

**Table 4.4: Performance Measure Matrix: Quality Control and Assurance for NEPA Decisions**

| Existing TxDOT Performance Measure                                                                                            |                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                            | Recommendations and Suggested Approaches for Performance Measure Refinement                                                                                                    |                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
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| Desired Outcome                                                                                                               | Indicator                                                                                                                                                                                                                                                                                      | Metric and Evaluation                                                                                                                                                                                                      | Desired Outcome                                                                                                                                                                | Indicator                                                                                                                                                                    | Metric and Evaluation                                                                                                                                                                                                                                                                                                                                                                                      | Rational and Additional Comments                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 100% of FEISs, NOIs, Notices of Final Agency Action (139I), and individual section 4(f)s determined to be legally sufficient. | Legal sufficiency statement in file pre-dating environmental document approval of FEISs and individual Section 4(f) determinations.<br><br>Legal sufficiency statement for NOI and Notice of Final Agency Action in file that pre-dates submittal to FHWA for posting in the Federal Register. | FEISs and individual Section 4(f) determinations that pre-date environmental document approval; NOIs and 139(I)s with legal sufficiency statements in file prior to submittal to FHWA for posting in the Federal Register. | <ul style="list-style-type: none"> <li>100% of FEISs, NOI, Notices of Final Agency Action (139I), and individual Section 4(f)s determined to be legally sufficient.</li> </ul> | <ul style="list-style-type: none"> <li>Legal sufficiency statement in file pre-dating environmental document approval of FEISs and individual 4(f) determinations</li> </ul> | Percent of: <ul style="list-style-type: none"> <li>FEISs and individual Section 4(f) determinations that pre-date environmental document approval.</li> <li>NOIs and 139(I)s with legal sufficiency statements in file prior to submittal to FHWA for posting in the Federal Register.</li> <li>Projects requiring early collaboration and consultation with resource agencies or local public.</li> </ul> | <ul style="list-style-type: none"> <li>Percent values are appropriate for reporting to FHWA. Internally, each district's totals (i.e., "3 out of 4") are recommended, recognizing the huge differences in scale of work between rural, urban, and metro districts.</li> <li>The timeframe from identification to implementation of corrective actions should require monitoring in order to track efficiency of proposed actions.</li> <li>Incorporating schedules for corrective actions and tracking timeframe can provide insight for improving timeframe between identification and self-corrective action. The agency can use such data to target areas of vulnerability which impede overall performance and compliance among Districts.</li> </ul> |
| 100% of EAs and EISs have completed environmental document review checklist in file.                                          | Completed environmental review checklist indicates QC review successfully completed.                                                                                                                                                                                                           | Percent of EAs and EISs with completed environmental document review checklist in file.                                                                                                                                    | <ul style="list-style-type: none"> <li>100% of EAs and EISs have completed environmental document review checklist in file.</li> </ul>                                         | <ul style="list-style-type: none"> <li>Completed environmental review checklist indicates QC review successfully completed</li> </ul>                                        | <ul style="list-style-type: none"> <li>Percent of EAs and EISs with completed environmental document review checklist in file.</li> <li>Schedules are included for process improvements and corrective actions still in work.</li> </ul>                                                                                                                                                                   | <ul style="list-style-type: none"> <li>Percent values are appropriate for reporting to FHWA. Internally, each district's totals (i.e., "3 out of 4") are recommended, recognizing the huge differences in scale of work between rural, urban, and metro districts.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |

| Existing TxDOT Performance Measure                                  |                                                                           |                                                                                                                                              | Recommendations and Suggested Approaches for Performance Measure Refinement                                                              |                                                                                                                                                                  |                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                               |
|---------------------------------------------------------------------|---------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Desired Outcome                                                     | Indicator                                                                 | Metric and Evaluation                                                                                                                        | Desired Outcome                                                                                                                          | Indicator                                                                                                                                                        | Metric and Evaluation                                                                                                                                                                                                                                                                         | Rational and Additional Comments                                                                                                                                                                                                                                              |
| Decreasing percentages of project filing errors detected over time. | Self-assessment team evaluation of sample of environmental project files. | Percent of sampled environmental project files determined to be complete and adequate each self-assessment period and compared year to year. | <ul style="list-style-type: none"> <li>Decreasing percentages of project completeness and adequacy errors detected over time.</li> </ul> | <ul style="list-style-type: none"> <li>Self-assessment team evaluation of at least a statistically significant sample of environmental project files.</li> </ul> | <ul style="list-style-type: none"> <li>Percent of sampled environmental project files determined to be complete and adequate each self-assessment period and compared year to year.</li> <li>Schedules are included for process improvements and corrective actions still in work.</li> </ul> | <ul style="list-style-type: none"> <li>Percent values are appropriate for reporting to FHWA. Internally, each district's totals (i.e., "3 out of 4") are recommended, recognizing the huge differences in scale of work between rural, urban, and metro districts.</li> </ul> |

**Table 4.5: Performance Measure Matrix: Effective Relationships with Agencies and the General Public**

| Existing TxDOT Performance Measure                                                                                                       |                                                                    |                                                                                                           | Recommendations and Suggested Approaches for Performance Measure Refinement                                                                                                                                                                                                     |                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
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| Desired Outcome                                                                                                                          | Indicator                                                          | Metric and Evaluation                                                                                     | Desired Outcome                                                                                                                                                                                                                                                                 | Indicator                                                                                                                                                                                                               | Metric and Evaluation                                                                                                                                                                                                                                                                                                                                          | Rational and Additional Comments                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| Assess changes in communication, among TxDOT, and Federal and State resource agencies from assumption of responsibilities under the MOU. | Annual resource agency poll                                        | Compare evaluation ratings for each period and measure the trend year-to-year.                            | <ul style="list-style-type: none"> <li>Communications coordination, and project outcomes remain consistent or improve over time.</li> <li>Increased feedback and data to refine measures</li> </ul>                                                                             | <ul style="list-style-type: none"> <li>Agency's annual resource agency poll and follow up process leads to improvements and corrective actions.</li> </ul>                                                              | <ul style="list-style-type: none"> <li>Compare evaluation ratings for each period and measure the trend year-to-year.</li> <li>Documentation demonstrating fully implemented process improvements and corrective actions. .</li> <li>Schedules for corrective actions in work.</li> </ul>                                                                      | <ul style="list-style-type: none"> <li>Resource agencies' expectations will be for perfection on TxDOT's part at all times and on all projects. Individual experiences will color the evaluations each year.</li> <li>The overall process for this measure should be focused on identifying and remedying major and/or recurring issues such that resource agencies see TxDOT as routinely forthright and compliant.</li> </ul>                                                                                                               |
| Assess changes in communication, among TxDOT and the public resulting from assumption of responsibilities under the MOU                  | Change in number of complaints received at ENV via complaint line. | Compare number of complaints received year to year.                                                       | <ul style="list-style-type: none"> <li>Communications coordination and project outcomes remain consistent or improve over time.</li> <li>Increased feedback and data to refine measures</li> <li>Incorporation of Title VI and Environmental Justice (EJ) principles</li> </ul> | <ul style="list-style-type: none"> <li>Measure numbers of comments received and addressed, indicate if project is controversial and includes EJ analysis.</li> <li>Notate whether project is urban or rural.</li> </ul> | <ul style="list-style-type: none"> <li>ENV and TxDOT website analytics for outlining web traffic internally and externally</li> <li>Number of projects with website and strategic outreach methods (e.g., project website for tracking)</li> <li>Number of materials designed and disseminated to Low-English populations (LEP) and EJ communities.</li> </ul> | <ul style="list-style-type: none"> <li>This measure narrowly focuses upon controversial projects or findings.</li> <li>A controversial project may have comments that might be considered complaints but ENV revises and responds to these and the project moves to development. This could be considered a success, emerging from a complex/controversial project, but only focusing on complaints in what can be a controversial process does not afford TxDOT the opportunity to show how it is working to address such issues.</li> </ul> |
| 100% of EA and EIS projects for which a public hearing is held prepare a public hearing summary report.                                  | Completed public hearing/meeting summary report in project file.   | Percent of signed final EA or EIS documents for which a public/hearing meeting summary report is in file. | <ul style="list-style-type: none"> <li>100% of EA and EIS projects document appropriate and timely responses to substantive comments.</li> </ul>                                                                                                                                | <ul style="list-style-type: none"> <li>Completed public response and outreach documentation is included in project file.</li> </ul>                                                                                     | <ul style="list-style-type: none"> <li>Percent of signed final EA or EIS documents for which adequate and complete response documentation is in file.</li> <li>Schedules for corrective actions still in work.</li> </ul>                                                                                                                                      | <ul style="list-style-type: none"> <li>Some comments are easy to respond too, others may be extremely difficult to respond to, and require coordination between multiple teams/groups to develop a response or resolution.</li> <li>'Effective responsiveness' and 'substantive comments' should be clarified with an accompanying metric in order to avoid potential litigation and forestall risk.</li> </ul>                                                                                                                               |

| Existing TxDOT Performance Measure                                                                          |                                                                                                              |                                                                                       | Recommendations and Suggested Approaches for Performance Measure Refinement                                                                             |                                                                                                                                                                  |                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                             |
|-------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Desired Outcome                                                                                             | Indicator                                                                                                    | Metric and Evaluation                                                                 | Desired Outcome                                                                                                                                         | Indicator                                                                                                                                                        | Metric and Evaluation                                                                                                                                                                                                                | Rational and Additional Comments                                                                                                                                                                                                                                            |
| TxDOT implements conflict resolution policies including 23 U.S.C. 139(h) and 40 CFR Part 1504 as necessary. | List of conflict resolution proceedings held, as identified in the NEPA Assignment Compliance Review report. | Number of complaints concerning TxDOT's compliance with conflict resolution policies. | <ul style="list-style-type: none"> <li>As necessary, TxDOT implements alternative conflict dispute resolution policies and mediation tactics</li> </ul> | <ul style="list-style-type: none"> <li>Documentation summarizing conflict resolution proceedings held, as identified in the Compliance Review report.</li> </ul> | <ul style="list-style-type: none"> <li>Documentation shows full procedural compliance with conflict resolution policies in each case during the reporting period.</li> <li>Schedules are included for corrective actions.</li> </ul> | <ul style="list-style-type: none"> <li>Risk reduction is achieved through this process since it encourages agencies to promote early project coordination.</li> <li>Year-on-Year comparison of conflict resolution proceedings should be assessed in the future.</li> </ul> |

**Table 4.6: Performance Measure Matrix: Increased Efficiency and Timeliness in the Completion of the NEPA Process**

| Existing TxDOT Performance Measure    |                                                    |                                                                                                                                                                                                            | Recommendations and Suggested Approaches for Performance Measure Refinement                  |                                                                                                             |                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
|---------------------------------------|----------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Desired Outcome                       | Indicator                                          | Metric and Evaluation                                                                                                                                                                                      | Desired Outcome                                                                              | Indicator                                                                                                   | Metric and Evaluation                                                                                                                                                                                                                                               | Rational and Additional Comments                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Timely completion of the NEPA Process | Time taken to properly complete CEs, EAs, and EISs | Compare median times to complete CEs, EAs, and EISs before and after assignment (CEs and EAs measured from date scoping completed to date of environmental determination; EISs measured from NOI to FEIS.) | <ul style="list-style-type: none"> <li>Timely completion of the NEPA Process</li> </ul>      | <ul style="list-style-type: none"> <li>Time taken, to complete CEs, EAs, and EISs.</li> </ul>               | <ul style="list-style-type: none"> <li>Compare completion times broken down by district category (to showcase difference between urban and rural districts) and compare the median days to complete NEPA documents including timeline to complete EPICs.</li> </ul> | <ul style="list-style-type: none"> <li>Median values are appropriate for reporting to FHWA. Internally, each district's timelines by category, average days, and variability are recommended. This detailed information will allow management to adjust resources as needed.</li> <li>“Timely” should be clarified more in the context of compliance with the MOU.</li> <li>Timely completion of the process should also include schedules for EPICs based upon project typology to provide a more accurate picture of time savings.</li> </ul> |
| Timely agency consultation.           | Time taken for Section 7 consulting.               | Compare median time from submittal of biological assessments to receipt of biological opinions before and after assignment.                                                                                | <ul style="list-style-type: none"> <li>Timely agency permitting and consultation.</li> </ul> | <ul style="list-style-type: none"> <li>Time taken for each permitting and consultation category.</li> </ul> | <ul style="list-style-type: none"> <li>Compare median times from submittal of initiating documentation to receipt of final approvals before and after assignment.</li> </ul>                                                                                        | <ul style="list-style-type: none"> <li>Median values are appropriate for reporting to FHWA. Internally, each district's timelines by category, average days and variability are recommended. This detailed information will allow management to adjust resources as needed</li> <li>“Timely” should be clarified more in the context of compliance with the MOU.</li> </ul>                                                                                                                                                                     |

## **4.4 Summary of Key Recommendations**

The recommendations and findings included in the matrix demonstrate potential improvements to performance management and monitoring during NEPA assignment. The preliminary NEPA Assignment performance measures currently utilized by TxDOT are useful in the short run, but the recommendations here aim to provide TxDOT options to adapt performance measurement as the program matures, as well as to ensure that the DOT performs NEPA duties in a defensible and complete manner.

### ***Compliance with NEPA and all Other Environmental Statutes***

- Regulations should not be left out. Metrics and indicators should provide a broad goal for ensuring compliance with all required environmental regulations and laws, but should also encompass all statutes, ordinances, and orders to ensure all human-related impacts are identified.
- New guidance and procedures will require a pre-determined timeframe to ensure consistency among practitioners and local agencies. This timeframe should eventually decrease with program maturity and “learning-by-doing.”

### ***Quality Control and Assurance for NEPA Decisions***

- Evidence of quality assurance and quality control is critical. Indicators suggesting compliance with the QA/QC plan should show a progression of improved knowledge for determining project classifications among TxDOT staff, local public agencies, and practitioners.
- Guidance and local-level training should address all pertinent topics under NEPA Assignment. In addition to checklists, clarification should help with document consistency.

### ***Relationships with the Agencies and the General Public***

- Interagency surveys to monitor relationships are not effective in capturing the entire picture. Both internal perspectives and external perspectives on NEPA Assignment operations should be incorporated for long-term program improvements.
- Counting “complaints” does not appropriately measure the success of NEPA Assignment and the process in general. Project proponents are much less likely to attend and participate in a meeting. “Comments received and addressed” would be a better way to measure effective public involvement. Strong public participation could mean the project team did an excellent job of outreach and should not be penalized for the public’s feedback.

### ***Increased Efficiency and Timeliness in Completion of NEPA Process***

- Improved efficiency and compliance with all aspects of NEPA Assignment will come with routine practice. Training can complement specific areas for improving areas of overall time-savings, such as decreasing the number of re-evaluations through collaboration, but the process needs to take into account simple effective practices observed among rural, urban, and metro districts.

## 4.5 Comparing Caltrans and TxDOT NEPA Assignment Performance Measures

Caltrans and TxDOT are required to report on the same performance measures, but they use different indicators and metrics to demonstrate performance in these areas. Caltrans reports more indicators than TxDOT for each performance measure. Nonetheless, both DOTs are generally reporting on process-based indicators (those which document how or whether a task was done) to demonstrate performance in the first two measures (compliance and quality control). Outcome-based measures, which document how the actions taken affect process outcomes, are being used by both DOTs to demonstrate performance in the last two measures (relationships and timeliness).

The following sections describe the differences and similarities between the metrics selected by TxDOT and Caltrans. Table 4.7 shows metrics only used by Caltrans. A comparison matrix of TxDOT and Caltrans performance metrics is shown in Table 4.8.

**Table 4.7: Metrics and Indicators for Caltrans Performance Measures**

|                                                                                                                                                                                                                                                |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| A.ii. Maintain documented compliance with responsibilities of all applicable federal statutes and regulations for which responsibility is assumed (Section 106, Section 7, etc.)                                                               |
| Compliance with Executive Order 11990 and Section 176(c) of the Clean Air Act                                                                                                                                                                  |
| Compliance with Traffic Noise Analysis Protocol Requirements                                                                                                                                                                                   |
| Appropriate use of C and D list CEs                                                                                                                                                                                                            |
| B.i.b. Maintain and apply internal quality control and assurance measures and processes including a record of compliance with FHWA's and state DOT's environmental document content standards and procedures, including those related to QA/QC |
| Percent of documents that followed applicable annotated outline                                                                                                                                                                                |
| Percent of draft and final environmental documents for which QA/QC procedures are appropriately completed                                                                                                                                      |
| C.i. Assess change in communication among TxDOT, Federal and State resource agencies, and the public resulting from assumption of responsibilities under the MOU                                                                               |
| Compare average evaluation rating of impartial third-party public meeting reviews                                                                                                                                                              |
| D.i. Compare time of completion for NEPA approvals before and after assumption of responsibilities under this MOU                                                                                                                              |
| Compare median time from beginning environmental studies/notice of intent to draft environmental document approval                                                                                                                             |

*Sources: Caltrans Standard Environmental Reference, 2015 and TxDOT Final QA/QC Plan 2015*

**Table 4.8: Comparison of Caltrans and TxDOT Performance Measures**

| A. Compliance with NEPA and other federal environmental regulations                                                                                                            |                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                         |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Sub-Measure                                                                                                                                                                    | TxDOT                                                                                                                                                                                                 | Caltrans                                                                                                                                                                                                                                                                                                                                |
| i. Maintain documented compliance with procedures and processes set forth in the MOU for the environmental responsibilities under the NEPA Assignment Program                  | Percent of self-assessments submitted to FHWA<br>Percent of corrective actions that are implemented                                                                                                   | Percent of self-assessments submitted to FHWA<br>Percent of corrective actions that are implemented                                                                                                                                                                                                                                     |
| ii. Maintain documented compliance with responsibilities of all applicable Federal statutes and regulations for which responsibility is assumed (Section 106, Section 7, etc.) | Percent of final environmental documents contain evidence of compliance with requirements of Section 7, Section 106, and Section 4(f)<br>-<br>-<br>-                                                  | Percent of environmental documents contain evidence of compliance with requirements of Section 7, Section 106, and Section 4(f)<br>Compliance with Executive Order 11990, Section 176(c) of the Clean Air Act, and Traffic Noise Analysis Protocol<br>Compliance with Section 6002 of SAFETEA-LU<br>Appropriate use of C and D list CEs |
| B. Quality Control and Assurance for NEPA decisions                                                                                                                            |                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                         |
| Sub-Measure                                                                                                                                                                    | TxDOT                                                                                                                                                                                                 | Caltrans                                                                                                                                                                                                                                                                                                                                |
| i. Maintain and apply internal quality control and assurance measures and processes including a record of:                                                                     |                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                         |
| a) legal sufficiency including reviews of NOIs and Notice of Final Agency Action (139(l))                                                                                      | Percent of FEIS and individual Section 4(f) determinations that pre-date environmental document approval; NOIs and 139(l)s legal sufficiency before submittal to FHWA for posting in Federal Register | Percent of final EISs and individual Section 4(f) determinations with legal sufficiency determinations completed prior to environmental document approval                                                                                                                                                                               |
| b) compliance with FHWA's and TxDOT's environmental document content standards and procedures, including those related to QA/QC                                                | -<br><br>Percent of EAs and EISs with completed environmental document review checklist in file                                                                                                       | Percent of draft and final environmental documents for which the completed QA/QC procedures are appropriately completed based on independent review of QC form and follow-up information<br>Percent of draft and final documents with completed checklists                                                                              |
| c) Completeness and adequacy of document of projects records for projects done under the Program                                                                               | Percent of sampled environmental project files determined to be complete and adequate each self-assessment period year to year                                                                        | Percent of sampled EA/EIS project files organized according to the established filing system                                                                                                                                                                                                                                            |

| C. Relationships with agencies and the general public                                                                                                              |                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Sub-Measure                                                                                                                                                        | TxDOT                                                                                                                                                                  | Caltrans                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| i. Assess change in communication among TxDOT, Federal and State resource agencies, and the public resulting from assumption of responsibilities under the MOU     | Agency - Compare average evaluation ratings of reach period and measure the trend year-to-year<br>Public - Compare number of complaints received year to year<br>-     | Compare average evaluation rating from Resource Agency Survey for each period and cumulatively over time<br><br>Compare average evaluation ratings from Public Meeting Material Review for each self-assessment period and cumulatively over time<br>Compare average evaluation rating of Impartial Third-Party Public Meeting Review of each self-assessment period and cumulatively over time                                                                                                                                                                                                                                                                                                                  |
| ii. Maintain effective responsiveness to substantive comments received from the public, agencies, and interest groups on NEPA documents and environmental concerns | Percent of signed final EA or EIS documents for which a public hearing/meeting summary report is in file                                                               | Percent of signed final document internal QC certification forms in file with public review comments box checked                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| iii. Maintain effective NEPA conflict resolution processes whenever appropriate                                                                                    | Number of complaints received concerning TxDOT's compliance with conflict resolution policies, year to year                                                            | Period from date that formal conflict resolution began to date resolution reached                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| D. Increased efficiency and timeliness in completion of NEPA process                                                                                               |                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| Sub-Measure                                                                                                                                                        | TxDOT                                                                                                                                                                  | Caltrans                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| i. Compare time of completion for NEPA approvals before and after assumption of responsibilities under this MOU                                                    | Compare median time to complete CEs, EAs from scope completion to date of determination<br><br>Compare median time to complete EISs from NOI to FEIS<br><br>-<br><br>- | For State Highway System (SHS) and Local Assistance (LA) projects, compare median time from begin administrative draft environmental QC process to draft environmental document approval before and after NEPA Assignment<br>For SHS and LA projects, compare median time from beginning administrative final environmental document QC process to final environmental document approval before and after Assignment<br>Compare median time from beginning environmental studies/notice of intent to draft environmental document approval before and after NEPA Assignment<br>Compare median time from beginning environmental studies/NOI to final environmental document approval before and after assignment |
| ii. Compare time to completion for key interagency consultation formerly requiring FHWA participation (e.g., Section 7, Section 106) before and after assumption   | Compare median time from submittal of biological assessments to receipt of biological opinions before and after NEPA Assignment                                        | Compare median time from submittal of biological assessments to receipt of biological opinions before and after NEPA Assignment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |

#### 4.5.1 Performance Measure: Compliance with NEPA and Federal Regulations

Caltrans and TxDOT have selected a similar indicator to demonstrate compliance with NEPA, Section 7 (endangered species), Section 106 (historical resources), and Section 4(f) (parklands). However, Caltrans includes additional indicators to demonstrate compliance with other federal regulations and executive orders. The following indicators are being reported:

- Compliance with Executive Order 11990 (Protection of Wetlands) and Section 176(c) of the Clean Air Act (funding of projects in nonattainment areas)
- Compliance with Traffic Noise Analysis Protocol Requirements
- Appropriate use of c and d list CEs

While the Caltrans list is still not all-encompassing, the DOT has selected a handful of key regulations that are reliably measurable to provide a more complete picture of compliance.

#### **4.5.2 Performance Measure: Quality Assurance and Quality Control**

TxDOT is reporting one metric for the QA/QC process: percent of EAs and EISs with completed environmental document review checklists in file. Caltrans includes two additional metrics that are specific to its QA/QC process:

- Percent of sampled documents that followed applicable annotated outline
- Percent of draft and final documents for which the completed QA/QC procedures are appropriately completed based upon independent review of QC form

These metrics may not be directly applicable to TxDOT's process. However, TxDOT may have similar opportunities to gauge adherence to the QA/QC Plan.

The addition of outcome-based measures to the first two TxDOT performance measures is recommended. Evidence from previous studies with DOTs suggests that is an effective method of observing progress and efficacy of corrective actions. For example, such metrics could include the number of lawsuits lost or won as an indicator of compliance, or percent of documents rejected or revised during the QA/QC process, or simply the number of reevaluations per district.

#### **4.5.3 Performance Measure: Relationships with Resource Agencies and Public**

NEPA assignment is the first program introduced by the FHWA to evaluate relationships with the general public and with resources agencies. TxDOT and Caltrans are both relying upon other agencies to complete evaluation surveys to measure change in communication with resource agencies over time. To measure relationships with the public, TxDOT is comparing the number of complaints received year-to-year, and Caltrans is comparing evaluations from public meetings.

Caltrans also uses an impartial third-party review of public meetings to assess performance. With or without the third-party review, the Caltrans method may be less sensitive to backlash from controversial projects, and more sensitive in TxDOT's efforts to demonstrate improvement from "good" to "best in class."

#### **4.5.4 Performance Measure: Timeliness in the NEPA Process**

TxDOT and Caltrans are both reporting on time to completion of environmental documents to demonstrate increased efficiency and timeliness of NEPA process. Caltrans additionally reports on the median time for additional intervals, such as time from NOI to draft environmental impact statement (DEIS). Measuring smaller time frames may allow more targeted identification of process strengths and deficiencies.

Both agencies are also reporting the median time from submittal of biological assessments to receipt of biological opinions before and after assignment. However, neither agency is reporting

time to complete consultation or permitting procedures for other resources, such as historical and archaeological resources.

The next chapter of the report reviews NEPA case law, and was conducted during the latter part of the project to ensure as an up-to-date review.

## Chapter 5. NEPA Case Law Review

This chapter provides a brief history of NEPA and reviews case law and specific areas from case law that TxDOT staff should be cognizant of under NEPA assignment. Also addressed is the state's waiver of sovereign immunity, as well as the development of the Administrative Record, Alternatives Analysis, Arbitrary and Capricious Decision-Making, Purpose and Need, Predetermination of a Favored Outcome, and the Determination of CE, EA, or EIS. The chapter wraps up with some key recommendations for TxDOT. Note that this chapter was developed during the last 2 months of the project to ensure that it was as up-to-date as possible and to take into account the projects findings to date as recommendations were being developed.

### 5.1 Why Review Case Law?

Assessing the impact of how case law impacts TxDOT's duties under NEPA Assignment is instructive on many fronts, but is critical to provide TxDOT staff with an understanding of the importance of adhering to duties and obligations when developing and signing off on NEPA documentation. Based upon a review of case law, under its NEPA Assignment duties and obligations, TxDOT must ensure that staff members at all levels are cognizant of how their actions may impact litigation, as litigation can impact project outcomes.

Additionally, the case law review provides useful examples for training materials and quizzes. If TxDOT staff wants to learn more about NEPA litigation, TxDOT report 0-6701-1 (*Linking Long-Range Transportation Planning with Project Planning in Support of the Environmental Review Process*) has a chapter that reviews NEPA case law on transportation.

### 5.2 Background and History of NEPA

The 1960s was a decade of action at the federal legislative level, with the passage of the Civil Rights Act in 1964, along with other Great Society legislation and environmental discussions after John Kenneth Galbraith's *The Affluent Society* (Galbraith, 1958) and follow-up book *The New Industrial State* in 1967 (Galbraith, 1967). These books highlighted the links between poverty and environment. At the same time, public awareness of humanity's impact on the environment grew, due to industrial activities that led to poor air quality and polluted rivers. Rachel Carson's *Silent Spring* (1962) led to the nationwide ban on use of DDT and changes in the use of pesticides. Earth Day in April 1970 was also a seminal event that highlighted public perception of the environment (Vig and Kraft, 2003). Finally, imagery played a strong role in legislative activity: in August 1969, a picture of a burning Cuyahoga River in Northeastern Ohio was on the cover of *Time* Magazine and the edition's article reported on the dismal state of America's polluted rivers and estuaries (*Time* Magazine, 1969).

These nascent beginnings of a new environmental movement led to federal debate regarding the federal/state role in infrastructure impacts and the position that legislative changes were needed to ensure that pollution would be controlled uniformly and not in a piecemeal state-by-state fashion (Friedman, 2006). The genesis of this theory was that there should be no pollution havens, and that federal enforcement power—which had historically been weak—should be strengthened. These policy discussions led to the passage of NEPA (PL 91-190), 42 USC §4331 in 1970.

Title I of NEPA requires federal agencies to integrate environmental values into decision-making processes using a systematic, interdisciplinary approach that considers the environmental impacts of proposed agency actions and reasonable alternatives for those actions. The NEPA

legislation established the CEQ within the Executive Office of the President. The CEQ oversees federal agency implementation of environmental impact assessment and also acts as a referee if agencies disagree over the adequacy of assessments. In 1978, the CEQ issued binding regulations that set the requirements for agencies to fulfill their NEPA obligations (CEQ, 2007). The CEQ required agencies to develop and create their own procedures to supplement these requirements based upon each agency's mandates, obligations, and missions. The CEQ has issued regulations over the past 45 years. Table 5.1 outlines major CEQ guidance issued during this time frame.

**Table 5.1: CEQ Guidance, 1970–2015**

| <b>Guidance Title</b>                                                                                                                               | <b>Year</b> |
|-----------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| Environmental review pursuant to the Safe Drinking Water Act of 1974                                                                                | 1974        |
| Executive Orders 11988 flood plain management & 11990 protection of wetlands                                                                        | 1978        |
| NEPA liaisons – agency implementing procedures                                                                                                      | 1979        |
| Interagency consultation to avoid or mitigate adverse effects on rivers in nationwide inventory                                                     | 1980        |
| Forty most asked questions concerning CEQs NEPA regulations                                                                                         | 1981        |
| Guidance regarding NEPA regulations                                                                                                                 | 1983        |
| Guidance on NEPA analysis for transboundary impacts                                                                                                 | 1997        |
| Environmental justice guidance under NEPA                                                                                                           | 1997        |
| Designation of non-federal agencies to be cooperating agency in implementing procedural requirements of NEPA                                        | 2000        |
| Cooperating agencies in implementing the procedural requirements of NEPA                                                                            | 2002        |
| Exchange of letters with Secretary of Transportation: Purpose and Need                                                                              | 2003        |
| Guidance on consideration of past actions in cumulative effects analysis                                                                            | 2005        |
| CEQ and OMB memorandum on environmental conflict resolutions                                                                                        | 2005        |
| CEQ, OSTP and OMB memo on national environmental status trends and indicators                                                                       | 2008        |
| Reporting on NEPA status for projects receiving American Recovery and Reinvestment Act funding                                                      | 2009        |
| Establishing, applying and revising categorical exclusions                                                                                          | 2010        |
| Appropriate use of mitigation and monitoring and appropriate use of mitigated findings of no significant impact                                     | 2011        |
| Memorandum for Heads of Federal Departments and Agencies: Improving the Process for Preparing Efficient and Timely Environmental Reviews under NEPA | 2012        |
| CEQ & OMB Memorandum on Environmental Collaboration and Conflict Resolution                                                                         | 2012        |
| Guidance on Effective Use of Programmatic NEPA Reviews                                                                                              | 2014        |

*Source: CEQ website, not dated*

### **5.3 NEPA Case Law**

Since NEPA's introduction, case law has developed precedent on the application, administration, and implementation of NEPA. Communities and nonprofit entities continue to

question NEPA processes, especially regarding the Administrative Record, Cumulative Impacts, Purpose and Need, and arbitrary or capricious decisions. The CEQ has conducted surveys on NEPA litigation since 2001 (CEQ website, not dated). In 2013 (latest data available), there were 96 cases filed, with 14 injunctions and remands issued. The majority of the cases were brought by public interest groups and individual citizen associations (75 out of the 96). For U.S. Department of Transportation (USDOT) agencies, four lawsuits were filed. No injunctions or remands were issued (these agencies include FHWA, FTA, Federal Aviation Administration, Surface Transportation Board, and Federal Motor Carrier Safety Administration). Tables 5.2 and 5.3 show how the case dispositions broke down across the 2013 cases for all federal agencies.

**Table 5.2: Basis of NEPA Dispositions in 2013**

| Decision type                        | No of Cases |
|--------------------------------------|-------------|
| Jurisdictional – Plaintiff Prevailed | 0           |
| Jurisdictional – Defendant Prevailed | 7           |
| NEPA not required                    | 4           |
| NEPA is required                     | 0           |
| CE adequate                          | 0           |
| CE not adequate                      | 2           |
| EA adequate                          | 5           |
| EA not adequate                      | 1           |
| EIS adequate                         | 8           |
| EIS not adequate                     | 1           |
| Supplemental EIS needed              | 0           |
| SEIS not needed                      | 0           |
| <b>TOTAL</b>                         | <b>96</b>   |

*Source: CEQ, 2013*

**Table 5.3: Plaintiffs in NEPA Cases Filed in 2013**

| Plaintiff                      | Cases filed |
|--------------------------------|-------------|
| Public interest group          | 65          |
| Individual/Citizen association | 10          |
| State government               | 0           |
| Local Government               | 2           |
| Business group                 | 6           |
| Property owners/residents      | 0           |
| Indian tribe                   | 1           |
| Multiple plaintiff types       | 12          |
| Other                          | 0           |

*Source: CEQ, 2013*

The breakdown on NEPA cases filed between 2010 and 2012 is as follows:

- 2012 – 88 cases filed, with 10 injunctions and remands. Of these 88 cases, 7 were filed against USDOT agencies.

- 2011 – 94 cases filed, with 21 injunctions and remands. Of these 94 cases, 20 were filed against USDOT agencies.
- 2010 – 87 cases filed, with 16 injunctions and remands. Of these 87 cases, 15 were filed against USDOT agencies.

Overall the number of suits against the USDOT’s agencies appears to be declining. The CEQ’s analysis provides no indication as to why the number has changed.<sup>27</sup> Drawing any conclusions from this limited data is difficult to do without further substantive analysis from the CEQ, and without adding data from 2014 and 2015. Whether NEPA Assignment has played a role in reducing cases is speculative. In 2011 Caltrans reported that during their pilot they received on average one NEPA lawsuit per year—a trend seen prior to the pilot program (Caltrans, 2011). For further information on case law, AASHTO’s Center for Environmental Excellence tracks NEPA cases in its “Case Law Updates on the Environment” (CLUE) website. Table 5.4 lists selected cases decided over the past 15 years on transportation projects.

**Table 5.4: Transportation NEPA Case Law Selected Judgments 2000–2015**

|                                                                                                          |                                                                                              |
|----------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------|
| Beverly Hills Unified School District v. Los Angeles County Metropolitan Transportation Authority (2015) | Crenshaw Subway Coalition v. Los Angeles County Metropolitan Transportation Authority (2015) |
| Clean Air Carolina v. NCDOT (2015)                                                                       | Maiden Creek Associates v. USODT (2015)                                                      |
| Lakes and Parks Alliance v. Metropolitan Council (2015)                                                  | RB Jai Alai LLC v. Florida Dot (2015)                                                        |
| Cutonilli v. FTA (2015)                                                                                  | Openlands v. USDOT (2015)                                                                    |
| Rio Associates v. Layne (2015)                                                                           | Committee of 100 on the Federal City v. Foxx (2015)                                          |
| 100 Friends of Wisconsin v. USDOT (2015)                                                                 | Catawba Riverkeep Foundation v. NCDOT (2015)                                                 |
| Crabb v. FHWA (2015)                                                                                     | Lakes and Parks Alliance v. FTA (2015)                                                       |
| Eufaula Heritage Association v. Alabama DOT (2015)                                                       | CARR v. Foxx (2015)                                                                          |
| Ted Souza v. Caltrans (2014)                                                                             | William Wood v. Massachusetts DOT (2013)                                                     |
| NRDC v. USDOT (2014)                                                                                     | Coalition for Advancement of Regional Transportation v. FHWA (2014)                          |
| Defenders of Wildlife v. NCDOT (2014)                                                                    | Our Money our Transit v. FTA(2014)                                                           |
| Latin Americans for Social and Economic Development v. FHWA (2014)                                       | Today’s IV, Inc. v. FTA (2014)                                                               |
| Citizens for Appropriate Rural Roads Inc. v. Foxx (2014)                                                 | Karst Environmental Education and Protection Inc. v. FHWA (2014)                             |
| Honolulu Traffic v. FTA (2014)                                                                           | Rj K Bhandarai v. USDOT (2014)                                                               |
| Highway Citizens Group v. USDOT (2013)                                                                   | Moyle Petroleum v. Ray LaHood (2013)                                                         |

<sup>27</sup> NEPA Assignment has been in place in California since 2007. Assignment authority for CEs has been in place with Alaska since 2009, Utah since 2008 and TxDOT since 2013.

|                                                                     |                                                                                       |
|---------------------------------------------------------------------|---------------------------------------------------------------------------------------|
| International Brotherhood of Teamsters v. USDOT (2013)              | Thompson Metal Fab v. USDOT (2013)                                                    |
| Hoosier Environmental Council v. Corps of Engineers (2013)          | Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb (2013)                 |
| Center for Biological Diversity v. California DOT (2013)            | Alaska Survival v. Surface Transportation Board (2013)                                |
| Hillside Environmental Loss Protection v. Corps of Engineers (2012) | Shenandoah Valley Network v. Capka (2012)                                             |
| Prairie Band of Pottawatomie Indians v. FHWA (2012)                 | Coalition to Preserve McIntire Park v. Mendez (2012)                                  |
| Coalition for a Sustainable 520 v. USDOT (2012)                     | Citizens for Smart Growth v. Secretary of Transportation (2012)                       |
| Carr v. LaHood (2012)                                               | Center for Biological Diversity v. California DOT (2012)                              |
| Sierra Club v. FHWA (2011)                                          | Southeast Alaska Conservation Council v. FHWA                                         |
| Vill. Of Barrington v. Surface Transportation Board (2011)          | West v. Horner (2011)                                                                 |
| Preservation Pittsburg v. Conturo (2011)                            | Blair v. Cal State DOT (2011)                                                         |
| Aquifer Guardians in Urban Areas v. FHWA (2011)                     | Friends of Congaree Swamp v. FHWA (2011)                                              |
| Cronin v. Ohio DOT (2011)                                           | N.C. Wildlife Federation v. NCDOT (2011)                                              |
| Clement v. LaHood (2010)                                            | Hamilton v. USDOT (2010)                                                              |
| Slockish v. FHA (2010)                                              | Latin Americans for Social and Economic Development v. FHWA (2010)                    |
| Karst Environmental Education and Protection, Inc. v. FHWA (2010)   | League of Wilderness Defenders Blue Mountain Biodiversity Project v. Allen (2010)     |
| Prairie Band Potawatomi Nation v. FHWA (2010)                       | NC Alliance for Transportation Reform v. USDOT (2010)                                 |
| Rohnert Park Citizens to Enforce CEQA v. USDOT (2010)               | Citizens for Smart Growth v. Peters (2010)                                            |
| Sierra Club v. FHWA (2010)                                          | Medina County Environmental Action Association v. Surface Transportation Board (2010) |
| Clement v. LaHood (2010)                                            | Sierra Club North Star Chapter v. Peters (2010)                                       |
| Highway J Citizens Group v. USDOT (2010)                            | River Fields v. Peters (2009)                                                         |
| Shenandoah Valley Network v. Capka (2009)                           | Rohnert Park Citizens to Enforce CEQA v. USDOT (2009)                                 |
| Virginians for Appropriate Roads v. Capka (2009)                    | North Idaho Community Action Network v. USDOT (2008)                                  |
| Pearson v. USDOT (2009)                                             | Northwest Bypass group v. U.S. Army Corps of Engineers (2008)                         |
| Concerned Citizens of Chappaqua v. USDOT (2008)                     | Hoosier Environmental Council v. USDOT (2007)                                         |

|                                                                           |                                                                    |
|---------------------------------------------------------------------------|--------------------------------------------------------------------|
| Rivers Unlimited v. USDOT (2008)                                          | Audubon Naturalist Society of the Central U.S. v. USDOT (2007)     |
| Ware v. FHWA (2007)                                                       | Conservation Law Foundation v. FHWA (2007)                         |
| Jones v. Peters (2007)                                                    | Karst Environmental Education and Protection, Inc. v. EPA (2007)   |
| Friends of Maqurewock, Inc. v. US. Army Corps of Engineers (2007)         | Merrit Parkway Conservancy v. Mineta (2005)                        |
| City of Clarkson Valley v. Mineta (2006)                                  | Friends of Marolt Park v. USDOT (2004)                             |
| Stewart Park and Reserve Coalition v. Slater (2005)                       | Valley Community Preservation Community v. Mineta (2004)           |
| Citizens against the Pellissippi Parkway Extension, Inc. v. Mineta (2004) | One Thousand Friends of Iowa v. Mineta (2004)                      |
| Senville v. Peters (2004)                                                 | Piedmont Environmental Council v. USDOT (2003)                     |
| Green/Guilford Environmental Association v. Wykle (2004)                  | Sierra Club v. U.S. Army Corps of Engineers (2002)                 |
| Utahan's for Better Transportation v. USDOT (2002)                        | Southwest Williamson County Community Association v. Slater (2001) |
| Wilds v. SCDOT (2001)                                                     | West v. Secretary of DOT (2000)                                    |
| National Parks and Conservation Association v. USDOT (2000)               |                                                                    |

*Source: Developed from AASHTO CLUE Database and Lexis-Nexis and Westlaw*

## 5.4 NEPA Case Law Analysis

Specific areas from case law that TxDOT staff should be cognizant of, as a consequence of NEPA assignment and the state's waiver of sovereign immunity, include the Administrative Record, Alternatives Analysis, Arbitrary and Capricious Decision Making, Purpose and Need, Predetermination of a Favored Outcome, and the Determination of CE, EA, or EIS.<sup>28</sup>

Over the past 45 years, courts have developed many tests to determine whether certain aspects of NEPA decision-making have been fulfilled, and a short selection of case law is discussed in this chapter regarding:

- NEPA Statute
- AR
- Arbitrary and Capricious Decision- Making
- Purpose and Need
- Alternatives Analysis
- Predetermination of a Favored Outcome
- EIS/EA or CE

<sup>28</sup> As noted earlier, a legal analysis of case law was undertaken during TxDOT Research Project 0-6701, if readers wish to further familiarize themselves on NEPA case law.

### 5.4.1 The NEPA Statute

NEPA is a procedural statute as opposed to a substantive statute; “NEPA does not mandate particular substantive results, but instead imposes only procedural requirements” (Crenshaw, 2015).<sup>29</sup> The procedural requirement of NEPA is that federal agencies analyze the environmental impact of their proposals and actions. “NEPA requires agencies to follow a set of action-forcing procedures that require that agencies take a hard look at environmental consequences and that provide for broad dissemination of relevant environmental information” (Coliseum, 2006). NEPA does not require that the agency reach any particular conclusion; it requires agencies to engage in an environmentally conscious process that may not reach an environmentally friendly result (Robertson, 1989).

Under NEPA Assignment, this means that TxDOT must ensure that their delegated authority comports with federal rules regarding the management, oversight, and processes behind conducting NEPA analysis. This requires that TxDOT will base all NEPA decisions on detailed information regarding significant environmental impacts—“It is not this court's role under NEPA to referee expert disputes when the agency reasonably evaluates the relevant factors” (Clean Air Carolina, 2015).

According to case law “NEPA merely prohibits uninformed—rather than unwise—agency action” (N Carolina Wildlife Fed’n, 2014). A reviewing court must ensure that the agency has examined the relevant data and articulated a satisfactory explanation for its actions (N.C. Wildlife Fed’n, 2014). While courts have noted that this standard is highly deferential, it does not reduce judicial review to a rubber stamp of agency action (Friends of Back Bay 2012).

### 5.4.2 Federal Court Role

Federal courts have jurisdiction over NEPA under the Administrative Procedure Act (5 U.S.C. §551-59 & §701-06). The Administrative Procedure Act provides that any agency decision that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” shall be set aside (5 U.S.C. §706(2)(A)). The court cannot substitute its judgment for that of an agency. Once an agency has made a decision subject to NEPA’s procedural requirements, the only role for the court is to ensure that the agency has considered the environmental consequences (Strycker’s Bay, 1980).

### 5.4.3 Administrative Record

The Administrative Record is extremely important to the NEPA process from a case law perspective. Judicial review under the Administrative Procedure Act judicial review is limited to the Administrative Record in existence. The Administrative Record is created from the administrative file. It should be noted that the Administrative Record is NOT the administrative file.

Courts may allow new evidence to be introduced into a NEPA case under very limited circumstances, so the administrative file is a critical item for TxDOT to maintain in an orderly fashion for construction of an Administrative Record. The Administrative Record should provide the reader (i.e., the judge) with clear documentation and a process to understand how the decision was made, allowing for rational, evidence-based decision-making processes. A strong Administrative Record leads to a defensible decision on the agency’s part; a weak or incomplete record, on its face, renders a decision less confident. The Administrative Record will be created

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<sup>29</sup> Please note that all full citations for cases can be found in the references section at the end of the report.

by one of the following: TxDOT's Office of General Counsel, the Attorney General of Texas, or TxDOT's Outside Counsel. They will examine and identify documents in the project file and will instruct TxDOT on how to compile the Administrative Record.

Figure 5.1 shows the main documents/items that should be in the Administrative Record, while Figure 5.2 shows what should not be included in the Administrative Record.

| What SHOULD be in the Administrative Record?                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                        |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>→ DEIS, FEIS, ROD, EA and FONSI</li> <li>→ Technical reports</li> <li>→ Correspondence</li> <li>→ Meeting summaries</li> <li>→ Field visits summaries</li> <li>→ Telephone memos</li> <li>→ Comment responses</li> <li>→ Modeling results</li> <li>→ Manuals or guidance documents</li> <li>→ Reference documents</li> <li>→ Treatises</li> <li>→ Scholarly works</li> </ul> | <p style="text-align: center;"><b>Any<br/>document<br/>that connects<br/>the decision-<br/>making<br/>document</b></p> |

*Source: TxDOT Environmental Coordinators Conference 2015*

*Figure 5.1: What Should Be in the Administrative Record*

| What SHOULD NOT be in the Administrative Record                                                                                                                                                           |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p style="text-align: center;">Privileged documents<br/> Drafts of documents<br/> Deliberative documents<br/> Personal notes<br/> Procurement documents<br/> Extraneous emails, e.g., meeting minutes</p> |

*Source: TxDOT Environmental Coordinators Conference 2015*

*Figure 5.2: What Should Not Be in the Administrative Record*

#### 5.4.4 So Why Is the Administrative Record so Important?

At TxDOT's Environmental Coordinators Conference in September 2015, speakers noted that in a NEPA lawsuit in Texas the following processes would not occur:

- Discovery
- Depositions
- Review of documents
- Trial

- Witnesses or cross-examination
- Jury
- May not even be a hearing by the judge

As a result, if there is not a robust Administrative Record, TxDOT may be unable to rely on the Administrative Procedure Act to work in its favor if a plaintiff brings a case arguing deficiency within the Administrative Record or the decision-making processes that led to a determination of a CE, FONSI, or ROD. Case law also bears out the importance of keeping a robust Administrative Record. In a 2014 case the court noted that *“in considering challenges to agency action under the Administrative Procedure Act, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court”* (Coalition for the Advancement of Regional Transportation, 2014). Courts will only allow new evidence to be introduced under four limited circumstances:

1. It is necessary to determine whether the agency has considered all relevant factors and explained its decision.
2. If the agency relied upon documents not in the record.
3. When supplementing the record is necessary to explain technical terms or complex subject matter items.
  - a. Courts prefer record that is contemporaneous with the project file.
4. The agency has acted in bad faith.

As the only element that the court will review in a NEPA case is the Administrative Record, constructing a tidy Administrative Record that is easy to follow and ensuring that the project’s arguments in motion do not conflict with the Administrative Record is extremely important. The following two cases succinctly show how the courts approach a “messy” Administrative Record versus a “tidy” Administrative Record. A third case shows how an Administrative Record can be held against a defendant if the Administrative Record runs counter to defendant’s arguments in court.

#### *The Messy Administrative Record Example*

In 2010 (Latin Americans, 2010), the court reviewed the Administrative Record for a proposed international bridge crossing in Detroit’s Delray neighborhood. Plaintiffs claimed that defendants failed to comply with NEPA when they issued the ROD. The court found that it could not grant the plaintiffs’ motion for discovery, because it was unable at the time to make an informed decision because of *“the current state of the Administrative Record.”* The court held that the Administrative Record was insufficient and because of this the court was not persuaded that it was in a position to make a decision regarding the completeness of the Administrative Record. During the case, the FHWA issued a new certified Administrative Record with errata sheets. This was contained on 14 DVDs, divided into three indices that according to the court had *“no discernible organizational structure.”* The court also noted that the FHWA had given the court *“little detail regarding its methodology in compiling the Administrative Record.”* The court noted that *“[t]he Administrative Record includes the DEIS, the FEIS, and the ROD along with approximately 130,000 pages of emails, notes, reports, records of meetings, and other materials.”*

*It does not explain how it (FHWA) selected which emails, notes, reports, records of meetings, and other materials would be included in the Administrative Record and which would be excluded.”*

The court held that until the FHWA fully described the process by which the Administrative Record was compiled, it could not determine/assess whether the process was sufficient and whether the FHWA was entitled to a presumption of regularity. The court noted *“the current state of the Administrative Record renders it virtually impenetrable.”* In this lawsuit the plaintiffs were asking the court to determine whether the ROD should be set aside as an arbitrary and capricious decision. The court noted that to do so, it must determine whether the FHWA complied with the procedures set forth in NEPA and Section 4(f) by engaging in a *“thorough, probing, in depth”* review within the Administrative Record. The FHWA provided *“an index en-mass to the Administrative Record comprising three volumes and 435 pages. There is no discernable organizational structure as to the dates, types of documents, or subject matter of the materials included in the Administrative Record. Further, there is nothing in the indices to indicate the DVD on which a given document is located. The Court is not in a position to engage in a ‘thorough, probing, in-depth review’ of the Administrative Record if it cannot effectively identify and locate relevant documents within the record.”*

#### *The Tidy Administrative Record Example*

In 2014 the United States Court of Appeals for the Sixth Circuit (Coalition for the Advancement of Regional Transportation 2014) reviewed the Administrative Record for a bridge project in Louisville Southern Indiana Ohio River Bridges Project, and noted that the *mammoth Administrative Record* (emphasis added)—which spanned over 20 years and included in excess of 150,000 pages chronicling the history of the project in exhaustive detail—*“compels a reasonable factfinder to conclude that the Project was motivated by the nondiscriminatory purpose of improving cross-river mobility, not racial animus.”* The court found that the Administrative Record chronicled the sequence of events and decision-making: *“The need to construct additional bridges for cross-river mobility has been recognized for nearly fifty years, and the Purpose and Need Statement substantiates the acute and growing need to address cross-river traffic congestion and safety and inefficient cross-river mobility for population and employment growth in the region. Also, the alternatives evaluation demonstrates that the Modified Selected Alternative was chosen because it best addresses the identified needs, not because of any intentional discriminatory impacts.”* The court noted that *“No reasonable jury would find anything about the ‘sequence of events’ leading up to the Project’s approval suggestive of discriminatory purpose.”*

#### *AR in Conflict with Arguments in Court*

In 2015 the United States District Court for the Eastern District of North Carolina, Western Division (Catawba, 2015) found that a defendant’s argument ran counter to the Administrative Record and vacated a ROD, noting that the *“Defendants’ argument contradicts the administrative record. Indeed, the administrative record establishes that the defendants’ growth and impact projections in the No Build scenario explicitly relied on socioeconomic data that assumed construction of the Garden Parkway.”* The court referred to an email among defendants’ employees noting concern about the agencies buying into the theory that overall growth does not change with or without the project—it just redistributes. The court found *“In sum, defendants made an unsupported assumption that growth in the Metrolina region would remain constant regardless of whether the Garden Parkway was built. In so doing, they failed to take a ‘hard look’ at the*

*environmental impacts of the proposed Garden Parkway and violated NEPA and the Administrative Procedure Act by preparing an inadequate EIS.”*

#### **5.4.5 Arbitrary and Capricious Decision-Making**

Challenges to an agency’s compliance with the NEPA are reviewed under standards set forth in the Administrative Procedure Act. Under the Administrative Procedure Act, the agency’s decision may be set aside only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law (5 U.S.C.S. §706(2)(A)). In making the determination whether an agency decision was arbitrary or capricious, the court must consider whether the decision was based on a consideration of the relevant factors and if there has been a clear error of judgment (Marsh, 1989). Under this standard, the court must assure itself that (i) the agency considered the relevant factors in making its decision, (ii) its action bears a rational relationship to the statute’s purposes, and (iii) there is substantial evidence in the record to support it.

In an early 1971 case (Citizens to Preserve Overton Park, 1971), the court held that while the standard of review was to be narrow, the court’s inquiry should be searching and careful. A 1989 case found that the court cannot substitute its own judgment for that of an agency, and only needs to determine if the agency *adequately* reviewed the issue (Neighbors Organized to Insure a Sound Env’t, 1989). Agencies are given great latitude regarding scientific matters within their area of expertise according to a 2002 case (Nat’l Wildlife Fed’n, 2002). If experts from both sides disagree on technical conclusions, the court *must* defer to the agency’s qualified experts (even if the court may find the contrary [plaintiff] views more persuasive) (Marsh, 1989). The court noted in 2011 that judicial review of an agency’s NEPA compliance does not include “flyspecking the agency’s decision-making process” (N.C. Wildlife Fed’n, 2011).

NEPA requires the plaintiff to bear the burden of showing that a decision was arbitrary and capricious but court decisions do not always favor the agency defendant. In a 2011 case (Southeast Alaska, 2011), the 9<sup>th</sup> Circuit Court of Appeals found for plaintiffs, who had asserted that the EIS failed to consider alternatives, including those using existing resources, which the court held were reasonable alternatives. In its reasoning, the court held that the FHWA failed to consider reassigning vessels as a project alternative; as a result, the EIS failed to examine a viable and reasonable alternative. Further, the FHWA could not provide justification for this omission in the EIS. The existence of a viable but unexamined alternative rendered the EIS inadequate. The court found that the EIS’s explanation of the FHWA’s consideration of a No Action Alternative was cursory. *“Three brief paragraphs first describe the No Action Alternative as an updated 1997 plan for ferry usage, then assert that using more ferries would reduce service elsewhere (without explaining the comparative needs for such services) and finally note that under the No Action Alternative AMHS could add ferries in the future but would not build anything.”* The court held that this explanation does not represent the *substantial treatment* required by NEPA’s implementing regulations to any non-construction alternatives.

In 2011, the United States District Court for the Northern District of California also found the plaintiff’s argument persuasive, issuing a preliminary injunction to stop development of a highway through old growth redwood trees on the basis that the EA was arbitrary and capricious (Bair v. Caltrans, 2011). The court held that plaintiffs had demonstrated that irreparable harm is likely and there were serious questions on the merit of conducting a full EIS as opposed to the EA that was undertaken. The court noted that agencies cannot avoid preparing an EIS by making conclusory assertions that an activity will have only an insignificant impact on the environment, holding that in this instance that *“there is too much evidence, that the impact would be significant.”*

Because Caltrans proposed activities would have taken place within the root zones of redwoods, there was reason to believe there would be a significant injury; the court noted that plaintiffs had shown inconsistencies in the EA's data analysis that might be found *"so implausible that it could not be ascribed to a difference in view or the product of agency expertise"* (citing dicta in *Lands Council*, 2008). The EA did not map all the trees where the construction would occur—including a redwood with a 91-inch diameter—and also miscalculated the diameters of several trees. According to the court, *"Such discrepancies are not merely differences in methodology for which deference would be given to agency experts. They are examples raising serious questions about whether defendants truly took a 'hard look' at the effects of the project."*

While the courts do give extreme deference to agency decision, they do undertake a rigorous assessment of the relevant factors. As an example in 2015, the court held that *"the magnitude of the Flyover Project far surpasses the scope of highway projects envisioned by § 771.117(d) (RB Jai Alai, 2015). As a result, Defendants were required by NEPA and FAHA to prepare either an EA or an EIS. Defendants failed to do so, rendering their 2012 confirmation of the Flyover Project as a CE arbitrary and capricious."*

#### **5.4.6 Purpose and Need**

As part of the development of the EIS, the agency must develop a Purpose and Need statement—usually one to two paragraphs—that details the rationale for the project, including the underlying Purpose and Need to which the agency is responding in its proposed alternatives, including the proposed action. The CEQ issued further guidance in an exchange of letters with the Secretary of Transportation in 2003 (CEQ, 2003 a, b).

Under NEPA, agencies must look hard at the factors relevant to the definition of purpose (*Citizens Against Burlington Inc.*, 1991). In *Burlington* the court held that *"An agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality."*

Agencies cannot frame their goals in terms so *unreasonably broad* (*Burlington*, 1991) that an infinite number of alternatives would accomplish those goals and the project would collapse under the weight of the possibilities. Recent case law has taken similar stands; in 2014 a court reviewed a plaintiff's assertion that the Purpose and Need statement was crafted without a rational basis. The court held that *"the Purpose and Need Statement at issue in this case is not arbitrary and capricious. The defined purpose—'to improve cross-river mobility between Jefferson County, Kentucky, and Clark County, Indiana'—was based on five distinct needs... Moreover, because defendants justifiably found the various cross-river mobility needs between Jefferson County and Clark County to be intertwined, they reasonably defined the Purpose and Need Statement for the Project to be regional in scope"*(*Coalition for the Advancement of Regional Transportation*, 2014).

However, in 2015 the U.S. District Court for the Northern District of Illinois, Eastern Division, found in that *"the purpose and need for the Illiana Corridor identified in the EIS are derived directly from the faulty 'no build' analysis. Because that analysis does not substantiate the purpose and need, the FHWA's approval of the ROD and final EIS is arbitrary and capricious and in violation of NEPA"* (*Openlands*, 2015).

#### 5.4.7 Alternatives Analysis

A major component of an EIS is its alternatives analysis (40 C.F.R. §1502.14). The CEQ's regulations specify that to satisfy NEPA, agencies must rigorously explore and objectively evaluate all reasonable alternatives and briefly discuss reasons for any alternatives being eliminated (§1502.14(a)). In 2015, the District Court for the Central District of California (Crenshaw, 2015) noted, "*Agencies enjoy considerable discretion in defining the purpose and need of a project, but they may not define the project's objectives in terms so unreasonably narrow, that only one alternative would accomplish the goals of the project*" (Citing Honolulu Traffic, 2014). In this case the court was reviewing the plaintiff's assertions that the FTA had not considered alternative configurations for this light rail project. The court noted here, in reviewing previous case law, "*that is not to say an agency must ceaselessly review alternatives to include every alternative device and thought conceivable by the mind of man.*" Courts have held that the alternatives an agency considers should be "*bounded by some notion of feasibility*" (Vt Yankee Nuclear Power Corp, 1978). The Fifth Circuit in 1974 held that an agency may prefer one alternative from the outset, but "*must proceed to perform its environmental tasks with good faith objectivity*" (Env'tl. Def. Fund, Inc. v. Corps of Eng'rs, 1974).

In reviewing the alternatives analysis, courts will review with considerable deference to the agency's role in setting policy and the agency's expertise to the subject matter. In a 2015 case (Clean Air Carolina, 2015) where plaintiffs argued that the defendant should have reevaluated possible alternatives to a bypass in light of the improved traffic situation, the United States District Court for the Eastern District of North Carolina found that the plaintiffs had not met the burden of showing that the defendants failed to take a sufficient hard look at the alternatives. In this instance, the defendants responded that they had taken the necessary hard look at reasonable alternatives in light of the current conditions, but rejected them as unable to sufficiently reduce projected congestion. The court cited a 1990 case that spoke to the deference afforded to an agency's alternatives analysis: "*the court engage[s] in both of these inquiries—whether an agency's objectives are reasonable, and whether a particular alternative is reasonable in light of these objectives—with considerable deference to the agency's expertise and policy-making role*" (N. Buckhead, 1990).

However, courts may overturn a ROD because of faulty alternatives analysis, notwithstanding deference to agency expertise. In 2015 the United States District Court for the Northern District of Illinois reviewed alternatives analysis for a proposed toll corridor between Illinois and Indiana (Openlands, 2015). Plaintiffs here had argued that the agencies had prematurely limited their analysis of reasonable alternatives by solely comparing the 'B3' route to a no-action alternative in the upcoming EIS. The plaintiffs further argued that by dismissing variations of northern alignments as a reasonable alternative, the agencies had not rigorously explored and objectively evaluated all reasonable alternatives. In addition, the plaintiffs argued that the alternatives analysis was premised upon population forecasts that conflicted with local MPO forecasts and ignored relevant census data, yielding baseline or no-build forecasts that were, in reality, premised on the assumption that the project will be built.

The court noted that "*Given the MPOs' legal mandate to develop long-range transportation plans for their areas and the influence they wield over local land use decisions through those transportation plans, it would seem unwise for the Agencies to reject the MPOs' population forecasts.*" However, the court found that plaintiff had not cited any legal authority that required the use of agencies to accept these forecasts: "*Because the Agencies have articulated*

*reasonable, if not persuasive, reasons for their decision not to use the MPOs' forecasts, that decision is not arbitrary within the meaning of the Administrative Procedure Act.”*

The court held that the approval of the Tier 1 final EIS was arbitrary and capricious, because the purpose and need for the Illiana Corridor identified in the EIS was derived directly from the faulty no-build analysis. The court found that the analysis did not substantiate the purpose and need; the flawed no-build analysis doomed the ROD and EIS analysis of the direct effects of the proposed corridor.

#### **5.4.8 Predetermination of a Favored Outcome**

Predetermination of a favored outcome is another area in which TxDOT's NEPA specialists should be cognizant of how concurrent activity—that may be taking place while an EA or EIS is being undertaken—may be viewed as an opportunity by a plaintiff looking to stop a project.

In 2015 the U.S. District Court for the District of Minnesota received a case where a state statute required a process to occur while the EIS was being developed; the plaintiffs argued that this closed off available options before the environmental process was completed. Here plaintiffs brought an action against the FTA, charging it violated NEPA by using the municipal consent process to close off available options before the environmental review process was complete (Lakes and Parks Alliance, 2015). The proposed project was Southwest Light Rail Transit's (SWLRT) construction of a light rail in the southwestern Twin Cities suburbs. After an agency completes the DEIS and a Supplemental DEIS, Minnesota statute requires a municipal consent process to be undertaken for light rail transit projects (Minnesota Statute §473.3994). This statute requires that each city and county in which a light rail transit route is proposed must hold a public hearing and vote to approve or disapprove the physical design component of the preliminary design plans for the project (Minn. Stat. §473.3994). The plaintiffs argued that the defendants violated NEPA by proceeding with the municipal consent process on the SWLRT before the completion of a full environmental review. The plaintiff further alleged that the defendants violated the state's municipal consent statutes by failing to provide a DEIS that analyzed the routes the cities voted on when giving municipal consent.

In its analysis, the court noted that CEQ regulations require an EIS to be prepared early enough so that it can serve practically as important contribution to the decision-making process—not to rationalize or justify decisions already made (40 C.F.R. §1506.1(a)(2); and §1502.5). However, the court also noted that Section 1506.1 states that it “*does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance*” (directing federal agencies to integrate the requirements of NEPA with other planning and environmental review procedures required by law so that all such procedures run concurrently rather than consecutively). Additionally, federal regulations permit an agency to choose its preferred alternative and indicate as much in the DEIS (§1502.14(e)), noting that an EIS may identify the agency's preferred alternative or alternatives.

In this instance the court found that there had not been an irreversible and irretrievable commitment to a specific SWLRT route, and that the plaintiff had not shown it was entitled to judgement as matter of law on the record. The court held that because

*The Met Council also distinguishes the "preliminary design plan" from the "preliminary engineering plan," which "means a light rail transit plan that includes the items in the preliminary design plan for the facilities proposed for construction, but with greater*

*detail and specificity to satisfy final environmental impact statement requirements. Since the "preliminary engineering plan" definition explicitly states that it must contain the information needed to meet the requirements of an FEIS, the Met Council argues that the legislature knew how to create an explicit requirement that EIS information be contained in a plan. Because they did not do so explicitly in the "physical design" of "preliminary design plan" definition and because they stated that a city only needs access to the "physical design component of the preliminary design plan" before a vote, the legislature must not have wanted to require that EIS information be available to cities prior to the municipal consent vote.*

The court, however, did note that this would not end the case:

*While the agency in charge can state a subjective preference, the unique nature of the municipal consent process in Minnesota for light rail projects, and the significant drumbeat of support the Met Council assembled for a single route, certainly comes close to having the practical effect of limiting the available options, such that the remaining federal environmental review is meaningless. Indeed, by signing an agreement with St. Louis Park that all but guarantees freight rail will stay in the Kenilworth Corridor, the Met Council has come dangerously close to impermissibly prejudicing the ongoing environmental review process. Given the importance of a searching environmental analysis of each of the available options, the remaining steps in the process of securing municipal consent and finalizing environmental review—by both the Met Council and the FTA—should provide that searching analysis in order to comply with NEPA's twin aims of informing decision makers and involving the public.*

#### 5.4.9 EIS/EA or CE?

While there has been a long history of case law regarding the sufficiency or adequacy of EISs since NEPA's inception, there is also a subset within case law that bears review: the determination that an agency makes to choose an EA instead of an EIS, and most importantly the decision to use a CE.

NEPA requires federal agencies to prepare an EIS when they engage in **major** Federal actions **significantly affecting** the quality of the human environment (42 U.S.C. § 4332(2)(C)). The EIS must include:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects that cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented.

In 2000 the 5<sup>th</sup> Circuit in *Westphal* created three criteria for reviewing adequacy of an EIS:

- 1) Whether the agency in good faith objectively has taken a hard look at the environmental consequences of a proposed action and alternatives;

- 2) Whether the EIS provides detail sufficient to allow those who did not participate in its preparation to understand and consider the pertinent environmental influences involved; and
- 3) Whether the EIS explanation of alternatives is sufficient to permit a reasoned choice among different courses of action.

The 5<sup>th</sup> Circuit also noted that any conclusions upon which the EIS/EA is based must be supported by the evidence in the Administrative Record. One could argue that these three criteria should also be criteria for environmental analysis undertaken by TxDOT under its NEPA Assignment status.

As an example of how a court might review a case where the argument centers on the choice to use a lesser analysis than EIS, a 2015 case from Florida is instructive. The dispute in this case arose out of the construction of a highway project in Casselberry, Florida [the Flyover Project] (RB Jai Alai, 2015). The Flyover Project consists of changing the existing at-grade intersection at US 17-92 and SR 436 to an above-grade, elevated highway overpass that will allow traffic traveling on US 17-92 to cross over SR 436 without interruption. The Flyover Project also involves adding frontage roads to allow access to local roadways; widening SR 436 to include additional left-turn lanes; and improving sidewalks, bicycle lanes, drainage systems, and landscaping. Numerous studies and a public hearing of the potential impacts the Flyover Project may have on the environment were conducted.<sup>30</sup> All of these studies concluded that the project would not significantly impact the environment and it was approved as a CE, exempting it from further environmental scrutiny in 2004. The project was reevaluated twice after this. In 2005 a re-evaluation was conducted to consider the environmental impacts of minor changes to safety and traffic flow issues. These design changes were found to not inflict significant impact on the environment, affirming CE status. A second re-evaluation was undertaken in 2012 because of design changes to the length of the overpass and to the width of a median. Again these changes were found to have no significant impact on the environment, affirming for the second time CE status. Construction for the Flyover Project began on October 10, 2013.<sup>31</sup>

Plaintiffs in this case alleged that the defendants violated NEPA by failing to adequately consider the Flyover Project's environmental impacts. The plaintiffs additionally allege that the defendants violated the Federal Aid Highway Act by approving federal funding for a project that did not comply with NEPA. Plaintiffs argued that the 2012 reevaluation failed to address new and changed circumstances to land use patterns, traffic patterns, contaminated sites, and impacts to wetlands.

The United States District Court for the Middle District of Florida, Orlando Division, found that Florida DOT had improperly categorized a project as a CE. The Court asked the defendants to explain why the Flyover Project was classified as a d-list CE and to provide case law in support of this assertion. According to the court, the Flyover Project *“does not fall within nor is it remotely similar to, any of subsection (d)'s listed actions... Although the Flyover Project undoubtedly involves installing traffic signals and lighting, it cannot be said with any degree of sincerity that building a massive highway overpass is similar in scope.”*

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<sup>30</sup> This included a Cultural Resource Assessment Survey, an Endangered Species Biological Assessment, an Air Quality Report, and a Noise Quality Report.

<sup>31</sup> According to the court, to date, more than 80% of construction is complete and more than 96% of federal funds allocated to the highway project have been spent.

The court held that *“Despite a valiant effort, the Court finds Defendants’ arguments unavailing and concludes that the initial classification of the Flyover Project as a d-list CE violated NEPA’s procedures and comparisons to other cases leads to the inescapable conclusion that the Flyover Project cannot be categorically excluded under NEPA.”*

## **5.5 Recommendations**

### **Recommendation 1: The Administrative Record is paramount.**

As noted in Section 5.4.4, ensuring that a tidy, readable, clear, and articulate Administrative Record can be compiled by TxDOT in the event of litigation is paramount. It should be a prime focus of the ENV Division to ensure that staff involved in developing NEPA documents are keenly aware of the need to provide a robust and defensible Administrative Record.

### **Recommendation 2: Ensure staff understands their signatory duties in signing off on documents and key decision points when determining which process the NEPA analysis will take.**

As noted in the case law analysis, the courts will review the Administrative Record in detail and will then examine the soundness of the logic and analysis that informed all decisions relating to the determination of whether a project will have a significant effect, and the selection of one of the three processing options (CE, EA, or EIS). TxDOT staffers must understand their role in process choice, and understand how to change the process choice if funding, or other impacts, significantly change the project scope, design, and impacts.

### **Recommendation 3: Understand that careless or thoughtless analysis can lead to an allegation of arbitrary and capricious decision-making.**

As the case law analysis has indicated, while the courts give deference to the agency’s decision-making process and expertise, they are required under the Administrative Procedure Act to consider whether the decision was based on a consideration of the relevant factors and if there has been a clear error of judgment. Under this standard, the court must assure itself that (i) the agency considered the relevant factors in making its decision, (ii) its action bears a rational relationship to the statute’s purposes, and (iii) there is substantial evidence in the record to support it. In addition, as the court only looks to the Administrative Record in existence, the decision-making process MUST be self-evident within the Administrative Record that will be compiled from TxDOT’s project file.

### **Recommendation 4: Document and explain the decision processes.**

Documenting the decision-making process is extremely important, as this will be inserted into the project’s Administrative Record and may be the pivot point on which a court will review arguments. As an example, if a district chooses to deviate from standard public data that is historically utilized, staff will need to set out a robust rationale for this approach. As the case law in shows, where an agency has articulated reasonable reasons for their decision process, the court will not find a decision arbitrary under the meaning of the Administrative Procedure Act, even if the court may remark upon that deviation, as it did in Openlands in 2015 case: *“Given the MPOs’ legal mandate to develop long-range transportation plans for their areas and the influence they wield over local land use decisions through those transportation plans, it would seem unwise for the Agencies to reject the MPOs’ population forecasts.”*

**Recommendation 5: Do not pursue the easiest path.**

As noted, courts will review the agency's decision-making process leading up to the decision to conduct an EA or EIS or decide a project is a CE. As one court noted, agencies cannot avoid preparing an EIS by making conclusory assertions that an activity will have only an insignificant impact on the environment. NEPA specialists at TxDOT need to ensure that they follow all internal guidance (which has been developed from federal and state statutes and regulations) in determining the decision-making process.

The next chapter lays out the process for developing the NEPA Assignment Training Modules developed within this project. The MOU between TxDOT and FHWA requires TxDOT to maintain an adequate number of trained and qualified personnel and the first two audits have recommended that TxDOT implements NEPA Assignment Training as part of its process under NEPA Assignment.

## **Chapter 6. NEPA Assignment Training Modules**

### **6.1 Introduction**

The MOU assigning TxDOT federal NEPA responsibility requires the agency to maintain “an adequate number of trained and qualified personnel” (FHWA TX Division 2014, p.9). This requirement applies to “environmental, technical, legal, and managerial expertise” as well as the capacity to carry out the duties under the MOU and Federal laws (FHWA TX Division 2014, p.8). As part of this project, TxDOT ENV staff indicated that specific training for NEPA Assignment was required, tailored for six target audiences based on common vulnerabilities in the NEPA process. Based on a review of audit findings and recent case law the following activities were undertaken:

- Reviewing examples of NEPA training available to environmental professionals across the United States,
- Reviewing existing NEPA training and presentations developed by TxDOT
- Identifying vulnerabilities through case law, audits, and practitioner experiences,
- Identifying gaps in training, building off existing work and
- Developing training material for six target audiences relevant to NEPA assignment:
  - Environmental Specialists
  - TxDOT Management
  - TxDOT Engineers
  - Consultants
  - Local Government Staff
  - Elected Officials

The material delivered in this project will assist TxDOT by training its staff to do their part in make legally defensible decisions according to NEPA under the Administrative Procedures Act.

### **6.2 Existing Online NEPA Training**

#### **6.2.1 Online NEPA Training Available Across the United States**

TxDOT currently provides NEPA pre- and post-assignment resources through its ENV website. Resources found on TxDOT’s website include manuals, toolkits, and advertisements for upcoming in-person training opportunities. To better understand how TxDOT compares with other state DOTs, a “desktop review” of the fifty other states’ (and the District of Columbia’s) DOT websites was conducted, searching for the availability and the quality of training resources. Training material is defined as information that could be presented online or in person, whereas reference material includes items such as toolkits, manuals, and guides.

The following indicators structured the availability and relevance of the training material:

- Whether the training materials were available to view for no charge.
- Whether the training materials were specifically about NEPA.<sup>32</sup>
- Whether the website referenced upcoming or prior in-person NEPA trainings, if these were required, and if there were entry fees.
- If the online NEPA reference materials were easy to find and access.

Table 6.1 summarizes the findings of the desktop review, which indicate that there is a variety of training standards available across the country.

**Table 6.1: Availability of State DOT NEPA Training**

| Indicator                                                         | Number of States* |
|-------------------------------------------------------------------|-------------------|
| NEPA training material found                                      | 23                |
| Online reference material found                                   | 37                |
| Referenced Training Opportunities, but no materials found         | 12                |
| Advertised External Training, like the National Highway Institute | 4                 |
| * Including the District of Columbia.                             |                   |

Four other states have either received NEPA Assignment (California) or are applying for NEPA Assignment (Ohio, Alaska, and Utah). These states' online materials were analyzed in depth to identify the differences in how each state DOT prepared for NEPA Assignment or how they were managing the post-assignment environment. Table 6.2 shows that each state provides different resources, and no two are alike. The four other states referenced in Table 6.2 are TxDOT's peer states in NEPA assignment.

**Table 6.2: NEPA Assignment Eligible States Training**

| Indicator                                                         | California | Ohio | Alaska | Utah | Texas |
|-------------------------------------------------------------------|------------|------|--------|------|-------|
| Training Calendars                                                |            |      | ✓      | ✓    | ✓     |
| In-person training by DOT                                         |            | ✓    | ✓      |      | ✓     |
| Online NEPA Training through DOT                                  | ✓          |      | ✓      |      | ✓     |
| Local Government Oriented Training                                | ✓          |      |        |      | ✓     |
| Online Manuals and/or Toolkits                                    | ✓          | ✓    | ✓      | ✓    | ✓     |
| Advertised External Training, like the National Highway Institute | ✓          |      |        |      |       |

The few states that offered online training had access-restricted training sites with instructions to log in, so the structure and content of these online trainings could not be reviewed. Some of the training modules were introductions to NEPA, whereas others were in-depth training in a specific subject area. NEPA assignment audits conducted by the FHWA have continuously highlighted the need for NEPA assignment training. They have even noted that the DOTs have been unable to keep up with demand for online training. TxDOT's main opportunity to improve their training regimen is to enhance online NEPA assignment instruction and to ensure that all staff

<sup>32</sup> Training related to internal processes of a specific DOT were not included in this review

who has some role in NEPA assignment regularly take training. To get started, TxDOT could format the training provided in this project into online trainings, possibly with voice-overs, timed requirements, or quizzes at the end.

### **6.2.2 Previous NEPA Training Material from TxDOT**

In preparation for NEPA assignment, ENV prepared numerous sets of presentations to train and inform TxDOT staff and other transportation professionals. These presentations focused on the path to NEPA assignment, from the regulatory changes that enable assignment to the unveiling of new resources TxDOT was developing to adapt to assignment (TxDOT, February 2014, (a), (b), and (c), March, 2014, and September 2014).

The content begins by contextualizing TxDOT's assignment of federal responsibility through an overview of MAP-21 and changes between SAFETEA-LU and MAP-21 regarding NEPA assignment. A status update was provided in each, including TxDOT's experiences with assignment for CE determinations and its application to the FHWA for full assignment. An overview of how responsibilities would change under assignment briefly informed audiences of anticipated changes in environmental document approval, procedural changes, legal burdens, and training. Finally, TxDOT identified new handbooks and toolkits being released to assist staff in procedural changes following assignment.

This material helped NEPA professionals anticipate the major changes that would occur under NEPA assignment, but it could not provide guidance based on an individual's role in the NEPA process. However, TxDOT ENV professionals presented these to audiences in person and were able to respond to questions based on the audience's level of knowledge.

### **6.2.3 Motivation for Training Materials**

The set of training materials delivered with this project will assist TxDOT in conjunction with other NEPA programs in place such as training and document checklists with preparing its staff, the staff of local sponsors, and private consultants to fulfill NEPA assignment duties and reduce risk by producing complete and defensible NEPA documents. The training will help to:

- Fulfill the MOU's requirement to maintain expertise,
- Address common audit findings,
- Address vulnerabilities found in a case law review, and
- Emphasize the importance of various roles within NEPA Assignment.

Under the MOU, NEPA assignment can be rescinded if the FHWA audits find that TxDOT is regularly non-compliant. Caltrans has been audited six times since its assignment of federal responsibilities in 2007. These audits were used throughout this research to determine common errors made under NEPA assignment and informed the training objectives of materials developed in this project. Table 6.3 lists ongoing errors by topic. Many issues in the audits were caused by uncertainty or confusion over Caltrans or federal procedural requirements, such as obtaining signatures from the correct authority, following proper QA/QC processes, and providing adequate documentation (FHWA Audit Reports 2008–2012).

**Table 6.3: Ongoing and Common Errors Evident in Program Implementation**

| <b>Topic</b>                                                                                       | <b>Noted Issues by FHWA Present in Caltrans Audits</b>                                                                                                                                                                                                                                                                                                                                     |
|----------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Purpose and Responsibilities</b>                                                                | <ul style="list-style-type: none"> <li>• General confusion over appropriate signature authorities at Local, District, and Agency level. Most commonly seen with new staff and consultants.</li> </ul>                                                                                                                                                                                      |
| <b>Assignments and Assumptions of Responsibilities to Comply with Federal Laws other than NEPA</b> | <ul style="list-style-type: none"> <li>• Incorrect determination of CEs due to lack of clear definitions and experience with new categories.</li> <li>• Incorrect use of project reevaluations and project recertification procedures resulting in time-delays and conflict.</li> </ul>                                                                                                    |
| <b>State Commitment of Resources and Training</b>                                                  | <ul style="list-style-type: none"> <li>• NEPA Assignment training program could not keep up with demand for on-line training.</li> <li>• Staff competency levels varied between districts. Agency HQ unable to accurately assess and track individual improvements over time.</li> </ul>                                                                                                   |
| <b>Procedural and Substantive Requirements</b>                                                     | <ul style="list-style-type: none"> <li>• Project errors and lack of knowledge with Section 7 (ESA), Section 4(f), and Section 106 procedures and requirements</li> </ul>                                                                                                                                                                                                                   |
| <b>MOU Monitoring and Oversight</b>                                                                | <ul style="list-style-type: none"> <li>• Confusion over expected roles for coordination, consultation, and collaboration (includes 5.1.4 of the MOU).</li> <li>• Incorrect QA/QC procedures and missing forms. Most commonly evident with Local Assistance projects.</li> <li>• Production of Quarterly Reports contained inaccuracies, missing information, and missing files.</li> </ul> |
| <b>Record Retention and Project Files</b>                                                          | <ul style="list-style-type: none"> <li>• Required project files missing from the Administrative record, or had wrong signatures and dates. Most notably, staff were not saving electronic e-mails or correspondence related to the Administrative Record.</li> <li>• Noted lack of training plan for local assistance/governments and NEPA practitioners.</li> </ul>                       |

*Source: FHWA Audits of Caltrans (FHWA 2008–2012)*

A review of federal case law from around the nation revealed that lawsuits stem from various causes with a common argument that the agency has been arbitrary and capricious in its decision-making process. The focal points of pleadings allege that the agency did not conduct a thorough alternatives analysis or it failed to include certain alternatives, often coupled with the argument that the direct, indirect, and cumulative impacts analysis was suspect. Additionally, plaintiffs have argued that the purpose and need statement was scoped too narrowly, so that it predetermined the selected alternative as the only viable option. Since NEPA is a procedural statute, rather than a substantive statute, it does not mandate particular substantive results but it does impose procedural requirements which the courts review under the Administrative Procedures Act. The court in reviewing a NEPA case will look solely to the Administrative Record in existence (courts have only allowed new evidence to be reviewed in very limited circumstances).

TxDOT is now the agency that will be responsible for developing the NEPA documentation that will form the Administrative Record which will be reviewed in any litigation. Therefore, it is extremely important that TxDOT staff involved in all aspects of the NEPA process understand that the Administrative Record should be clear, unambiguous, and show how the agency analyzed various elements and came to the final decision in a rational and understandable manner.

Finally, the materials developed in this chapter will help TxDOT improve its introductory NEPA training by emphasizing the importance of particular roles under NEPA Assignment. Existing training is not tailored to the full spectrum of professionals who work with TxDOT to fulfill the requirements of NEPA under assignment. The proposed training was tailored for each of these specific groups (environmental specialists in TxDOT, TxDOT management, consultants, engineers, local government staff and public officials). Previous presentations were delivered in person, which can overcome the challenge of tailoring training to different needs and audiences. However, this system falls short of meeting the needs of a vast state with changing staff in the same way online training can. Recognizing that there are still shortcomings to self-paced training as opposed to facilitator-led training, online training can also be integrated into TxDOT's training program to provide documentation of NEPA Assignment training for the FHWA audits.

### **6.3 Explanation of Training Delivered to TxDOT**

The objective of the trainings created (provided to TxDOT as a product: 0-6866-P1) is to provide NEPA Assignment information to all professionals in the NEPA process. This training is not intended to be a replication of existing NEPA training that TxDOT conducts, nor is it a training on performing NEPA documentation. Rather, the information is intended to provide an overview of the responsibilities and duties under NEPA assignment, followed by a quiz. The training slides and quizzes can be found in Appendix C.

TxDOT staff helped identify six groups to receive the training: Management, Environmental Specialists, Engineers, Local Government, Elected Officials, and Consultants. Six PowerPoints have been developed specifically for these groups. The PowerPoints contain sections that outline an introductory review of NEPA and an explanation of how NEPA Assignment has changed the general responsibilities held by these six groups. An overview of what to expect and develop for different project classifications lays the foundation for project delivery of CEs, EAs, and EISs. Major aspects of implementing the NEPA process across all project classifications are outlined, such as project initiation and quality assurance and control. Finally, real-world examples are used to illustrate how important each person's role is to the larger NEPA process under assignment, and to provide examples of where and how mistakes can take place. A quiz similarly utilizes examples from practice to assess the user's understanding of the material.

## Chapter 7. Conclusions and Recommendations

As TxDOT moves into its second full year of NEPA Assignment, TxDOT has already undergone two audits (the second of which occurred as this research project was drawing to a close) and has begun to assess how NEPA Assignment works in practice. A major finding of TxDOT's first audit noted that it needed to ramp up its training on NEPA Assignment, improve the consistent use of the ECOS system across the department, standardize the QA/QC procedure of reviewing documents, and reevaluate the performance measures.

This research project, which began during the first 12 months of NEPA Assignment, has reviewed NEPA Assignment materials, assessed the MOU, conducted an analysis of recent NEPA litigation trends, and developed training materials utilizing resources from various other states. The major conclusion that can be drawn from this analysis and review is that TxDOT needs to stay engaged and involved in all aspects of NEPA Assignment, and that continuous training of staff and other stakeholders is necessary to ensure that TxDOT reduces its risk of litigation. Other recommendations that the research recommended include:

It is important that TxDOT clarify the necessary procedures for projects or related technical studies, which had been initiated prior to the authorization of NEPA Assignment. NEPA Assignment requires files be checked and re-checked throughout the environmental process at each milestone, in order to ensure that all relevant documents are present and complete. This requires a dedication of Agency resources to track and ensure that documents are circulated at key milestones of the review process, and that the transmittal of required project files across DDOs is consistent and uniform.

The FHWA has recommended the implementation of an environmental database system under NEPA Assignment on a statewide basis to assist in the development of a comprehensive database of environmental projects and milestones to improve the accuracy of the information reported. ECOS provides an opportunity to link DDOs, but further investigation is required by TxDOT to better address corrective strategies specific to reporting errors. Also, during the first TxDOT audit, the FHWA found many errors in the current ECOS system, including inadequate documentation that the constraints of a specific CE were met and inconsistent file-naming (resulting in confusion over whether the documentation was complete).

In addition to regular self-assessments, it is recommended that TxDOT create an interagency self-assessment survey similar to Caltrans', discussed in Section 3.4 of this report, to evaluate annual communication between resource agencies.

It is recommended that the existing performance measures be used in the short-term as implementation tools. Research and current practice however, point to the need for adaptation of the performance measures that project long-term performance goals capable of adapting to unforeseen risks inherent to NEPA assignment. Performance measures should include information that helps district-level managers and NEPA practitioners measure the incoming workload and gain insight into causes of outcomes for future risk-reduction. As such, performance measurement expresses the intent of TxDOT's goals during NEPA assignment and how that strategy connects with everyday operations across DDOs. Such systems create an essential feedback and learning mechanism in support of key management decisions.

It is recommended that ENV work in tandem with TxDOT's General Counsel Division to issue guidance and information on inherent risks associated with the Administrative Record. It is important that staff recognize the legal implications and necessity of compliance with the Administrative Record documentation procedures. Apparent internal inconsistencies in the

Administrative Record should be identified by TxDOT prior to formal audits and, if possible, the documents that explain these inconsistencies have to be located and included in the Administrative Record. Chapter 5 also noted that TxDOT will need to ensure that a tidy, readable, clear, and articulate Administrative Record can be compiled in the event of litigation. It should be a prime focus of the ENV Division to ensure that all staff who are involved in developing NEPA documents are keenly aware of the necessity to provide a robust and defensible Administrative Record.

Additionally, ensuring that staff members understand their signatory duties when signing off on documents and the key decision points when determining which documentation path the NEPA analysis will take are critical. As noted in the case law analysis, the courts will review the Administrative Record in detail and will then examine the soundness of the logic and analysis that informed all decisions relating to the determination of whether a project will have a significant effect, and the selection of one of the three processing options (CE, EA, or EIS). TxDOT staffers must understand their role in process choice, and understand how to change the process choice if funding, or other impacts, substantially change the project scope, design, and impacts.

To reduce allegations of arbitrary and capricious decision-making it is important to perform and document rigorous analysis that will help counteract such allegations. As the case law analysis has indicated, while the courts give deference to the agency's decision-making process and expertise, they are required under the Administrative Procedure Act to consider whether the decision was based on a consideration of the relevant factors and if there has been a clear error of judgment. Under this standard, the court must assure itself that (i) the agency considered the relevant factors in making its decision, (ii) its action bears a rational relationship to the statute's purposes, and (iii) there is substantial evidence in the record to support it. In addition, as the court only looks to the Administrative Record in existence, the decision-making process **must** be self-evident within the Administrative Record that will be compiled from TxDOT's project file.

Likewise, documenting and explaining the decision-making process is extremely important, as this will be inserted into the Administrative Record and may be the basis on which a court will review arguments. As an example, deviating from the standard public data that is historically utilized will require a robust rationale for this approach. As case law shows, where an agency has articulated reasonable reasons for their decision process, the court will not find a decision to be arbitrary under the meaning of the Administrative Procedure Act, even if the court may remark upon that deviation, as it did in *Openlands* in 2015 case: *"Given the MPOs' legal mandate to develop long-range transportation plans for their areas and the influence they wield over local land use decisions through those transportation plans, it would seem unwise for the Agencies to reject the MPOs' population forecasts."*

TxDOT staff should not necessarily pursue the easiest path on environmental documents, especially if there is a reasonable likelihood that a more rigorous analysis would be appropriate. As noted, courts will review the agency's decision-making process leading up to the decision to conduct an EA or EIS or decide a project is a CE. As one court noted, agencies cannot avoid preparing an EIS by making conclusory assertions that an activity will have only an insignificant impact on the environment. NEPA specialists at TxDOT and consultants need to ensure that they follow all internal guidance (which has been developed from federal and state statutes and regulations) on determining the decision-making process.

Finally, the training materials developed in this report will hopefully be useful to TxDOT and improve its introductory NEPA Assignment training by emphasizing the importance of particular roles under NEPA Assignment. Existing training is not tailored to the full spectrum of professionals who work with TxDOT to fulfill the requirements of NEPA under assignment. The

proposed training was tailored for each of these specific groups: environmental specialists in TxDOT, TxDOT Management, consultants, engineers, local government staff, and public officials.

Currently NEPA Assignment training sessions are conducted by senior TxDOT ENV staffers. This requires regular travel, is a budget expense that could be utilized elsewhere, and cuts into staff hours that could be productively used in other ways. While, some might argue that in-person training may help to convey information on specific elements to various NEPA professionals and stakeholders, tailored on-line training can achieve this same objective. In a state with a large changing staff and a vast geography, online training can increase access statewide to introductory instruction about TxDOT's and individual stakeholder's roles and responsibilities under NEPA Assignment. Online training can also be integrated into TxDOT's training tracking to provide documentation of NEPA Assignment training to the FHWA during program audits. Subsequent training or expanded scenario exercises could be added later to supplement the current information.

The training also fulfills one of TxDOT's performance measures to achieving continuous improvement through education and training. Tracking pre- and post-NEPA Assignment training will help TxDOT understand progress toward or shortfalls in applying NEPA to public transportation projects and prevailing future legal challenges, which will contribute to this performance measure.

In conclusion, learning from other states' experiences, updating TxDOT's performance measures, improving project tracking within ECOS, and helping all practitioners understand regulations other than NEPA will all contribute to improved chances of TXDOT's environmental decisions satisfying the obligations in its MOU with the FHWA and hold up to a legal challenge, since TxDOT now shoulders that responsibility.

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## Appendix A. Caltrans Interagency Relationship Survey

### 2009–2013 Caltrans Pilot Program Performance Evaluation

| Survey Questions and Interagency Function                                                                                                                                                                                        | Year and Aggregated Responses |      |      |      |      |      |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------|------|------|------|------|------|
|                                                                                                                                                                                                                                  | 2006                          | 2009 | 2010 | 2011 | 2012 | 2013 |
| Caltrans is <b>capable</b> of assuming NEPA responsibilities<br>(% of respondents answering capable "4" to very capable "5")                                                                                                     | 60%                           | 90%  | 92%  | 85%  | 70%  | 90%  |
| Quality in the NEPA process <b>has suffered</b> without FHWA<br>(% of respondents answering agree "4" to strongly agree "5")                                                                                                     | 43%                           | 45%  | 64%  | 58%  | 55%  | 53%  |
| Caltrans has been more <b>cooperative</b> on existing PAs and MOAs than FHWA<br>(% of respondents answering agree "4" to strongly agree "5")                                                                                     | 30%                           | 37%  | 47%  | 22%  | 38%  | 14%  |
| Caltrans <b>does not listen</b> to agencies as well as FHWA did<br>(% of respondents answering disagree "2" to strongly disagree "1")                                                                                            | -                             | 70%  | 43%  | 62%  | 44%  | 40%  |
| Caltrans is <b>not adhering</b> to federal law and regulations<br>(% of respondents answering disagree "2" to strongly disagree "1")                                                                                             | -                             | 47%  | 64%  | 61%  | 59%  | 47%  |
| Caltrans is <b>responsive</b> to concerns expressed by Agencies<br>(% of respondents answering disagree "2" to strongly disagree 1")                                                                                             | 57%                           | 69%  | 75%  | 77%  | 78%  | 90%  |
| Rating Caltrans' <b>interagency coordination performance</b> with respect to the individual agency and responsibilities under federal law and NEPA assignment<br>(% of respondents answering good "4" to excellent "5")          | 43%                           | 51%  | 45%  | 53%  | 53%  | 50%  |
| Rating Caltrans' <b>timeliness</b> in whereby resolutions are being reach with respect to individual agency and responsibilities under federal law and NEPA Assignment<br>(% of respondents answering good "4" to excellent "5") | 37%                           | 40%  | 27%  | 26%  | 45%  | 37%  |
| <b>NEPA and consultation processes are more efficient</b> under Caltrans than were under FHWA<br>(% of respondents answering agree "4" to strongly agree "5")                                                                    | 49%                           | 44%  | 41%  | 54%  | 56%  | 53%  |
| Caltrans <b>consultation and coordination responsibilities are compliant</b> with respect to individual agency missions under federal law and NEPA.<br>(% of respondents answering good "4" to excellent "5")                    | 43%                           | 39%  | 39%  | 41%  | 38%  | 39%  |

Sources: California Department of Transportation, 23 USC 327 Self Assessments 1-7

## **Appendix B. Caltrans Audit Findings**

| COMPLIANT (C)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | NEEDS IMPROVEMENT (N)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | DEFICIENT FINDINGS (D)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | GENERAL COMMENTS |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------|
| <p><b>1) Legal Sufficiency (MOU 8.2.5):</b> developed consistent process to conduct legal sufficiency. Compliant with MOU section 8.2.5</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                 | <p><b>1) QA/QC (MOU 8.2.5):</b> process not implemented for all projects. Personnel did not demonstrate a consistent understanding of each step in the SHS and Local Assistance (LA) qa/qc process.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | <p><b>1) QA/QC Process (8.2.5):</b> FHWA listed several deficiencies, including:</p> <p><b>1a)</b> Completion of QC Certification forms: required internal and external certification forms were not consistently completed prior to approval of each document. In most cases (7 of 11), documents had signatures prior QA/QC completion</p> <p><b>1b)</b> Inconsistent Completion of Env Document: Preparation and Review Tool Checklist and Resource/Technical Specialist Certification - not always consistent between documents.</p> <p><b>1c)</b> Peer reviewers did not meet requirements set in SER</p> |                  |
| <p><b>2) Program Procedures and Policies (MOU 1.1.2):</b> commitments, addition of SER and guidance, under chapters 37 and 38 pertaining to NEPA Assignment.</p>                                                                                                                                                                                                                                                                                                                                                                                                                            | <p><b>2) Changes to QA/QC under SER (MOU 8.2.5):</b> FHWA commented that SER procedural changes were not timed correctly and no system to audit changes to QA/QC measures - resulted in an erroneous omission due to lack of clarification between preparer and HQ.</p>                                                                                                                                                                                                                                                                                                                                                                                                                              | <p><b>2) Pilot Program Self Assessment (MOU 8.2.6):</b> self assessment failed to meet MOU outlines requiring "any areas needing improvement." Self Assessment did not identify mistakes with peer reviewers in QA/QC process.</p>                                                                                                                                                                                                                                                                                                                                                                             |                  |
| <p><b>3) Training Plan (MOU 12.1.2)</b> conducted a needs assessments and developed specific training guide</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | <p><b>3) Env. Documentation Protocols - Class of Action Determination: (MOU 3.2.5)</b> FHWA was unable identify how documentation was determined for Class of Action. FHWA recommended acceptable options in SER.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | <p><b>3) Records Management (MOU 8.3):</b> Caltrans uniform filing system did not have uniform requirements at each district (specifically district 4). System did not match watch Agency outlined in SER.</p>                                                                                                                                                                                                                                                                                                                                                                                                 |                  |
| <p><b>4) Interagency Agreements (MOU 5.1.5):</b> specifically NHPA, 106 PA - FHWA commended early PA.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | <p><b>4) Documentation of Program Procedures in SER:</b> Caltrans will need to acceptable options to convey the recommendation to the signatory official once completing QA/QC reviews</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                  |
| <p><b>5) State Commitment of Resources (MOU 4.2.2):</b></p> <p><b>5a)</b> Creation of 8 new FTEs to support pilot program</p> <p><b>5b)</b> Assigning additional responsibilities to existing Caltrans HQ staff in areas of Legal Sufficiency, Training and Local Assistance</p> <p><b>5c)</b> Continuing expansion of technical specialists and generalists to assist with Local Assitance review and approval of NEPA elements</p> <p><b>5d)</b> Maintaining organizational staff capacities to carry out responsibilities pertaining to MOU section 4.2.2-4.2.3 for Section 106/NHPA</p> | <p><b>5) Execution of Legal Sufficiency Review Process:</b> documents were found to had not gone through the legal sufficiency process correctly. Some documents were noted to arrive to early in the process (one step ahead), while some did not follow guidance for determining when a legal review was necessary.</p> <p>FHWA commented Caltrans should monitor and train staff on when legal sufficiency is declared necessary under Assignment, and also when a legal sufficiency review is NOT required.</p> <p><b>6) Self Assessments (MOU 8.2.6):</b> Process needs to comply with MOU, first self-assessment conducted by Agency needs to target all areas in MOU - not just outcomes.</p> | <p><b>4) Statement Regarding Assumption of Responsibility (MOU 3.2.5):</b> boilerplate language regarding 23 USC 327 and FHWA responsibilities was not present on title pages (missing on 2 draft EIS and one EA).</p>                                                                                                                                                                                                                                                                                                                                                                                         |                  |

| COMPLIANT (C)                                                                                                                                                                                                                                                                                                                                                                                                                                              | NEEDS IMPROVEMENT (N)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | DEFICIENT FINDINGS (D)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | NOTED PRACTICES                                                                                                                                                                                                                                          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| <p><b>1) Training of Legal Division Staff (MOU 12.1.1):</b> Caltrans legal division maintains and effectively tracks training of legal staff. Each Assistant Chief Counsel (ACC) work together to identify opportunities statewide.</p> <p><b>2) Conformity Determinations (8.5 MOU):</b> Conformity decisions were made in the correct procedures determined at the state levels, particularly by transmitting letter to be included in FEIS or DEIS.</p> | <p><b>1) Commitment of Agency Resources (MOU 4.2.2):</b> Internal procedures in work breakdown structure (WBS) code that there was inaccurate tracking of time and labor. FHWA commented Caltrans should continue to clarify, define, communicate, and emphasize consistent use of WBS supportive to capitol projects of the program.</p> <p><b>2) District Training Approaches and Implementation (MOU 4.2.2):</b> FHWA observed that there is considerable variation between staff competency between districts. FHWA commented that Caltrans will need to assess how it's staff are trained, and how to meet their needs. In particular, FHWA found training needs in such areas as:</p> <p><b>2a) Project files:</b> when to initiate a project file and what information should be contained</p> <p><b>2b) Internal QA/QC Certification Form:</b> who the reviewers should be (defined in SER), and when they should sign the form</p> <p><b>2c) Class of Action Determinations:</b> what documentation is used, when a determination is required, and who must be involved</p> <p><b>2d)</b> Differentiating between CE that fall under old Definitions (6004) vs. new Definitions (6005)</p> <p><b>2e)</b> What approvals and decisions need to be included in quarterly reports, and what project stage they are to be report at</p> <p><b>2f)</b> Environmental document transmittals for Legal Sufficiency step</p> <p><b>2g)</b> Environmental document and project file transmittals to transfer projects between staff</p> <p><b>3) Performance Measures Evaluation (MOU 10.1.1 and 10.1.2)</b></p> <p><b>3a) Timely completion of NEPA Process:</b> Caltrans needs to expand beyond simply time to complete review, FHWA suggests expanding to other elements of NEPA. Also, baseline data to evaluate progress program responsibilities (median timeframe approach), is too limited and does not provide a realistic or reliable basis - need to account for size, scope, and complexity.</p> <p><b>3b) Compliance with NEPA and Other Fed. Laws/Regulations:</b> Caltrans measures by evaluating % of documents under commitment with internal certification forms. FHWA was unable to identify the basis CA used/modified for measuring environmental document preparation and time period.</p> <p><b>3c)</b> CA, with FHWA, needs to develop an approach to evaluate the effectiveness and establish a process to communicate changes implemented for each performance measures (MOU 10.1.1).</p> <p><b>4) Quarterly Reports (MOU 8.2.7):</b> Reports did not have accurate listing of all approvals and decisions. "Clear guidance to Districts is needed on what approvals and decisions are to be reported and at what stage are they to be reported (2008: 10)."</p> <p><b>5) Varying Understanding of New CEs (MOU 3.1.1 and 3.1.2):</b> FHWA found inconsistent understanding of old and new determinations of CE. FHWA remarked that district staff need to understand 1) the purpose, 2) use of procedures, and 3) consistency and completion of project file as outlined by checklists and determination forms.</p> | <p><b>1) Performance Measure (MOU 10.1.3):</b> Caltrans does not have a measure to evaluate changes in communication between agency, federal and state resources, and the general public</p> <p><b>2) QA/QC Certification Process (MOU 8.2.5):</b> FHWA noted several deficiencies, as Caltrans staff did not adhere to SER, particularly:</p> <p><b>2a) Quality Control Program:</b> audits noted 6 instances when the signatory was not the actual last reviewer (as required)</p> <p><b>2b) Independent Reviews:</b> Certification forms out of order, in three instances, where external followed internal certification</p> <p><b>3) Submission of Documents for Legal Review:</b> FHWA noted that three of four documents requiring review were not submitted in order of procedures. This included such procedural deviations:</p> <p><b>3a)</b> Complex EA criteria underwent legal review prior to approval by program office, deviating from SOP for complex EAs</p> <p><b>3b)</b> Early invitation for review w/out proper documents prepared. Transmittals were sent without all required items.</p> <p><b>3c)</b> EIS' transmitted for Legal Review prior to internal certification by chief district engineer.</p> <p><b>4) Environmental Document Process - Class of Action Determination</b> - there was a noted lack of documentation surrounding the thought process and analysis necessary for determination of project class. FHWA noted that 23 USC 771.11(a) were not followed correctly. Process was not followed correctly, as listed in SER, as projects were missing records pertaining to class of action and concurrence.<br/><i>This deficiency was cited twice thus far by FHWA.</i></p> <p><b>5) Maintenance of Project and General Administrative Files (MOU 8.2.4):</b> FHWA identified inconsistencies pertaining to "discharge" of responsibilities assumed under program. In particular maintenance of files pertaining to following inconsistencies:</p> <p><b>5a)</b> files with incomplete or missing documentation (required)</p> <p><b>5b)</b> files missing UFS file tabs</p> <p><b>5c)</b> electronic correspondence missing or not printed;</p> <p><b>5d)</b> project files maintained separately from one another</p> <p><b>5e)</b> lack of direction among staff on what should be included in the administrative record</p> | <p><b>1) Use of standard "spreadsheet" template</b> to convey the comments of HQ NEPA coordinators on environmental documents to District Staff and increase transparency (Districts 7, 8, and 11). HQ NEPA coordinator consolidates comments on each document reviewed and provides to district point of contact. Standard ENV Doc. Template included:</p> <p><b>1a)</b> information on each document,</p> <p><b>1b)</b> comment and action needed</p> <p><b>1c)</b> commenter and communication history</p> <p><b>2) Intranet Sites at Districts to Access Materials</b> and Documents: used private, interagency portals to post district specific documents related to the overall program. Internal system for all users at each district to access specific documents and changes.</p> <p><b>3) File Transfer SOP</b> for transferring projects between staff - selective use of transferring projects so that newer staff are not over burden transitioning employee's and projects.</p> |

**6) Creating and Maintaining Electronic Project File Protocols (MOU 8.2.4 and 8.2.5):** Caltrans was found to have a lack of consistent filing and record keeping procedures related to storage of electronic communications - agency does not have a systematic process for formal directives regarding electronic correspondence and/or documentation.

**7) Establishment of Environmental Project Files:** lack of clear understanding and inconsistent implementation on environmental project files; not in line with SER directions (chapter 37/38).

**8) QA/QC Process Implementation (MOU 8.2.5):** process has not been consistently practices for all projects and reviews. Not in line with SER Chapter 38. FHWA noted a general lack of understanding of the purpose of the use of internal certification and qa/qc procedures. Lack of understanding involves overall "logic of the comprehensive progression of authorities and the reviews needed." Staff did not understand that environmental branch chief must be final signatory.

GENERAL COMMENTS

FHWA AUDIT #3 FINDINGS: CALIFORNIA PILOT PROGRAM, NEPA ASSIGNMENT (23 USC 327)

| COMPLIANT (C)                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | NEEDS IMPROVEMENT (N)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | DEFICIENT FINDINGS (D)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
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| <p><b>1) Completion of PES Form:</b> Local assistance project and audit confirmed that the PES forms were completed correctly.</p>                                                                                                                                                                                                                                                                                                                                               | <p><b>1) QA/QC Certification Process (MOU 8.2.5):</b> Audit identified incomplete and incorrectly completed QC certification forms.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | <p><b>1) Performance Measure "Monitoring Relationships with Public" (MOU 10.2.1):</b> Caltrans does not incorporate the views of the public on communication with the agency regarding federal-aid SHS projects. Required feedback on a project-by-project basis.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| <p><b>2) Tracking and Managing Projects (MOU 8.2.7):</b> Central region of CA, and districts, have developed "sophisticated" data management system using FileMaker software application for tracking and managing Capital projects. Follows standard district practices. Features of the tacking system include color coding to identify inactive projects or deadlines.</p>                                                                                                    | <p><b>2) Self-Assessment and Process Reviews (MOU 8.2.6):</b> internal formal process reviews required improvements to meet it's stated intent, FHWA noted:</p> <p><b>2a) Review of ALL Projects during the self assessments:</b> agency will need to evaluate projects at all phases of project development, complete review should include ALL projects, including those that have not met the decision-making milestones.</p> <p><b>2b) More details on performance measures are needed.</b> FHWA noted that more detailed discussions should be included on each performance measure. Examples include sample procedures for EAs/EIS' project files in filing system, and sampling procedures for checking completeness of QC forms.</p> <p><b>2c) Limited Scope of the Self-Assessment Review:</b> self assessments focused too much on effectiveness by Caltrans - agency focused only on one aspect. Rather, FHWA noted that reviews should address newly occurring areas of weakness/potential weaknesses.</p> <p><b>2d) Reviewing all Elements of Assumed Responsibilities (MOU 8.2.6):</b> FHWA noted that Caltrans should conduct a comprehensive, systematic review of all processes; as the agency was noted on multiple occasions for lacking a clear, adopted methodology.</p>                                                                                                                                       | <p><b>2) Documentation of Class of Action Determinations:</b> Districts were found to deviate from SER, and did not follow proper class of action documentation. FHWA noted one project where change was from EA to EIS but with no documentation identified in the project file to demonstrate the identification or the concurrence of the decision to down scope the project file type.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| <p><b>3) Project Files/Uniform Filing System (MOU 8.2.4):</b> North and central regions have taken additional steps to ensure files are organized properly and easily accessible. Caltrans added sub-tabs for areas with biological and resource technical reports.</p> <p><b>4) QA/QC Process (MOU 8.2.5):</b> Central region introduced a QA/QC unit for capital program staff requiring internal QA/QC branch chief signature - exceeding requirements of QC plan in SER.</p> | <p><b>3) Air Quality Conformity Determinations (MOU 8.5.1):</b> Staff are required to document conformity analyses for each project. FHWA requires conformity determination to be submitted after preferred alternative is identified. Audit team identified a misunderstanding by staff regarding conformity process, decision prior to letter submissions. Furthermore. several staff, district and local levels, were not aware of their responsibilities to request formal FHWA conformity determinations.</p> <p><b>4) Project Files/Uniform Filing System (MOU 8.2.4):</b> FHWA staff noted several inconsistencies, in particular:</p> <p><b>4a)</b> missing UFS tabs and sections containing no information</p> <p><b>4b)</b> documentation was missing from project files</p> <p><b>4c)</b> project files identified unsigned or incomplete</p> <p><b>5) Commitment of Resources (MOU 4.2.2):</b> Charging and monitoring time was noticed in the following instances:</p> <p><b>5a)</b> inconsistencies with time charging practices between programs</p> <p><b>5b)</b> local agency frustration with amount of work under program</p> <p><b>6) In/adequate QA/QC Review of Technical Studies:</b> Peer review of LA projects found biological studies was sometimes less thorough for SHS projects. FHWA noted that a the standard is required for both SHS and LA projects when conducting resource agency reviews.</p> | <p><b>3) Local Assistance Training Plan (MOU 12.1.1):</b> MOU clarifies Caltrans responsibility to have all appropriate employees and training to local assistance staffers and practitioners. FHWA noted in particular the agency lacked information of local training, and the following:</p> <p><b>3a)</b> formalized training for DLA staff on DLA-specific processes</p> <p><b>3b)</b> lack of ongoing training procedure for local agencies and consultants. This included a lack of information or formal clarification of expected training and outreach to be offered.</p> <p><b>4) Quarterly Reports (MOU 8.2.7):</b> FHWA noted an ongoing inaccurate listing of all approvals and decisions under NEPA assignment. Quarterly reports, all five submitted by point of audit, contained substantial errors and had to be revised and resubmitted by Caltrans staff. FHWA noted the approaches that communication is not always timely between generalists and project staff responsible for tracking and reporting. Districts were also unable to readily produce of all projects that fall under District and Agency authority.</p> <p><b>5) Performance Measure "Monitor Relationships with Federal and State Resource Agencies (MOU 10.2.1C):</b> This performance measure had not been implemented. Caltrans has hired a consultant to undertake a survey of Federal and State resource Agencies to assess their relationship with Caltrans.</p> <p><b>6) Delegation of Signature Authority (MOU 1.1.1):</b> Incorrect clarification on signature authority. Caltrans mistook signature authority for EIS and 4(F) evaluations. Trouble with Resource documents and EA/EIS signature authority. FHWA noted that Caltrans issued two memos inconsistent with FHWA clarification letter on signature authorities and protocols.</p> |

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| <p><b><u>7) Training on Air Quality Conformity (MOU 12.1.1):</u></b> Environmental planners noted that more training (ongoing training to meet changing standards) is needed in the area of air quality conformity. More information and guidance is required to note conformity requirements for:</p> <p>7a) Statewide Transportation Improvement Program</p> <p>7b) Transportation Improvement Plan</p> <p>7c) Emission Budgets and Regional Transportation Plans</p> <p>FHWA noted that primers or training guides in this arena are necessary to improve planners and Districts' output.</p>                                                                                                        | <p><b><u>7) Assignment of 6002 Responsibility Under Assignment (MOU 3.2.2):</u></b> Caltrans is responsible for complying with 23 USC 139, which states that a federal lead agency for a highway project conducting a NEPA process "shall identify, as early as practicable in the environmental review process for a project, any other federal and non-federal agencies that may have an interest in the project, and shall invite such agencies to become participating agencies in review process for the project (23 USC 139: 6002)."</p> <p>FHWA found in 3 EIS' that there were invitation letter sent, despite all projects having a niche or interest with a federal resource agency.</p> |
| <p><b><u>8) Procedural and Substantive Requirements (MOU 5.1.1):</u></b> Caltrans responsibilities as FHWA signatory in carrying out roles for implementing correct requirements. In particular, FHWA noted:</p> <p>8a) USACE and USFWS staff noted in one instance an assessment of project threatened endangered species. However, no formal consultation was conducted.</p> <p>8b) USACE reported several 404 documents contained insufficient information to support decision-making and chosen alternatives. This stalled USACE in getting the permit over as required. FHWA notes training (MOU 10.2.1) for performance would help the Agency to monitor relationship with resource agencies.</p> | <p><b><u>8) Corrective Action for Audit Deficiency:</u></b> FHWA found that several projects with concurrence, the class of action determination documentation was issued a day before the audit began. This corrective action was required in previous audits for resubmitting and re-evaluations of projects.</p>                                                                                                                                                                                                                                                                                                                                                                                |
| <p><b><u>9) Assignments under Pilot Program (MOU 3.2.2):</u></b> FHWA found staff lacked understanding of environmental review process definition and roles of participating/cooperating agencies.</p> <p>9a) invitation letters lacked indication to cooperation in subject line.</p> <p>9b) several projects listed w/FHWA involvement despite delegation</p> <p>9c) letter does not clarify different roles and responsibilities; not following laws</p>                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |

| NOTED PRACTICES                                                                                                                                                                                                                                                                                                                                          | GENERAL COMMENTS                                                                                                                                                                                                                                                                                    |
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| <p><b>1) Environmental Document Template:</b> Improved template for use by districts, which establishes format and provide technical cues where specific data should be entered by specific authors. Helps ensure compliance with commitments and laws.</p>                                                                                              | <p><b>FHWA OPINION:</b> General audit opinion noticed significant differences across Districts in terms of: 1) availability of resources and allocation, 2) details of implementation, 3) district processes, and 4) overall district-wide improvement and progress towards Agency commitments.</p> |
| <p><b>2) Preliminary Environmental Studies for Large Projects:</b> <i>Preliminary Environmental Studies (PES) form</i> has been developed and completed for Agency staff, practitioners, and local agencies to conduct joint reviews. PES offers the opportunity to discuss NEPA process requirements and technical studies required for completion.</p> | <p><b>FHWA OBSERVATION:</b> Highly decentralized nature of Caltrans operations is major factor to deviations observed. Decentralized nature of Agency "necessitates clear, consistent, and ongoing oversight by HQ over state operations [(specifically, among districts)]."</p>                    |
| <p><b>3) Individual Development Programs (IDPs):</b> training programs crucial to the certification of Caltrans staff; meets the critical elements for both SHS and local projects. IDPS used by senior environmental staff to guide and track staff training.</p>                                                                                       | <p><b>FHWA RECOMMENDATION:</b> FHWA recommended Caltrans refine approaches to "resource commitments given the likelihood of increasing resource demands associated with exclusively managing more complex and controversial projects under the [pilot] program (2009: pg. 2377-78)"</p>             |
| <p><b>4) Local Assistance Work Plan:</b> District 10 (southern ca) utilizes a work plan and tracking sheet as a work flow chart for local projects in district. This particular tool helps practitioners and decision-makers with requirements, sequencing, and timing of environmental compliance activities.</p>                                       | <p><b>IMPROVEMENT W/ PERFORMANCE MEASURE:</b> Caltrans developed a method to evaluate relationships with general public by assigning a survey rating measuring the quality of public meeting materials. A total of 27 surveys for 27 projects conducted.</p>                                        |
| <p><b>5) Variations of Staff Competency for New CE definitions:</b><br/>By the third audit, FHWA did not note any critical misunderstandings of new CE designations - a marked improvement from previous audits. SER has been updated and guidance provided via training and tools.</p>                                                                  | <p><b>DOCUMENT/RECORD CONCERNS:</b> ongoing concern for FHWA, as complexity of projects increases with maturation of program - the variability in reporting and tracking resource expenditures (time, money) may affect the timely delivery of documents.</p>                                       |



FHWA AUDIT #4 FINDINGS: CALIFORNIA PILOT PROGRAM, NEPA ASSIGNMENT (23 USC 327)

| COMPLIANT (C)                                                                                                                                                                                                    | NEEDS IMPROVEMENT (N)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | DEFICIENT FINDINGS (D)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
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| <p><b>Legal Sufficiency Timeline-</b> attorney reviews of NEPA and Section 4(f) documents per 23 CFR 771.125(b) and 774.7(d) were conducted within the allotted times by Caltrans internal performance Goals</p> | <p><b>1) Inadequate Guidance in the SER (Section 8.2.5 of MOU)- QA/QC processes on SER were unclear, misleading, or incomplete.</b> Documents were incomplete or not signed off by the correct authority, or not at all.</p> <p>1a) Environmental Document Review Checklists were found that were not signed by the Senior Environmental Planner or not signed at all</p> <p>1b) Missing Boilerplate Text: citation required for Section 4(f) evaluations is for Section 6005 CEs "pursuant to 23 USC 327" was also being quoted for Section 6004 CEs, where it should refer to "pursuant to 23 USC 326".</p> <p>1c) NEPA re-evaluations Guidance and the Revalidation Form (23 CFR 771.129) was not updated since the Assignment, where it said it "would" be updated. So there was not direction on how to complete the task with the new assigned responsibilities.</p> <p>1d) Environmental Justice procedures in SER did not reflect the same definitions as FHWA's actions, nor did the flowchart on SER clearly state the need to identify such EJ populations. FHWA COMMENT: Specific guidance needs to be given to NEPA practitioners how to integrate a project level review into a NEPA process, to document proposed steps to guards against adverse effects, or to document meaningful public involvement opportunities and consider the results.</p> <p><b>2) Procedural and Substantive Requirements (MOU 5.1.1)-</b> working with appropriate Federal agencies need improvement. More specifically:</p> <p><b>2a) Confusion over the implementation of the ESA Section 7</b> and how it related to the USACE permitting process. Local project sponsors lacked clarity on Section 7 compliance and sometimes acted as lead agency for ESA Section 7 and CWA Section 404 (which are not assigned responsibilities under the MOU)</p> <p><b>2b) Required Language Omissions:</b> Documents being transmitted to federal resource agencies lacked the required language in consultation documents, "Caltrans is transmitting ___ as the NEPA lead agency....."</p> <p><b>3) Section 4(f) Documentation (5.1.1)-</b> inconsistencies were identified with the documentations required in carrying out the Section 4(f) provisions, including:</p> <p><b>3a) No documentation</b> was provided in an EA to support "temporary uses to not normally constitute use under 4(f) policy"; where 23 CFR 774.13(d) requires there must be a documented agreement with the official jurisdiction over the 4(f) resource that the requisite conditions have been met.</p> <p><b>3b) Resources claimed</b> were not Section 4(f) resources but documentation did not support the statements. Implied <i>de minimis</i> effect but no documentation was provided. No evidence of public involvement or coordination with the officials with jurisdiction over the 4(f) resource.</p> <p><b>3c) References</b> were made to outdated 4(f) regulation (23 CFR 771.135) rather than to the updated regulation at 23 CFR 774</p> <p><b>4) Circulation of Draft Section 4(f) Evaluation-</b> there is confusion as to the requirements of circulation to the Dept. of Interior for review. One time it was sent to FHWA to be forwarded to the DOI.</p> | <p><b>1) QA/QC Review (MOU 3.2.5):</b> NEPA documentation should reflect that FHWA has no role in the review and decision making process, and there were 3 instances where a doc referenced to FHWA rather than Caltrans</p> <p><b>2) QA QC Certification Process: (MOU 8.2.5)</b> QA/QC Certification Process- Incomplete and incorrectly completed QC certification forms continue to be identified. Including the following:</p> <p><b>2a)</b> Signatures by appropriate authority were not obtained in proper sequence</p> <p><b>2b)</b> Some QA/QC forms were incomplete or missing</p> <p><b>3) Quarterly Reporting (MOU 8.2.7):</b> Caltrans must submit a report each quarter for the first 2 years listing all approvals and decisions of assumed responsibilities, which continues to be deficient as accuracy varies over the districts. Errors include incorrectly characterizing projects</p> |

**5) Section 4(f) Implementation (MOU 5.1.1)-** inconsistencies were identified with the implementation and general understanding required in carrying out the Section 4(f) provisions, including:

**5a) FHWA's Nationwide Programmatic 4(f) - EA Omission,** said section 4(f) "policy" instead of "regulation"; should have cited 23 CFR Part 774.

**5b) Section 106 (SHPO) - FONSI** - lacked the correct applicability of FHWA's Nationwide Programmatic Section 4(f) evaluation for the rehab or replacement of historic bridges. 5 criteria must be met and must be included in the document and project file. The EA also reached Section 4(f) conclusions prior to executing the Section 106 MOU with the State Historic Preservation Office.

**6) Legal Division Staff (MOU 4.2.2)** - legal experience in federal environmental law varies between district offices in some of the busiest districts. Caltrans must be staffed adequately. Legal sufficiency reviews will be inconsistent across the state.

**7) Training inconsistencies for Caltrans staff capacity (MOU 4.2.2)**

**7a) Toolkits:** The tools Caltrans uses to track individual staff training are used in varying ways across districts, and the audit team was unsure how they're used to identify training gaps, so there is no way leadership can ensure assigned responsibilities.

**7b) Lack of knowledge** in the following areas: Section 4(f), Section 7 of the ESA, and the reevaluation process.

**7c) Tracking Online Training Courses:** there is no way Caltrans can track completed online training

**FHWA TRAINING SUGGESTION:** Caltrans should be tracking the employees completion of online training and should determine which online training courses should be prerequisites for performing certain NEPA assumption activities.

**8) Administrative Inconsistencies (MOU 8.2.4):** There were inconsistencies in the maintenance of project and general administrative files, including:

**8a) Missing Project Documentation:** ED was missing from several project files. Examples included: a Biological Opinion; ESA Section 7 concurrence documentation; internal and external communications related to the project; letters from the District Local Agency Engineer to the local agency transmitting the Preliminary Environmental Study form with the list of the required technical studies for the project; and noise abatement decision report.

**8b) Required** documentation were not in the project file but were elsewhere in the District office

**8c)** Required documentation regarding public hearings could not be found

**8d)** Project files were missing required UFS tabs (though they contained pertinent documentation) and some sections contained no information or explanation as to why the tabs were missing or tab sections were empty

NOTED PRACTICES

**FHWA SUGGESTION:** Highly decentralized nature of Caltrans’ operations is a major contributing factor to the variation observed. FHWA noted to continue oversight over District offices and provide programs that encourage the exchange of information and sharing of best practices and resources between districts.



FHWA AUDIT #5 FINDINGS: CALIFORNIA PILOT PROGRAM, NEPA ASSIGNMENT (23 USC 327)

| COMPLIANT (C)                                                                                                                                                                                                           | NEEDS IMPROVEMENT (N)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | DEFICIENT FINDINGS (D)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
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| <p><b>1) Quarterly Reports (MOU 8.2):</b> Caltrans continues to submit required reports to FHWA</p>                                                                                                                     | <p><b>1) Administrative Record (MOU 8.2.4):</b> There were inconsistencies in the maintenance of project and general administrative files:<br/><b>1a)</b> Required documentation were not in the project file but were elsewhere in the District office<br/><b>1b)</b> Missing, out of order, or incomplete UFS tabs</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | <p><b>1) Quarterly Reports (MOU 8.2.7):</b> inaccurate project reporting is ongoing issue including 1)omissions of two Ease, 2)omission of one FONSI, 3)omission of a BO, 4) incorrect date for CE determination, etc.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <p>2) Even with the loss of staff, furloughs, and budget constraints, Caltrans continues to be compliant in their commitment of resources needed to carry out the responsibilities assumed under the Pilot Program.</p> | <p><b>2) Performance Measure "Monitor Relationships with Agencies and the General Public (MOU Section 10.2.1):</b> Annual resource agency surveys indicate rankings of communication with resource agencies, but not separately, which would produce a more accurate assessment of individual relationships.<br/><b>FHWA RECOMMENDATION:</b> the specific agencies' rating info be shared with FHWA so that relationship issues can be addressed.</p> <p><b>3) Coordination with Resource Agencies (MOU 7.1.1):</b> Through interviews with resource agency staff, the audit team learned the following:<br/><b>3a) Preapplication with USACE (MOU 7.1.1):</b> Caltrans is not conducting preapplication coordination with the USACE district office nor engaging in appropriate coordination on NEPA reviews which is limiting the agencies’ flexibility to develop project alternatives and mitigation options.<br/><b>3b) Conflict Resolution (MOU 7.1.2):</b> Conflicts are not being addressed and “good faith” efforts to resolve conflicts between these Federal agencies , such as disagreement on timeframes, insufficient information provided.</p> <p><b>4) Procedural and Substantive Requirements (MOU 5.1.4):</b> working with appropriate Federal agencies needs improvement based upon the following findings:<br/><b>4a) MOU Section 5.1.4:</b> Section 7 consultation was incomplete and section 7 finding was not in FOSNI<br/><b>4b) EO 11988 Floodplain Management (23 CFR 650):</b> An EA did not identify that the project was in a 100-year flood zoning, "practicality finding" should have been found in FONSI</p> | <p><b>2) Inconsistencies with Section 4(f) Requirements (5.1.1):</b><br/><b>2a)</b> A bridge replacement project in a national forest, no doc was in the EA regarding the 4(f) status of the facilities in the project vicinity or any impact to those resources.<br/><b>2b) 23 CFR 774.4(b):</b> A letter from the jurisdiction over a 4(f) resource stated the impact would be <i>de minimis</i> , but the EA document nor project file contained the supporting doc for that determination<br/><b>2c)</b> One EA document discussed four different types of Section 4(f) approvals but did not finish the process (Programmatic, individual evaluation, constructive use, and <i>de minimis</i> )</p> <p><b>3) QA/QC Certification Process (8.2.5):</b> Incomplete and incorrectly completed QC certification forms continue to be identified.<br/><b>3a)</b> An EA and Section 4(f) Evaluation was approved contingent on changes that still needed to be made to the document<br/><b>3b)</b> One QC certification form was approved by the Quality Control Reviewer, Preparer, and Branch Chief without the technical reviewer’s signature (done first) due to pending comments<br/><b>3c)</b> Undated signatures were found or signatures were obtained in the wrong order<br/><b>3d)</b> Missing signatures from required reviewers<br/><b>3e)</b> External signatures were obtained after the internal signatures, where as external should be completed before internal review can start</p> |
|                                                                                                                                                                                                                         | <p><b>5) Compliance with Procedural and Substantive Requirements (MOU 5.1):</b> Includes compliance with federal laws, regulations, executive orders, etc. Error in documentation found:<br/><b>5a)</b> A FOSNI did not include a response to comments received on the EA<br/><b>5b)</b> A FOSNI did not include a statement that the Section 7 consultation had been completed with ESA<br/><b>5c)</b> CE determinations did not reference the most current noise studies performed</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | <p><b>4) Administrative Record:</b> There were inconsistencies in the maintenance of project and general administrative files, including:<br/><b>4a)</b> Missing from the project file: Signed final ED, certification form, etc.<br/><b>4b)</b> Missing files all together, either had been disposed of or misplaced.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|                                                                                                                                                                                                                         | <p><b>5d)</b> CE determinations did not reference the most current traffic analysis performed<br/><b>5e)</b> A project file contained a fact sheet that contained incorrect information on the level of the ED. Since it was apart of the project file, but was not released to the public, it still is on the administrative record</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |

**6) Re-evaluation Process Inconsistencies (MOU 5.1; 23 CFR 771.129):**

- 6a)** A re-evaluation was used to combine portions of two EISs. The FHWA reevaluation process does not accommodate such an approach, including one conformity determination.
- 6b)** No evidence was found that a Section 106 Area of Potential Effect was revised after the footprint expanded, AFTER the final ED. Then the ED was not reexamined.
- 6c)** A re-evaluation of an original CE contained an addition of another project CE determination. A new CE was issued for the combined project without including a new project description.

**6d)** A re-evaluation did not include documentation of an affirmative determination that the NEPA document was still valid

**6e)** Re-evaluations were approved without the original project file. Reviewing the project file or final ED document is required.

**FHWA RECOMMENDATION:** additional clarification and guidance needs to be provided by Caltrans to the environmental staff as to the purpose and use of the reevaluation process. A re-evaluation is done to determine if the approved environmental document or the CE designation remains valid. In the re-evaluation process, the original decision and analysis needs to be reviewed for its validity.

**7) Section 4(f) and Locally Significant Historic Resources (MOU 12.1.1, 4.2.2):** SER sets forth food procedures for documenting impacts to 4(f), and outlines for each document. But SER does not address how Caltrans should determine whether a historic resource which is significant at the local level should be considered eligible for protection under Section 4(f).

**FHWA RECOMMENDATION:** SER should include a process to ensure consistency in the determination of local resources. ( internal/external consultation that is required)

**8) Staff and Program Training (MOU 3.1, 4.2.2):** Training plan for generalists are not uniform or monitored by the senior environmental planner nor district director.

**9) Staff Training and Understanding of Processes (MOU 3.1.1/.2):**

- 9a)** Lack of understanding of Section 4(f) process and options for implementation and the documents required. Including de Minimis impacts finding determination, use of 4(f) programmatic agreements, and the explanation to be included on the ED
- 9b)** Lack of awareness of any policy of guidance for the use of the statue of limitations notice
- 9c)** Lack of awareness and knowledge of the "Blanket" CE for approval of design exceptions

FHWA AUDIT #6 FINDINGS: CALIFORNIA PILOT PROGRAM, NEPA ASSIGNMENT (23 USC 327)

| COMPLIANT (C)                                                                                                                                                                                                                          | NEEDS IMPROVEMENT (N)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | DEFICIENT FINDINGS (D)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
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| Caltrans was found to be compliant in meeting the requirements of the MOU for the key Pilot Program areas within the scope and the limitations of the audit, with the exceptions noted in the Deficient and Needs Improvement findings | <b>1) Program Training: Inconsistent Level of Training for Staff (MOU 12.1.1/4.2.2):</b><br><b>1a) Section 4(f)</b> District Points of contact have little, if any training with writing/reading 4(f) docs and had little training in 4(f), there was also no plan to improve this<br><b>1b) Online Training:</b> Although the number of online trainings have increased, there still is no way to track those taking the trainings.<br><b>1c)</b> Staff have had to cancel their attendance to trainings due to various reasons<br><b>1d) Large staff turnover</b> needs to be replaced with trainings for the new staff, but rarely was the case due to resource limitations | <b>1) Quarterly Reports (MOU 8.2.5):</b> Quarterly Reports; inaccurate project reporting is ongoing issue including 1)omissions of one ROD 2)omission of one FONSI<br><b>FHWA RECOMMENDATION:</b> Since Caltrans had found these quarterly reports to be Deficient in every audit to date, they created a statewide implementation of the File Maker Pro environmental database, called STEVE. It is anticipated that the implementation of this database system will improve the accuracy of information provided in the quarterly reports to FHWA                                                                                                                                                           |
|                                                                                                                                                                                                                                        | <b>2) Program Training: Inconsistent Understanding of Required Processes (MOU 4.2.2/3.1.1)</b><br><b>2a)</b> Lack of understanding of the FHWA fiscal constraint requirements and its relationship with NEPA docs<br><b>2b)</b> Lack of understanding of the following Section 4(f) terms: use, temporary occupancy, avoidance alternatives, least overall harm analysis, constructive use<br><b>2c)</b> Determining the de minimis impact on 4(f) resources<br><br><b>2d)</b> Lack of knowledge to identify the officials with jurisdiction over Section 4(f) resources<br><b>2e)</b> Lack of understanding that one District requires all EAs to hold public hearings        | <b>2) QA/QC Certification Documentation(MOU 8.2.5):</b> Incomplete and incorrectly completed QC certification forms continue to be identified.<br><b>2a)</b> QC reviews were completed and signed by reviewers after the approve date of the document<br><b>2b)</b> One class of action determination form was signed on the same date that the document was approved<br><b>2c)</b> QC Certification forms contained undated signatures or not in the right sequence. QC certification forms contained signatures that were obtained after the internal QC certification form<br><b>2d)</b> QC Certification forms were missing signatures of required reviewers                                              |
|                                                                                                                                                                                                                                        | <b>3) Air Quality Conformity Determinations (MOU 8.5.1, 23 USC 327(a)(2)(b)(ii)(I)):</b><br>Required to submit a request to FHWA for a formal conformity determination after the preferred alternative is identified, and before the final NEPA action is completed. One EA was approved without FHWA approval.                                                                                                                                                                                                                                                                                                                                                                | <b>3) QA/QC Certification Process (MOU 8.2.5):</b> A NEPA QC reviewer claims he was directed by the Office Chief of Environmental Affairs and the District Director to sign the internal certification form without having reviewed the final version of the environmental document in order to meet the project schedule; after investigation, this was not deemed true.                                                                                                                                                                                                                                                                                                                                     |
|                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | <b>4) Re-Evaluation Process (MOU 5.1 and 23 CFR 771.129):</b> identified varying degrees of understanding of, and compliance with, these procedures and the improper use of reevaluation documentation to serve another project development purpose<br><b>4a)</b> A re-evaluation was used to increase the scope of the original EA/FONSI; the FHWA re-evaluation process does not accommodate such an approach.<br><b>4b)</b> A re-evaluation document was made for an intersection improvement that was to be added to a larger project, already under construction.<br><b>FHWA RECOMMENDATION:</b> Under NEPA, the project should have been a stand-alone CE, as it was not apart of the original project. |
|                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | <b>5) Section 4(f) Documentation (MOU 5.1.1):</b> project file reviews and interviews with staff conducted during this audit identified inconsistencies with the implementation and documentation requirements for carrying out the Section 4(f) provisions.<br>5a) some evaluations did not contain a required Section 4(f) avoidance alternative analysis.<br>5b) Some did not provide a least overall harm analysis                                                                                                                                                                                                                                                                                        |

**6) Statement of Assumption (Boilerplate) (MOU 3.2.5)**: required on the cover page of each ED, "Pursuant to 23 USC 326/327..", findings include:

- 6a)** Was not on one EA document
- 6b)** One Final EIS language had been modified
- 6c)** 3 state-level CEQA-specific docs had FHWA language pertaining to NEPA

NOTES / GENERAL COMMENTS

## **Appendix C. NEPA Training Modules**

**(Also published separately as 0-6866-P1)**



**THE UNIVERSITY OF TEXAS AT AUSTIN  
CENTER FOR TRANSPORTATION RESEARCH**

**0-6866-P1**

## **NEPA Assignment Training PowerPoint and Quizzes**

**Research Supervisor:**  
Lisa Loftus-Otway

*TxDOT Project 0-6866: NEPA Reporting Synthesis of State Practices*

**NOVEMBER 2015; PUBLISHED OCTOBER 2016**

|                                                                                                                                                                  |                                                                                                                                                                     |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Performing Organization:</b><br>Center for Transportation Research<br>The University of Texas at Austin<br>1616 Guadalupe, Suite 4.202<br>Austin, Texas 78701 | <b>Sponsoring Organization:</b><br>Texas Department of Transportation<br>Research and Technology Implementation Office<br>P.O. Box 5080<br>Austin, Texas 78763-5080 |
| Performed in cooperation with the Texas Department of Transportation and the Federal Highway Administration.                                                     |                                                                                                                                                                     |

## **Introduction to the Training Materials**

The objective of these training materials is to provide National Environmental Policy Act (NEPA) Assignment information to all professionals involved in the NEPA process. This training is not intended to be a replication of existing NEPA training that TxDOT conducts, nor is it a training on performing NEPA documentation. Rather, the information is intended to provide an overview of the responsibilities and duties under NEPA assignment, followed by a quiz.

TxDOT staff helped identify six groups to receive the training:

1. Consultants
2. Elected Officials
3. Engineers
4. Environmental Specialists
5. Local Government Staff
6. Management

Six PowerPoint presentations were developed specifically for these groups. The PowerPoint presentations contain sections that outline an introductory review of NEPA and an explanation of how NEPA Assignment has changed the general responsibilities held by these six groups. An overview of what to expect and develop for different project classifications lays the foundation for project delivery of Categorical Exclusions (CEs), Environmental Assessments (EAs), and Environmental Impact Statement (EISs). Major aspects of implementing the NEPA process across all project classifications are outlined, such as project initiation and quality assurance and control. Finally, real-world examples are used to illustrate how important each person's role is to the larger NEPA process under assignment, and to provide examples of where and how mistakes can take place.

Also provided here are five quizzes (for all but the elected official group), which similarly use examples from practice to assess the user's understanding of the material.

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# NEPA Assignment

Consultants

# Purpose of this Training Module

**Purpose:** The purpose of this training is to provide an overview of recent changes to TxDOT's responsibilities under the National Environmental Policy Act of 1969 (NEPA). This training module has been tailored to emphasize how these changes impact the role of consultants and their daily responsibilities on the job.

**Outline:**

1. Understanding NEPA
2. NEPA Assignment
3. Project Class of Action
4. Implementing the NEPA Process

# 1. Understanding NEPA

NEPA is the National Environmental Policy Act of 1969.

“In enacting NEPA, Congress recognized that nearly all Federal activities affect the environment in some way and mandated that before Federal agencies make decisions, they must consider the effects of their actions on the quality of the human environment. Under NEPA, CEQ works to balance environmental, economic, and social objectives in pursuit of NEPA’s goal of ‘productive harmony’ between humans and the human environment.”

*U.S. Council on Environmental Quality*

NEPA is a U.S. environmental law that requires practitioners to consider the effects of their actions on the quality of the human and natural environment.

# 1. Understanding NEPA

## **When is NEPA compliance required?**

- NEPA compliance is required when an action uses **any amount** of federal funding.
- State-funded projects or those in the state's right-of-way follow a similar State of Texas environmental process. Be aware that the environmental process is a critical path for any transportation project, regardless of whether federal funding is being used.
- A project cannot proceed to letting or right-of-way acquisition prior to NEPA clearance.

## **What are the requirements of NEPA?**

- NEPA is a procedural law that regulates how and whether impacts on the human and natural environment are assessed.
- Challenges to NEPA decisions are brought under the Administrative Procedures Act.
- Assuming the project meets a legitimate public purpose, NEPA does not require that the final action preserve the natural environment at all costs; depending on the resource, mitigation of impacts may be permissible.
- Permitting or mitigation measures required by other regulations are also part of the NEPA process.

# 1. Understanding NEPA

## **What are the products of the NEPA process?**

Due diligence under NEPA requires that you document the **impacts of the project** and **maintain an administrative record**.

- 1. Document** - Depending on the *project class of action*, this decisional document can vary in size and analytical depth, identifying all potential environmental impacts of the project. The three *classes of action* will be discussed shortly. It is your responsibility to know which type of study is appropriate for any given project.
- 2. Administrative Record** - an electronic filing system that holds formal and informal documents showing that the correct process was followed in support of an environmental decision. The administrative record is reviewed for annual audits and is relied upon in the event of litigation (Note: historically, the AR was literally a physical project file).

# 1. Understanding NEPA

Other regulations and executive orders can be a part of the NEPA process if a resource covered by another regulation is affected.

| Regulation                                                 | Resource                                                              |
|------------------------------------------------------------|-----------------------------------------------------------------------|
| Section 4(f) of the Department of Transportation Act       | Publicly owned Parks and Recreation Facilities;<br>Historic Resources |
| Section 106 of the National Historic Preservation Act      | Historic and Archeological Resources                                  |
| Section 7 of the Endangered Species Act                    | Threatened and Endangered Species                                     |
| Section 404 of the Clean Water Act                         | Waters and Wetlands                                                   |
| Executive Order 12898; E.O. 13166                          | Environmental Justice; Limited English Proficiency                    |
| Several Other Regulations affecting a variety of resources | See TxDOT Environmental Specialist Toolkit for complete list          |

- Some parallel regulations exist at the state level for most of these resources and they would apply for state-funded projects.
- You should be familiar with these regulations and be prepared to work with TxDOT and the respective authorities to meet their environmental procedures.
- To learn more about these regulations, see TxDOT's **Environmental Compliance Toolkits**.

# 1. Understanding NEPA

## **Key responsibilities of consultants**

Consultants play a key role in the NEPA process by providing subject area expertise and ground-level analysis of existing conditions and environments, and relaying information to TxDOT employees in an effort to help them make the best decisions.

- Creating clear documentation from data collection to environmental document approval will help the project remain legally defensible.
- As a consultant, you are responsible for always pulling the most recent version of toolkits and handbooks from the TxDOT ENV website. Using outdated forms and procedures may lead to redoing work within your existing budget constraints and could introduce delays into the schedule.
- Maintain communication with the environmental specialist and anyone else who has been designated as your liaison. Project changes left uncommunicated can have substantial consequences to the project.
- Coordinate timelines with the team; be sure to include subcontractors in the discussion.

## 2. NEPA Assignment

**Moving Ahead for Progress in the 21<sup>st</sup> Century (MAP-21)** is a federal transportation law (2012) that allows the FHWA to “assign” or delegate the review and approval NEPA documents to state Departments of Transportation (DOTs). Under NEPA assignment, DOTs assume the FHWA’s authority for making environmental decisions.

Texas was the second state to assume this responsibility when FHWA authorized NEPA assignment in December 2014. TxDOT sought NEPA assignment because it is hoped that it will shorten project review periods, allow TxDOT to develop a more robust review process, and cut project costs where possible.

Another important note about the NEPA assignment is that **Texas has waived sovereign immunity**, meaning TxDOT can be sued over an environmental decision. Unlike the past, the State of Texas must provide its own legal defense in federal court including the costs of any judgments against it. **NEPA assignment means that any decisions made can be examined in court and TxDOT (not the FHWA) will be responsible for defending it.**

# 3. Project Class of Action

## What is meant by a “NEPA project Class of Action”?

Depending upon the project’s scope, location, federal funding, and impacts harming the natural and human environment, a project can be classified as either a Categorical Exclusion (CE), an Environmental Assessment (EA), or an Environment Impact Statement (EIS) for environmental review.

Within the last two classifications (EA & EIS), additional environmental issues can arise, depending upon the project’s complexity.

Most TxDOT projects are classified as CEs. However, undertaking an EA or an EIS will increase the commitment of time and energy expended.

TxDOT must be prepared for all types of environmental regulatory compliance. Under NEPA assignment, TxDOT has the authority to approve all decisions that fall under the NEPA umbrella except for Tribal coordination, air conformity determination, and FHWA approval of Section 4 (f).

Because a design change or other changes to the project can impact the timeline of the environmental process or even the type of documentation is required, it is essential that TxDOT staff, resource agency staff, consultants, and local government staff and elected officials **communicate regularly and effectively**.

# 3. Project Class of Action

## What is a Categorical Exclusion?

Categorical Exclusions (CEs) apply to non-controversial actions that are known to have negligible impacts. Actions that can be categorically excluded are listed in code of federal regulations (23 CFR 771.117).

There are two categories:

- **c-list:** The c-list CEs fall into explicitly defined categories. With proper technical documentation, a c-list CE project can be cleared by the Department Delegate at the District level.
- **d-list:** These projects may be designated as CEs after technical documentation establishes that the project does not create the environmental impacts that would elevate it to an EA level (requires peer review at the district level).

Technical Memoranda are prepared for a CE.

# 3. Project Class of Action

## **Classification as a CE**

CEs must not have unusual circumstances leading to:

- Significant environmental impacts
- Substantial controversy on environmental grounds
- Significant impact on properties protected under Section 4(f) or under Section 106 of the National Historic Preservation Act
- Inconsistencies with any federal, state, or local law, requirement, or administrative determination relating to the environmental aspects of the action

The project file must demonstrate the following:

- The project fits within the selected CE category
- The project does not have unusual circumstances
- The project has independent utility
- The project has logical termini (for linear facilities)
- The determination does not restrict consideration of alternatives for other reasonably foreseeable projects

# 3. Project Class of Action

## **Determining the correct type of Categorical Exclusion**

There are 30 “c-list” CE types, plus the “open-ended d-list CE”. The d-list CEs do not have sufficient impacts to elevate the project to an EA. A d-list CE requires a District-Engineer-level review.

It is critical for a project to be properly classified, if a CE is being used for environmental compliance. Refer to TxDOT’s manual entitled *Guidance: Choosing a Categorical Exclusion* to help you better understand where your project falls.

TxDOT’s *CE Determination Form* will also need to be completed. The TxDOT website has documentation that will help staff identify the best fit for a CE.

# 3. Project Class of Action

## What are the main components of a Categorical Exclusion?

CEs require the least complex documentation process. Milestones for preparing a CE include:

- Project scoping
- Complete studies, reports, documentation
- Project sponsor submittal of CE documentation
- The Department Delegate or District Engineer will make the environmental decision and will sign determination form.

## Who is the Department Delegate?

- c-list CE: anyone with signing authority, including **Environmental Specialists**
- d-list CE: District Engineer or District Administrator

# 3. Project Class of Action

## **What is an Environmental Assessment?**

An **Environmental Assessment (EA)** is prepared when an action may or may not have a significant impact on resources. An EA is used when an EIS is not required, but the action is not eligible to be processed as a CE.

EAs can have two outcomes. If a project's impacts on resources are limited, TxDOT will issue a "Finding of No Significant Impact" or a FONSI. The project may then proceed to letting. However, if a significant impact is found that cannot be resolved, an EIS must be prepared for the project.

The Technical Memoranda documenting studies on resource impacts will be similar for CEs and EAs.

# 3. Project Class of Action

## **What are the main components of an Environmental Assessment?**

The Technical Reports that document the studies on resource impacts are similar for both CEs and EAs. However, due to their increased complexity, EAs have more project milestones:

- Complete scope development
- Hold kickoff meeting
- Research, prepare, and submit draft technical reports
- Undertake agency coordination, resolve issues
- Review and publish draft EA
- Offer opportunity for public involvement
- Prepare final EA and FONSI
- Approve FONSI or proceed as an EIS

# 3. Project Class of Action

## **What is an Environmental Impact Statement?**

An **Environmental Impact Statement (EIS)** is prepared for major actions that would have a significant impact on the human or natural environment. These may be large projects, highly controversial, largely on new location, or located in a sensitive resource area (such as an endangered species habitat).

## **Main components of an EIS**

EISs require the most extensive documentation and public input. Milestones of the EIS process are:

- Letter of initiation
- Publish Notice of Intent (NOI)
- Invitation of other agencies, scoping, and kickoff meeting
- Two public meetings (typically)
- DEIS preparation assessing multiple alternatives, review, and publication, advertise and address comments
- Public hearing process
- Final EIS preparation (including preferred alternative and No Build)
- Publish Notice of Availability (NOA) and Record of Decision (ROD)

# 4. Implementing the NEPA Process

## Meetings and Communication

NEPA assignment is a team effort, so clear and frequent communication is essential. Those involved will vary according to project classification.

- Start each project off with 1) a site visit to gain a basic understanding of existing environmental conditions and the study area; 2) hold a kickoff meeting with the project team, especially for EAs and EISs. Here you and your team can set expectations for future communications and milestones. As a consultant, it's important to voice any environmental concerns now.
- If anything is decided after this point without your knowledge, it could greatly effect your assessment. Stay in the know.

Any **communication and decision made** will need to be recorded in the administrative record, including decisions made over email.

# 4. Implementing the NEPA Process

## Tools and Toolkits

Due to the changes that have come with NEPA assignment, more documentation is now expected in some steps of the NEPA process, and have decreased in other steps. To assist you, TxDOT has developed new tools and guidance for your use in preparing and reviewing environmental documents.

**\*\*You must always go to the TxDOT ENV website and download the most recent version of the following:**

### TOOLKITS

- ✓ Archeological Resources
- ✓ Historic Resources
- ✓ Ecological Resources
- ✓ Coastal Barrier Resources
- ✓ Farmland Protection
- ✓ Endangered Species Act
- ✓ TPWD Chapter 26
- ✓ LWCF Section 6(f)
- ✓ USDOT Section 4(f)
- ✓ Water Resources
- ✓ Community Impacts, EJ, and Title VI

### HANDBOOKS

- ✓ Environmental Project Development Overview
- ✓ CE
- ✓ EA
- ✓ EIS
- ✓ Public Involvement
- ✓ Indirect & Cumulative Impacts
- ✓ Bicycle and Pedestrian Considerations
- ✓ Air Quality
- ✓ Traffic Noise
- ✓ Hazardous Materials

# 4. Implementing the NEPA Process

## QA/QC Process

As a consultant, your work (specifically the Technical Memoranda) will be reviewed and approved through TxDOT's QA/QC process. It's important to know what this process is, and where your role will be influenced by the process.

TxDOT integrates quality assurance (QA) and quality control (QC) considerations into its environmental decisions to achieve compliance with applicable laws, regulations, and standards. **QA is devoted to preventing problems, and QC is devoted to identifying and correcting problems.**

The QA/QC processes are in place to prevent possible errors or omissions that could be presented in court.

# 4. Implementing the NEPA Process

## **QA/QC Process**

Each QA/QC measure will evaluate the project-level documentation to date, looking for thoroughness, accuracy, errors, and omissions. Project-level documentation can be evidence of communications and meetings, TxDOT checklists, and more. After each document is reviewed, it officially becomes a part of the project file and administrative record.

**The Technical Memoranda will be reviewed by TxDOT before the team can start preparing the draft environmental document. The consultant's contribution throughout the NEPA process, including emails, meetings, and reports, will also be analyzed.**

# Wrap Up

- The NEPA process looks at how infrastructure development can occur while minimizing adverse impacts on the natural, cultural, and human environment.
- NEPA is required when any federal money is spent on a project, and state-funded projects have a similar process.
- Assignment of responsibility for environmental decision-making from the FHWA to TxDOT can result in faster project delivery, but TxDOT will need to document more detailed information along the way to ensure defensible decisions.
- Your role as a consultant in championing projects and communicating priorities has not changed under NEPA assignment.
- However, your responsibility to accurately and thoroughly ensure all decisions are clearly documented in the administrative record has increased.

# Wrap Up

Consultants relay information to TxDOT employees in an effort to help them make the best decisions.

- Create clear documentation from data collection to environmental document approval to help the project remain legally defensible.
- At the beginning of every project, coordinate timelines with the team; be sure to include subcontractors in the discussion.
- Maintain communication with the Environmental Specialist and anyone else who has been designated as your liaison.
- Collaboration among environmental, engineering, consulting, and local government team members leads to “hard look” documentation that is consistent with TxDOT’s format requirements and a strong, legally defensible administrative record.

# NEPA Assignment

Elected and Appointed Public  
Officials

# Purpose of this Training Module

There has been a significant change to how TxDOT completes the environmental phase of project delivery following NEPA assignment.

In order to streamline project delivery, this guidance was prepared to:

- Introduce elected and appointed public officials to the NEPA process as it relates to transportation projects
- Update public officials on TxDOT's role under NEPA assignment
- Provide an overview of the NEPA process and the milestones necessary to achieve efficient project delivery

# 1. What is NEPA?

NEPA is the National Environmental Policy Act of 1969.

“In enacting NEPA, Congress recognized that nearly all Federal activities affect the environment in some way and mandated that before Federal agencies make decisions, they must consider the effects of their actions on the quality of the human environment. Under NEPA, CEQ works to balance environmental, economic, and social objectives in pursuit of NEPA’s goal of ‘productive harmony’ between humans and the human environment.”

*U.S. Council on Environmental Quality*

NEPA is a U.S. environmental law that requires practitioners to consider the effects of their actions on the quality of the human and natural environment.

# 1. What is NEPA?

## **When is NEPA required?**

- NEPA is required when an action uses **any amount** of federal funding.
- State-funded projects or those in the state's right-of-way follow a similar State of Texas environmental process. Be aware that the environmental process is a critical path for any transportation project, regardless of whether federal funding is being used.

## **What are the requirements of NEPA?**

- NEPA is a procedural law that regulates how and whether impacts on the human and natural environment are assessed and mitigated.
- NEPA does not require that the final action preserve the natural environment at all costs.
- Permitting or mitigation measures required by other regulations are also part of the NEPA process.

# 1. What is NEPA?

## **What are the products of the NEPA process?**

An environmental decision that includes documentation of environmental resources that may be affected by the action; descriptions of the anticipated impacts of various proposed alternatives, including a no-build alternative; and identification of a preferred alternative, along with any mitigation actions.

Documentation can vary greatly in size and depth of analysis depending on the class of action. Three classes of action, from least to most complex, are:

- Categorical Exclusion (CE)
- Environmental Assessment (EA)
- Environmental Impact Statement (EIS)

These classes will be discussed in more detail in Section 5.

# 1. What is NEPA?

Other regulations and executive orders may be included in the NEPA process if a resource covered by another regulation is affected. If a protected resource is affected, the NEPA process might require a longer timeline to allow consultation with subject matter experts.

Examples of potentially impacted resources:

- Endangered species
- Historic and archeological resources
- Parks and recreation
- Air quality
- Water quality
- Low income or minority populations

## 2. What Is My Role Under NEPA?

### **An Elected or Appointed Official's Role Under NEPA**

Elected and appointed public officials can help the NEPA process go smoothly by engaging the public and providing them with realistic expectations, accurate information, and encouraging them to attend public meetings and hearings.

**Elected and appointed officials should refrain from making promises to constituents without discussing these proposals with the project sponsor and TxDOT beforehand.**

Failure to do so could result in:

- Project redesign
- Restarting the environmental compliance process
- Creating new impacts on resources that will require additional documentation and agency coordination
- Bidding and construction delays
- Higher project costs
- Opportunities for litigation

## 2. What Is My Role Under NEPA?

It is also very important that elected and appointed public officials not publicly express a preference for a particular project alternative during the NEPA process, until the preferred alternative is selected.

Once it is selected, officials should not confuse the public by openly expressing a preference for an alternative other than the preferred alternative. Elected and appointed officials should either publicly support the preferred alternative or refrain from commenting.

Failure to do so undermines the objective process of selecting the preferred alternative and erodes the effectiveness of and public confidence in the NEPA process.

# 3. What is NEPA Assignment?

MAP-21 is a surface transportation funding bill enacted by Congress in 2012. A key goal of the MAP-21 legislation (and NEPA assignment) is to reduce project delivery delays.

To achieve this goal, the USDOT seeks to shift environmental review to state DOTs. A Memorandum of Understanding (MOU) between TxDOT and the USDOT outlines how TxDOT will implement NEPA assignment. Texas is now the second state to be assigned federal NEPA responsibilities and liabilities.

In this role, TxDOT is now the lead agency for document preparation and review.

### 3. What is NEPA Assignment?

As the lead agency, TxDOT has taken on a number of the FHWA's important roles in the NEPA process.

| Responsibility                                                 | Prior to NEPA Assignment | Under NEPA Assignment |
|----------------------------------------------------------------|--------------------------|-----------------------|
| Determining class of action (CE, EA, or EIS)                   | FHWA                     | TxDOT                 |
| Preparing supporting technical studies                         | TxDOT                    | TxDOT                 |
| Preparing the NEPA documentation                               | TxDOT                    | TxDOT                 |
| Responsible for federal resource agency consultations          | FHWA                     | TxDOT                 |
| Approves and files the NEPA document                           | FHWA                     | TxDOT                 |
| Defends NEPA document in federal court, if there is litigation | FHWA/DOJ                 | TxDOT/<br>TXOAG*      |

\* Texas Office of the Attorney General

# 3. What is NEPA Assignment?

Under NEPA assignment, certain TxDOT staff can now approve environmental documents. This authority may reduce the amount of time required for document review and approval. However, to receive this authority, the State of Texas had to agree to waive its sovereign immunity.

The State of Texas is now legally responsible for any legal fees and judgments related to TxDOT's NEPA activities. As a result, expect that local project sponsors will work closely with TxDOT, so that TxDOT staff are fully aware of what they are signing.

# 4. Project Development

## **When Does TxDOT Build a Project?**

Before TxDOT can support the construction of a project, it must be listed in both state and regional planning documents. This means that if the boundaries of a project change or if the project was not listed in the planning documents: the regional Metropolitan Transportation Plan (MTP) and the regional Transportation Improvement Plan (TIP), as well as the Statewide Transportation Plan (STP) and the State Transportation Improvement Plan (STIP), these will need to be updated.

No federal or state funds can be released until the project is in the TIP and STIP. Allocating state funds prematurely to a project, before it is included in the regional and state plans, could jeopardize federal funding for all projects in the region. The local transportation planning process is guided by federal laws, which must be followed.

Long-range transportation plans are typically updated on five-year cycles (more frequently if your region is in non-attainment). Use these windows of opportunity to add, change, or remove projects through the planning process.

# 4. Project Development

## **Who does the work?**

TxDOT or a local government entity can act as the **project sponsor**. Being a project sponsor means taking responsibility for implementing the NEPA process, including technical studies.

If a local government is serving as a project sponsor, it is important for them to assess whether they have the available staff and expertise to supervise consultants or conduct studies internally.

For more information on how local governments and TxDOT work together throughout the NEPA process, please see the Local Government Toolkit on the TxDOT Environmental Division's website.

# 5. NEPA Implementation

## **What does the NEPA process look like?**

The correct environmental process to follow depends on the project's characteristics, its funding source, and the affected resources. For federally funded projects, there are three possible classifications of an action:

- Categorical Exclusion (CE)
- Environmental Assessment (EA)
- Environmental Impact Statement (EIS)

# 5. NEPA Implementation

Categorical exclusions (CEs) apply to projects that **do not individually or cumulatively have a significant environmental impact.**

Most roadway projects will be classified as CEs. Examples of projects that may be classified as a CE are:

- Activities that do not involve or lead to construction
- Construction of bicycle and pedestrian lanes, paths, and facilities
- Projects in the state safety plan
- Alterations to increase accessibility for disabled or elderly persons

A CE **cannot** be used under certain circumstances, such as the following:

- Displacement of people
- Impacts on natural, cultural, recreational, or historic resources
- Public opposition or controversy on environmental grounds

# 5. NEPA Implementation

Categorical exclusions require the least complex documentation process. Milestones for CEs include:

- Perform project scoping
- Complete the studies, reports, and documentation
- Project sponsor (TxDOT or local government) submits the CE documentation
- The TxDOT Environmental Affairs Division delegate makes the environmental decision and signs the determination form
- Kickoff meetings and public participation may or may not be necessary, depending on the complexity of the CE. **If you believe public participation is needed, be sure to communicate this need as early as possible.**

The TxDOT delegate will be either an Environmental Specialist or the District Engineer/Administrator, depending upon which type of CE was prepared.

# 5. NEPA Implementation

For projects with substantial impacts or potential for controversy, an environmental assessment (EA) or an environmental impact statement (EIS) is prepared. **The purpose of an EA is to determine if an EIS is necessary.**

Analysis of alternatives is a key component of an EA or an EIS, so you will see multiple solutions proposed and evaluated as part of the process.

EAs can have two outcomes:

- If minimal impacts to resources are expected, TxDOT will issue a “finding of no significant impact” or FONSI. The project may then proceed to letting.
- If a significant impact is found, an EIS will be prepared for the project.

# 5. NEPA Implementation

EAs have more project milestones than CEs due to the public process and evaluation of alternatives:

- Scope development and kickoff meeting
- Research, prepare, and submit draft EA
- Review and publish draft
- Offer opportunity for public comment
- Respond to comments and prepare final EA and FONSI
- Approve FONSI or proceed as an EIS

The TxDOT Environmental Affairs Division Director has signature authority for the final environmental documents.

# 5. NEPA Implementation

An EIS requires more detailed documentation and a significant public participation process. It is initially completed as a Draft EIS (DEIS) and, upon approval, as a Final EIS (FEIS). Milestones of the EIS process are:

- Letter of initiation
- Published Notice of Intent (NOI)
- Invitation of other agencies, scoping, and kickoff meeting
- Two public meetings
- DEIS preparation, review, and publication
- Public hearing
- FEIS preparation
- Published Notice of Availability (NOA) and Record of Decision (ROD)

TxDOT's Environmental Affairs Director has the sole approval authority for an EIS. There may be co-signatories, if other agencies are cooperating agencies.

## 6. Wrap-Up

- The NEPA process looks at how infrastructure development can occur while minimizing adverse impacts on the natural, cultural, and human environment.
- NEPA is required when any amount of federal money is spent on a project, and state-funded projects have a similar process.
- TxDOT's NEPA assignment can result in faster project delivery, but it also brings risk because the State of Texas has waived its sovereign immunity.
- The implementation of NEPA requires following the spirit and letter of federal laws.
- Environmental documentation for a project may be as a categorical exclusion, an environmental assessment, or an environmental impact statement, depending upon the impacts.
- There are a number of other federal laws, regulations, and Executive Orders that may need to be followed during NEPA implementation.

# 6. Wrap-Up

As an elected or appointed public official, you have the trust of your constituents and a public platform to work with.

- Help your constituency form realistic expectations for project timelines
  - Do not make promises that are out of your control and not without coordinating with TxDOT and the local project sponsor
- Guide people to accurate information throughout the NEPA process
- Alert the public of opportunities to participate in the NEPA process through public meetings, hearings, and opportunities to comment on environmental documents
- Do not publicly express a preference for a particular alternative during the NEPA process, until the preferred alternative is selected
- Once the preferred alternative is selected, do not confuse the public by promoting an alternative that was not selected as the preferred alternative



# NEPA Assignment

Engineers

# Purpose of this Training Module

**Purpose:** The purpose of this training is to provide an overview of recent changes to TxDOT's responsibilities under NEPA. This training module has been tailored to emphasize how these changes impact the role of TxDOT's engineers and their daily responsibilities on the job.

**Outline:**

1. Understanding NEPA
2. NEPA Assignment
3. Project Classes of Action
4. Implementing the NEPA Process
5. Common NEPA Challenges

**Quiz:** Your understanding of this training module will be assessed with a short quiz.

# 1. Understanding NEPA

NEPA is the National Environmental Policy Act of 1969.

“In enacting NEPA, Congress recognized that nearly all Federal activities affect the environment in some way and mandated that before Federal agencies make decisions, they must consider the effects of their actions on the quality of the human environment. Under NEPA, CEQ works to balance environmental, economic, and social objectives in pursuit of NEPA’s goal of ‘productive harmony’ between humans and the human environment.”

*U.S. Council on Environmental Quality*

NEPA is a U.S. environmental law that requires practitioners to consider the effects of their actions on the quality of the human and natural environment.

# 1. Understanding NEPA

## **When is NEPA compliance required?**

- NEPA compliance is required when an action uses **any amount** of federal funding.
- State-funded projects or those in the state's right-of-way follow a similar State of Texas environmental process. Be aware that the environmental process is a critical path for any transportation project, regardless of whether federal funding is being used.
- A project cannot proceed to letting or right-of-way acquisition prior to NEPA clearance.

## **What are the requirements of NEPA?**

- NEPA is a procedural law that regulates how and whether impacts on the human and natural environment are assessed.
- Challenges to NEPA decisions are brought under the Administrative Procedures Act.
- Assuming the project meets a legitimate public purpose, NEPA does not require that the final action preserve the natural environment at all costs; depending on the resource, mitigation of impacts may be permissible.
- Permitting or mitigation measures required by other regulations are also part of the NEPA process.

# 1. Understanding NEPA

## What are the products of the NEPA process?

1. An **administrative record** demonstrating that the NEPA process was followed to the letter and intent of the law and the decision-making process would withstand the “hard look” (i.e. rigorous and robust) test.
2. An **environmental decision** that includes documentation of environmental resources that may be affected by the action; descriptions of the anticipated impacts of various proposed alternatives, including a no-build alternative; and identification of a preferred alternative, along with any mitigation actions.

Documentation can vary in size and depth of analysis depending on the class of action. Three classes of action, from least to most complex, are:

- Categorical Exclusion (CE)
- Environmental Assessment (EA)
- Environmental Impact Statement (EIS)

These classes will be discussed in more detail in Section 3.

# 1. Understanding NEPA

Other federal regulations and Executive Orders can be a part of the NEPA process if a resource covered by another regulation is affected.

Parallel regulations exist at the state level for most of these resources and they would apply for state-funded projects. For example, cultural resources are regulated nationally through the National Historic Preservation Act and are governed at the state level through the Antiquities Code of Texas.

| Regulation                                                 | Resource                                                              |
|------------------------------------------------------------|-----------------------------------------------------------------------|
| Section 4(f) of the Department of Transportation Act       | Publicly-owned Parks and Recreation Facilities;<br>Historic Resources |
| Section 106 of the National Historic Preservation Act      | Historic and Archeological Resources                                  |
| Section 7 of the Endangered Species Act                    | Threatened and Endangered Species                                     |
| Section 404 of the Clean Water Act                         | Waters and Wetlands                                                   |
| Executive Order 12898; E.O. 13166                          | Environmental Justice; Limited English<br>Proficiency                 |
| Several other regulations affecting a variety of resources | See TxDOT Environmental Toolkit for complete<br>list                  |

# 1. Understanding NEPA

## The Engineer's Role Under NEPA?

TxDOT and consulting engineers play a key role in the NEPA process when developing the design and location of infrastructure. The selected location can determine what type of environmental documentation is required, especially when for acquisition of right-of-way.

### **Location Matters: Safety Rest Area**

A safety rest area along an interstate highway was proposed, and TxDOT staff began looking at locations along the corridor. The ideal site would have access to utilities on a vacant parcel. Two possible locations were found, and preliminary designs for the structure and highway access began. During the NEPA process, field work revealed that part of one site was situated in a wetland and adjacent to an archeological site. Proceeding with this site would require permits from the U.S. Army Corps of Engineers and an archeological survey with Texas Historical Commission review. These impacts could add months to the project time. Fortunately, similar constraints were not encountered at the alternate site. The project development team documented the alternatives analysis and proceeded with the least environmentally harmful option to gain project clearance on time.

## 2. What is NEPA Assignment?

Moving Ahead for Progress in the 21st century (MAP-21) is a surface transportation funding bill enacted by Congress in 2012. A key goal of the MAP-21 legislation (and NEPA assignment) is to reduce project delivery delays.

To achieve this goal, the USDOT seeks to shift environmental review responsibility to state DOTs. A Memorandum of Understanding (MOU) between TxDOT and the FHWA outlines how TxDOT will implement NEPA assignment. Texas is now the second U.S. state to be assigned federal NEPA responsibilities and liabilities.

## 2. What is NEPA Assignment?

To receive assignment, TxDOT has waived sovereign immunity (formerly afforded by the FHWA), meaning TxDOT can be sued in federal court and it will also need to **defend legal challenges** to project development decisions in court, as opposed to relying upon the FHWA as it has in the past.

This means that design decisions made by a project engineer **can be examined in court** as part of the administrative record for the environmental decision and if there is a judgment against TxDOT as a result of these actions, the State of Texas will have to pay the legal costs, as well as any costs for mitigation and damages.

## 2. What is NEPA Assignment?

### **Where do Project Engineers fit into NEPA Assignment?**

The basic roles and responsibilities of TxDOT and consulting engineers did not change after TxDOT's assignment of federal NEPA responsibilities.

However, as previously stated, TxDOT is now responsible for defending the administrative record (or provide proof that the NEPA process was correctly followed) and has an **increased burden to thoroughly document project decisions**, so they will be upheld. If the administrative record is not complete, is vague, or appears to reflect arbitrary and capricious decisions, a court can determine that the environmental decision is invalid.

You may be asked to demonstrate justification for decisions made during the project development process, which includes the NEPA process.

It is critical that TxDOT and consulting engineers keep environmental staff informed of any design changes so they can be assessed for environmental impacts and so the administrative record is kept up-to-date.

# 3. Project Class of Action

The required environmental process depends on the project's funding source and the affected resources. For federally funded projects, there are three possible classifications of action:

- Categorical Exclusions (CEs)
- Environmental Assessments (EAs)
- Environmental Impact Statement (EISs)

The project design may determine its effects on different resources. For example, the selected design may adversely affect wetlands, wildlife, or vulnerable populations.

Because a design change or other changes to the project can impact the timeline of the environmental process or even the type of documentation that is required, it is essential that TxDOT staff, resource agency staff, consultants, local government staff, and elected officials **communicate regularly and effectively**.

# 3. Project Class of Action

Categorical Exclusions apply to projects that do not individually or cumulatively have a significant environmental effect. Most TxDOT projects will be classified as CEs, and the environmental documentation process should be straightforward. However, even within CEs there can be challenges.

## Restrictions on using CEs

**To be processed as a CE, the project cannot result in significant:**

- Relocation of people
- Impact on natural, cultural, recreational, historic, or other resources
- Impact on air, noise, or water quality
- Individual or cumulative impacts

**Unusual circumstances that preclude use of a CE:**

- Controversy on environmental grounds, or opposition from the public
- Properties protected by other regulations, such as endangered species
- Inconsistencies with local, state, or federal requirements or procedures

TxDOT's Environmental Toolkits contain detailed information on the thresholds that prevent project processing as a CE. Note that environmental work is iterative so if an impact is identified, the documentation type can be elevated to an EA or even an EIS.

# 3. Project Class of Action

There are 30 CE transportation actions listed in federal code (23 CFR 771.017 (c)), called “c-list” CEs. For example:

- c(1): Activities which do not involve or lead to construction
- c(3): Construction of bicycle and pedestrian lanes, paths, and facilities
- c(15): Alterations to increase accessibility for disabled or elderly persons
- c(18): Track and rail bed maintenance within existing right-of-way

When a CE is applied to a project, know that each classification has certain **constraints** associated with it. Some examples of limitations are below:

- c(22) must take place entirely within existing right-of-way
- c(26, 27, 28) cannot be used if one of several “section (e)” constraints (environmental or cultural impacts) exist

Because of these constraints, it is critical to communicate any design changes to the environmental specialist coordinating the project **as soon as possible, since it may result in a reclassification of the project to another type of CE.**

Actions that are not listed in paragraph c, but may meet the requirements of a CE, can be documented as a “d-list” CE. These CEs require more rigorous justification and technical documentation that the project **does not** result in environmental impacts elevating it to EA level to receive approval and be processed as a CE project. They require peer review at district level.

# 3. Project Class of Action

Categorical Exclusions should require the least complex documentation process. See TxDOT's Environmental Toolkits for detailed guidance. Milestones for CEs include:

- Scope project
- Completing studies, reports, documentation
  - Note that all environmental resource categories have to be considered—if a Technical Report is not required, this should be documented within the project file.
- Secure CE documentation according to file retention procedures
- Document environmental decision and TxDOT ENV delegate signs determination form
- *Kickoff meetings may or may not be necessary, depending on the complexity of the CE. During the meeting, design benchmarks for future meetings should be determined.*

Who can sign CEs?

- c-list: Anyone with signing authority at the District level; can be an Environmental Specialist
- d-list: District Engineer or Administrator

# 3. Project Class of Action

For projects with substantial impacts or potential for controversy, an environmental assessment (EA) or an environmental impact statement (EIS) is prepared. **The purpose of an EA is to determine whether an EIS is necessary.** Many projects have too many impacts to be processed as a CE, but by demonstrating an adequate “hard look” within the EA classification, the document can be cleared without an EIS.

An analysis of alternatives is a key component of an EA or an EIS, so you will be asked to propose multiple design solutions as part of the process.

EAs can have two outcomes:

- If minimal impacts to resources are expected, and the documentation demonstrates that impacts have been avoided, minimized, or mitigated, TxDOT may issue a “finding of no significant impact” or FONSI. The project may then proceed to letting.
- If a significant impact is found, an EIS may need to be prepared for the project. An EIS requires that multiple feasible options are analyzed to an equivalent level of detail in the Draft EIS. The preferred alternative is typically documented in the Final EIS.

# 3. Project Class of Action

EAs have more project milestones than CEs due to the public involvement process and evaluation of alternatives, including:

- Developing scope and hold kickoff meeting
- Research, prepare, and submit draft Technical Reports on alternatives
- Undertake agency coordination and resolve issues
- Review and publish draft EA addressing preferred alternative versus No Build
- Offer opportunity for public involvement
- Respond to public and agency comments and prepare final EA and FONSI
- TxDOT approves FONSI or proceeds with preparing an EIS

The TxDOT Environmental Affairs Division Director has signature authority for the final environmental documents.

# 3. Project Class of Action

An EIS requires more detailed documentation and a significant public participation process. It is initially completed as a Draft EIS (DEIS) and, upon approval, as a Final EIS (FEIS).

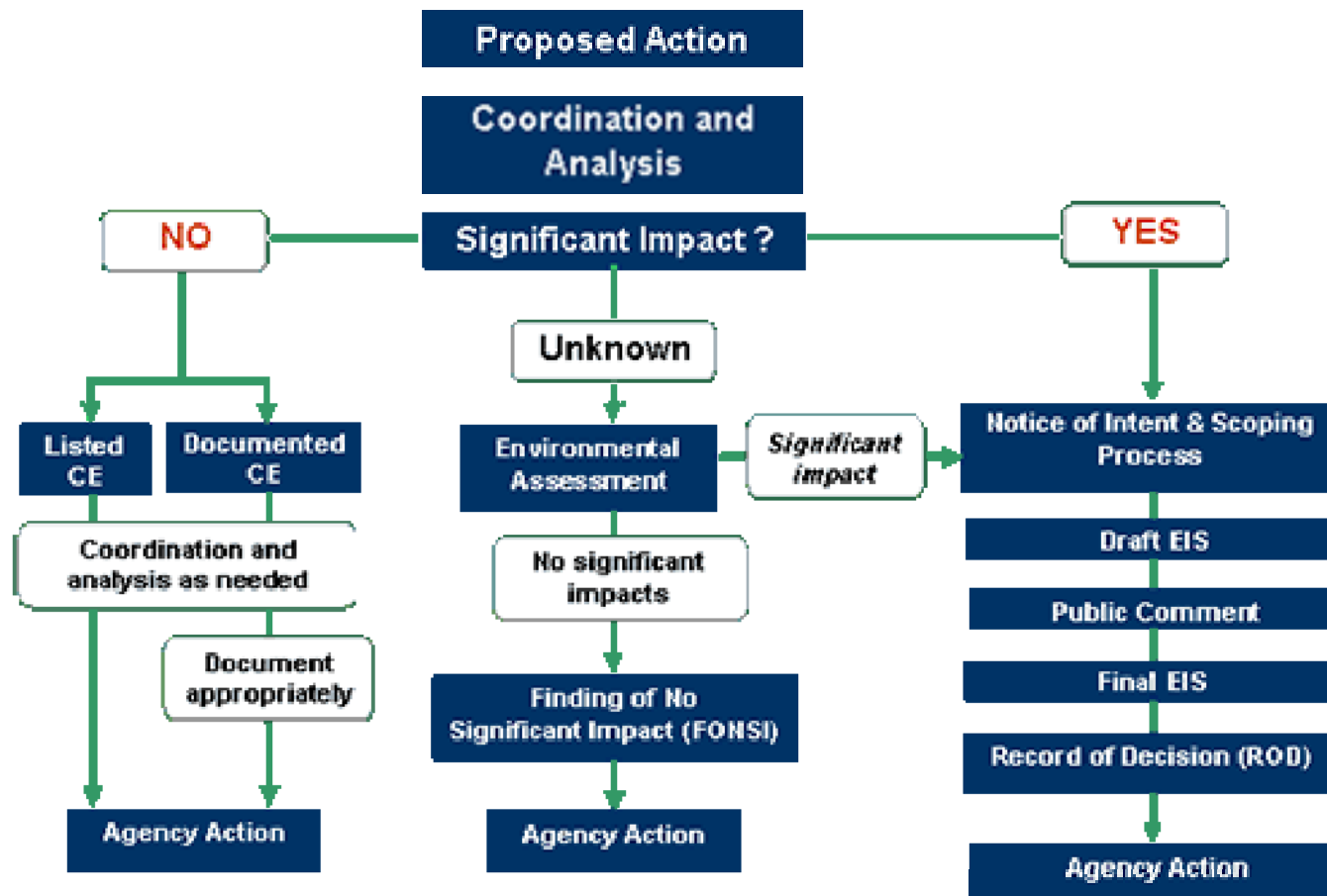
Milestones of the EIS process are:

- Letter of initiation
- Published Notice of Intent (NOI)
- Invitation to identify Participating and Cooperating agencies
- Invitation to other agencies to participate in scoping and kickoff meeting
- Two public meetings (typically)
- DEIS preparation, review, and publication
- Public hearing
- Response to comments, revision and resubmittal process
- FEIS preparation on Preferred Alternative versus No Build
- Published Notice of Availability (NOA) and Record of Decision (ROD)

The TxDOT Environmental Affairs Division Director has the approval authority for an EIS. There may be co-signatories, if other agencies are cooperating agencies.

# 3. Project Class of Action

In summary, the potential impacts of the project will determine the depth and complexity of the environmental documentation process. Below is a greatly simplified representation of the NEPA process.



Source: AASHTO, NEPA Processes

# 4. Implementing the NEPA Process

## Meetings and Communication

The NEPA process is a **team effort**, so there will be the need for clear and frequent communication between the project engineer and the environmental coordinator, in addition to other parties such as TxDOT management, local government staff, local elected officials, etc. The individuals or groups of individuals involved will vary according to project classification.

A strong start to each project includes two things:

- 1) Know the project area, i.e., make a site visit.
- 2) Hold a kickoff meeting for EAs and EISs. Work with design and environmental leadership to determine if a kickoff meeting is needed for a CE. Here you and your team can set expectations for future communications and project milestones.

The team will also need to establish a strong Purpose and Need. This anchors any environmental document.

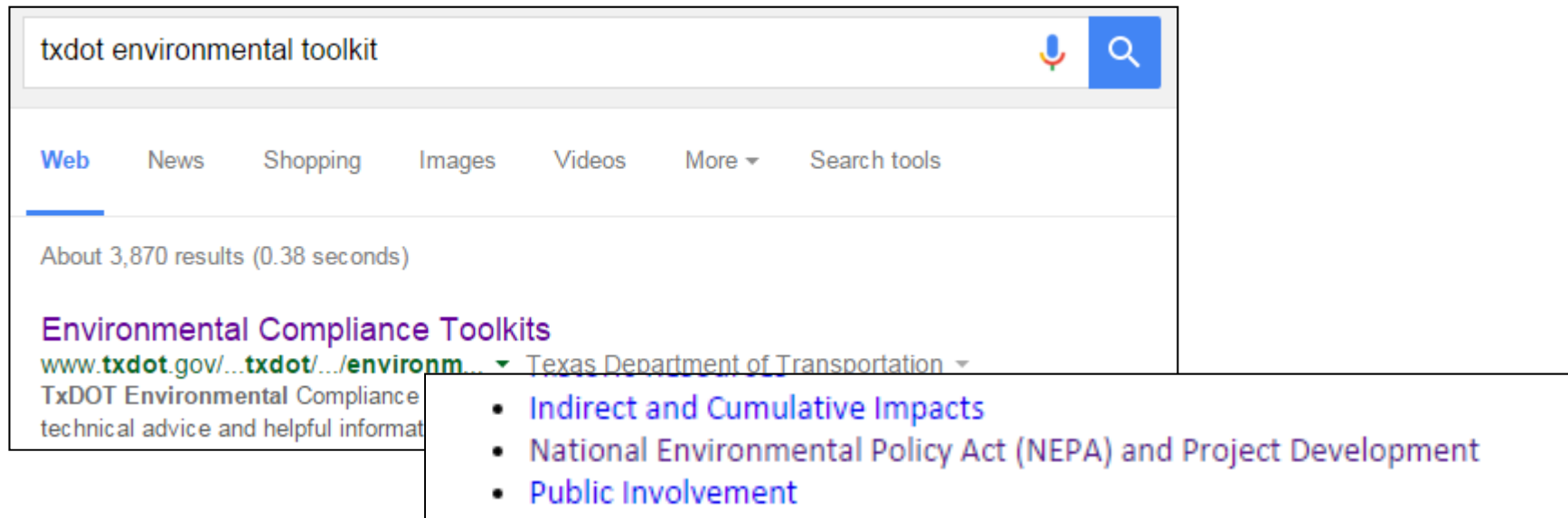
Any communication regarding decision-making needs to be recorded in the administrative record. Decisions over e-mail are also considered a part of the administrative record. A project e-mail address is a good tool for documenting e-mail communication in the administrative record.

# 4. Implementing the NEPA Process

## Tools and toolkits

Due to the changes with NEPA assignment, more uniform documentation is expected in some steps of the NEPA process (and less in other steps). Therefore, TxDOT has **developed new tools and guidance** for your use in preparing and reviewing environmental documents.

When using tools from the Environmental Compliance Toolkit, you must **always go to the TxDOT ENV website** and download the most recent version. Documentation forms may be updated periodically and these changes may not be announced.



The screenshot shows a Google search interface with the query "txdot environmental toolkit". The search results are displayed under the "Web" tab. The first result is titled "Environmental Compliance Toolkits" and is from the website "www.txdot.gov/...txdot/.../environm...". The result snippet mentions "Texas Department of Transportation" and "TxDOT Environmental Compliance technical advice and helpful informat". A list of topics is shown below the snippet:

- Indirect and Cumulative Impacts
- National Environmental Policy Act (NEPA) and Project Development
- Public Involvement

# 4. Implementing the NEPA Process

## QA/QC Process

TxDOT integrates quality assurance (QA) and quality control (QC) considerations into its environmental decisions to achieve compliance with applicable laws, regulations, and standards. **QA is devoted to preventing problems, and QC is devoted to identifying and correcting problems.**

The QA/QC processes are in place to prevent possible errors or omissions that could be presented in court.

Each QA/QC measure evaluates the project-level documentation to date, looking for thoroughness, accuracy, errors, and omissions. Project-level documentation can be evidence of communications and meetings, TxDOT checklists, and more. Once each document is reviewed, it officially becomes a part of the Administrative Record. The Administrative Record then follows the file retention Schedule.

Work completed by consultants is expected to undergo additional QA/QC processes prior to being submitted to TxDOT.

# 5. Common NEPA Challenges

This section includes scenarios that illustrate common NEPA challenges faced by TxDOT engineers. Each presents a situation and asks you to think about how you would respond.

1. Narrow Purpose and Need
2. Changes in project design that are not covered in the environmental documentation
3. Inadequate documentation of project decisions

# 5. Common NEPA Challenges

## 1. Narrow Purpose and Need

A shale boom in your district has caused sudden population growth in a medium-size city. As a result, the city's main north-south arterial has become highly congested, and local governments want to see this road widened. TxDOT agrees that this is a major concern in your district and allocated funding for the project. You are now faced with the cornerstone of the NEPA process: Defining Purpose and Need.

How would you describe this project's purpose and need? What could happen if the Purpose and Need were defined too narrowly? Too broadly?



*Traffic in Yorktown, in the Eagle Ford Shale region*

# 5. Common NEPA Challenges

## 1. Narrow Purpose and Need

One way to define this project's purpose and need (P&N) is to say an increase in mobility between the north and south parts of the city has created the need to relieve congestion in a busy corridor.

Defining P&N as "road widening from two lanes to four lanes" is too narrow for the NEPA process. Courts have found that this type of P&N is so narrow that only one alternative could be selected, and subsequent alternatives analysis would be invalid. What about transit options? Innovative transportation solutions or changeable message signs? Restriping? If this happens in your district, you are putting yourself at risk of being involved in a NEPA lawsuit.

On the other hand, the P&N also cannot be too broad. If the P&N for this project were "to increase mobility in the city," then any number of solutions could be found, and alternatives analysis would not be meaningful. Similarly, project opponents may seek to argue that the P&N is too broad in court.

A cleaner P&N would be "alleviate congestion and improve safety between two logical termini by assessing feasible options including road widening, ITS, and transit options while minimizing environmental impacts."

# 5. Common NEPA Challenges

## 2. Change in project design

When you conduct an engineering site visit for a new creek crossing, you realize that the creek is often dry. You decide to change the bridge bent arrangement from one on each side of the creek to only one in the center of the bed. You believe that your new design will lower the cost of construction materials without impacting any water resources.

Do you think the change in design will have an impact on the time to complete the NEPA process? When should the you notify environmental staff of the change?



*Shoal Creek in Austin, Texas (KUT)*

# 5. Common NEPA Challenges

## 2. Change in project design

This change could introduce an impact to waters and potential wetlands and consequently require permitting. The creek and banks could include archeological resources or important wildlife habitat. Affecting additional resources (or exacerbating existing impacts) may prolong the NEPA process, i.e., impacts to <0.5 acres of jurisdictional waters may be processed under a Nationwide Permit #14 while more than one acre would require a time-consuming Individual Permit. Always notify the environmental coordinator and project team immediately when a design change occurs. Even if a meeting is scheduled in the near future, environmental specialists, consultants, and local government staff are proceeding with their work on a daily basis, so any work on an out-of-date design burdens the scope and schedule.



*Shoal Creek in Austin, Texas (KUT)*

# 5. Common NEPA Challenges

## **3. Inadequate documentation of project decisions**

During a meeting with the environmental team, you all agree that a proposed change in your design will reduce the impact on low-income residents near the project and allow the environmental process to go more quickly. You proceed with your recently approved design.

Does this change need to be documented in the file of record? If so, do you need to include the reason for the changes? What might happen if you omitted this change from the record?

Community impacts should be communicated via Meetings of Affected Property Owners (MAPOs) or other outreach mechanisms. Without such documentation, the administrative record could appear to be incomplete, or community members with an unclear understanding of project impacts may raise controversy that causes delays.

# 5. Common NEPA Challenges

## **3. Inadequate documentation of project decisions**

All project decisions and changes must be documented in ECOS (TxDOT's environmental compliance oversight system). In the case of an audit or lawsuit, the reviewer will be looking for evidence of logical and thoughtful decision making throughout the NEPA process. This requirement means that the rationale for the change must be included with documentation of the change.

Unsupported or undocumented decisions could result in an audit finding during scheduled audits by the FHWA, or worse, a missing piece during a lawsuit.

It is important to note that you will not have the opportunity to defend your decision by providing new information in the event of a lawsuit. In recent lawsuits, courts have only looked at the existing administrative record delivered by the responsible agency.

# Wrap Up

TxDOT engineers make decisions that can affect which resources are impacted and how much environmental analysis is required.

- At the beginning of every project, set milestones to meet with the environmental team
- Always communicate design changes as soon as possible; don't wait until the next checkpoint—environmental staff can provide technical information to help designers determine prudent options that avoid impacts (and associated cost and time pressures).
- Be aware that as technical reports are being developed, environmental experts might identify a resource that was not known at the time of design and requires changes to the design
- Collaboration among engineering and environmental team members leads to “hard look” documentation that is consistent with TxDOT's format requirements and a strong, legally defensible administrative record.

# Wrap Up

- The NEPA process looks at how infrastructure development can occur while minimizing adverse impacts on the natural, cultural, and human environment.
- NEPA is required when any federal money is spent on a project, and state-funded projects have a similar process
- Assignment of responsibility for environmental decision-making from FHWA to TxDOT can result in faster project delivery, but TxDOT will need more detailed information along the way to ensure defensible decisions
- Your basic engineering role in developing projects that serve a legitimate public purpose and steering them through regulatory clearance to letting has not changed under NEPA assignment
- However, your responsibility to accurately and thoroughly ensure all decisions are clearly documented in the administrative record has increased.
- One day, you may have to take the stand, so be prepared!

# NEPA Assignment

Environmental Specialists

# Purpose of this Training Module

**Purpose:** The purpose of this training is to provide an overview of recent changes to TxDOT's responsibilities under the National Environmental Policy Act of 1969 (NEPA). This training module has been tailored to the Environmental Specialist's roles and responsibilities, so that you will better understand your daily responsibilities on the job.

**Outline:**

1. Understanding NEPA
2. NEPA Assignment
3. Project Class of Action
4. Understanding Other Environmental Regulatory Processes
5. Implementing NEPA
6. The Administrative Record
7. Common NEPA Challenges

**Quiz:** Your understanding of this training module will be assessed with a short quiz.

# 1. Understanding NEPA

NEPA is the National Environmental Policy Act of 1969.

“In enacting NEPA, Congress recognized that nearly all Federal activities affect the environment in some way and mandated that before Federal agencies make decisions, they must consider the effects of their actions on the quality of the human environment. Under NEPA, CEQ works to balance environmental, economic, and social objectives in pursuit of NEPA’s goal of ‘productive harmony’ between humans and the human environment.”

*U.S. Council on Environmental Quality*

NEPA is a U.S. environmental law that requires practitioners to consider the effects of their actions on the quality of the human and natural environment.

# 1. Understanding NEPA

## **When is NEPA compliance required?**

- NEPA compliance is required when an action uses **any amount** of federal funding.
- State-funded projects or those in the state's right-of-way follow a similar State of Texas environmental process. Be aware that the environmental process is a critical path for any transportation project, regardless of whether federal funding is being used.
- A project cannot proceed to letting or right-of-way acquisition prior to NEPA clearance.

## **What are the requirements of NEPA?**

- NEPA is a procedural law that regulates how and whether impacts on the human and natural environment are assessed.
- Challenges to NEPA decisions are brought under the Administrative Procedures Act.
- Assuming the project meets a legitimate public purpose, NEPA does not require that the final action preserve the natural environment at all costs; depending on the resource, mitigation of impacts may be permissible.
- Permitting or mitigation measures required by other regulations are also part of the NEPA process.

# 1. Understanding NEPA

## **What are the products of the NEPA process?**

Due diligence under NEPA requires that you document the **impacts of the project** and **maintain an Administrative Record**.

- 1. Document** - Depending on the *project class of action*, this decisional document can vary in size and analytical depth, identifying all potential environmental impacts of the project. The three *class of actions* will be discussed in Section 3. It is your responsibility to know which type of study is appropriate for any given project.
- 2. Administrative Record** - an electronic filing system that holds formal and informal documents showing that the correct process was followed in support of an environmental decision. The administrative record is reviewed for annual audits and is relied upon in the event of litigation (Note: historically, the AR was literally a physical project file).

# 1. Understanding NEPA

## **Key Responsibilities of an Environmental Specialist**

Some key responsibilities of Environmental Specialists include:

- Require and facilitate frequent communication among team members.
- Participate in defining class of action, scoping, technical reports, draft and final environmental documents, and public involvement.
- Be aware of the potential impacts of changes:
  - Project design, amount and sources of funding, and regulations could result in major or minor changes in NEPA documentation requirements

The design and environmental processes are iterative, so changes are likely during the life of the project—as Environmental Specialist, initiate the conversation with the project engineers to ensure that you are working with the latest design and current funding information. *Do not assume that others will inform you of each and every change that might occur.*

## 2. NEPA Assignment

**Moving Ahead for Progress in the 21<sup>st</sup> Century (MAP-21)** is a federal transportation law (2012) that allows the FHWA to “assign” or delegate the review and approval NEPA documents to state Departments of Transportation (DOTs). Under NEPA assignment, DOTs assume the FHWA’s authority and make independent environmental determinations.

Texas was the second state following California to assume this responsibility in December 2014. TxDOT sought NEPA assignment because it is hoped that it will shorten project review periods, allow TxDOT to develop a more robust review process, and cut project costs where possible.

Under NEPA assignment, the FHWA retains three responsibilities:

1. Air quality conformity determinations
2. Government-to-government consultation with Native American Tribes
3. USDOT responsibilities for statewide and metropolitan planning

Transit-related NEPA studies that involve TxDOT will continue to fall under the overview of the Federal Transit Agency (FTA) and are not eligible for NEPA assignment.

## 2. NEPA Assignment

### **New Responsibilities under Assignment**

The responsibilities assumed under NEPA assignment are not limited to the NEPA review and approval process and compliance with other federal laws triggered by the project, but also include all of the liabilities that come with them. Because of this assumption of liabilities, **Environmental Specialists can no longer ask the FHWA questions about environmental issues related to a project. However, it is acceptable to ask engineering-related questions.**

Another important note about the NEPA assignment is that **TxDOT has waived sovereign immunity**, meaning the State of Texas can be sued over an environmental decision. Unlike in the past, the State of Texas must provide its own legal defense in federal court including the costs of any judgments against it. **NEPA assignment means that any decision made by an Environmental Specialist can be examined in court and TxDOT (not the FHWA) will be responsible for defending it.**

## 2. NEPA Assignment

### Differences under NEPA Assignment

This chart shows the responsibilities that were previously held by the FHWA and are now assigned to TxDOT.

| Responsibility                                                  | Prior to NEPA Assignment | Under NEPA Assignment |
|-----------------------------------------------------------------|--------------------------|-----------------------|
| Determining class of action (CE, EA, or EIS)                    | FHWA                     | TxDOT                 |
| Preparing supporting technical studies                          | TxDOT                    | TxDOT                 |
| Preparing NEPA Environmental Review document                    | TxDOT                    | TxDOT                 |
| Responsible for state and federal resource agency consultations | FHWA                     | TxDOT                 |
| Approves and files NEPA document                                | FHWA                     | TxDOT                 |
| Defends NEPA document in federal court, in case of lawsuit      | FHWA/DOJ                 | TxDOT/TxOAG           |

## 2. NEPA Assignment

### **NEPA Audits**

Under NEPA assignment, TxDOT has agreed to undergo periodic audits by the FHWA. The FHWA audits look for improper decisions or flawed execution of the NEPA process. During the audits, TxDOT will be assessed as either deficient, non-compliant, or compliant, according to various criteria. A deficient (worst) or non-compliant rating means that TxDOT is not complying with the NEPA assignment Memorandum of Understanding (MOU) between the FHWA and TxDOT.

TxDOT has undergone its initial audits since assignment and other state DOTs have also undergone audits. To date, the California Department of Transportation (Caltrans) has undergone the greatest number of audits and provides other states with insight into common pitfalls and issues that FHWA looks for.

The next two slides summarize the findings from previous FHWA audits of Caltrans, which identify ongoing and common errors.

## 2. NEPA Assignment

### Ongoing and Common Errors Evident during the Implementation of NEPA Assignment

| Topic                                                                                       | Noted Issues by FHWA Present in Caltrans Audits                                                                                                                                                                                                                                       |
|---------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Purpose and Responsibilities                                                                | <ul style="list-style-type: none"><li>• General confusion over appropriate signature authorities at local, district, and agency level. Most commonly seen with new staff and consultants.</li></ul>                                                                                   |
| Assignments and Assumptions of Responsibilities to Comply with Federal Laws other than NEPA | <ul style="list-style-type: none"><li>• Incorrect determination CEs due to lack of clear definitions and experience with new categories.</li><li>• Incorrect use of project reevaluations and project recertification procedures resulting in time-delays and conflict.</li></ul>     |
| State Commitment of Resources and Training                                                  | <ul style="list-style-type: none"><li>• NEPA assignment training program could not keep up with demand for on-line training.</li><li>• Staff competency levels varied between districts. Agency HQ unable to accurately assess and track individual improvements over time.</li></ul> |

Source: FHWA Audits of Caltrans (FHWA 2008-2012)

## 2. NEPA Assignment

### Ongoing and Common Errors Evident during the Implementation of NEPA Assignment

| Topic                                   | Noted Issues by FHWA Present in Caltrans Audits                                                                                                                                                                                                                                                                                                                   |
|-----------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Procedural and Substantive Requirements | <ul style="list-style-type: none"><li>• Project errors and lack of knowledge with Section 7 (ESA), Section 4(f), and Section 106 procedures and requirements.</li></ul>                                                                                                                                                                                           |
| MOU Monitoring and Oversight            | <ul style="list-style-type: none"><li>• Confusion over expected roles for coordination, consultation, and collaboration.</li><li>• Incorrect QA/QC procedures and missing forms. Most commonly evident with Local Assistance projects.</li><li>• Production of Quarterly Reports contained inaccuracies, missing information, and missing files.</li></ul>        |
| Record Retention and Project Files      | <ul style="list-style-type: none"><li>• Required project files missing from the Administrative Record, or had wrong signatures and dates. Most notably, staff were not saving electronic e-mails or correspondence related to the administrative record.</li><li>• Noted lack of training plan for local assistance/governments and NEPA practitioners.</li></ul> |

Source: FHWA Audits of Caltrans (FHWA 2008-2012)

## 2. NEPA Assignment

### Signature Authority under Assignment

| Document Classification        | TxDOT Employee with Signature Authority                                                                                                                                            |
|--------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| c-list Categorical Exclusion   | <ul style="list-style-type: none"><li>• Environmental Specialist</li><li>• District Engineer or District Administrator</li><li>• Director Environmental Affairs Division</li></ul> |
| d-list Categorical Exclusion   | <ul style="list-style-type: none"><li>• District Engineer or District Administrator</li><li>• Director Environmental Affairs Division</li></ul>                                    |
| Environmental Assessment       | <ul style="list-style-type: none"><li>• Director Environmental Affairs Division</li></ul>                                                                                          |
| Environmental Impact Statement | <ul style="list-style-type: none"><li>• Director Environmental Affairs Division</li></ul>                                                                                          |

**If there is uncertainty about who has signature authority over a document, contact the Environmental Affairs Division for guidance! Improper signatures will delay the project and show up on FHWA audits of TxDOT.**

# 3. Project Class of Action

## **What is meant by a “NEPA project Class of Action”?**

Depending upon the project’s scope, location, amount of federal funding, and environmental impacts, a project can be classified as either a Categorical Exclusion (CE), an Environmental Assessment (EA), or an Environment Impact Statement (EIS) for environmental review.

Within the last two classifications (EA & EIS), additional processes can arise, depending upon the project.

Most TxDOT projects are classified as CEs. However, when an EA or an EIS is undertaken, it will increase the commitment of time and resources expended.

TxDOT must be prepared for all types of environmental regulatory compliance. Under NEPA assignment, TxDOT may or may not have the authority to approve all decisions that fall under the NEPA umbrella.

# 3. Project Class of Action

## What is a Categorical Exclusion?

Categorical exclusions (CEs) apply to non-controversial actions that are known to have negligible impacts. Actions that can be categorically excluded are listed in federal code.

When classifying a project as a CE, know that each classification has certain **constraints** associated with it. Be sure to reference TxDOT's *Guidance for Choosing a Categorical Exclusion* in the Environmental Compliance Toolkit.

There are two categories:

- **c-list:** The c-list CEs fall into explicitly defined categories. With proper technical documentation, a c-list CE project can be cleared by the Environmental Specialist at the District level.
- **d-list:** These projects may be designated as CEs after technical documentation that the project does not result in environmental impacts that elevate it to an EA level (requires peer review at the district level).

# 3. Project Class of Action

## **Classification as a CE**

CEs must not have unusual circumstances leading to:

- Significant environmental impacts
- Substantial controversy on environmental grounds
- Significant impact on properties protected under Section 4(f) or under Section 106 of the National Historic Preservation Act
- Inconsistencies with any federal, state, or local law, requirement or administrative determination relating to the environmental aspects of the action

The project file must demonstrate the following:

- The project fits within the selected CE category
- The project does not have unusual circumstances
- The project has independent utility
- The project has logical termini (for linear facilities)
- The determination does not restrict consideration of alternatives for other reasonably foreseeable projects

# 3. Project Class of Action

## **Determining the correct type of Categorical Exclusion**

There are 30 “c-list” CE types, plus the “open-ended d-list CE”. The d-list CEs do not have sufficient impacts to elevate the project to an EA. A d-list CE requires a District-Engineer-level peer review.

It is critical for a project to be properly classified, if a CE is being used for environmental compliance. Refer to TxDOT’s manual entitled *Guidance: Choosing a Categorical Exclusion* to help you better understand where your project falls.

TxDOT’s *CE Determination Form* will also need to be completed. The TxDOT website has documentation that will help staff identify the best fit for a CE.

# 3. Project Class of Action

## What are the main components of a Categorical Exclusion?

CEs require the least complex documentation process. Milestones for preparing a CE include:

- Project scoping
- Complete studies, reports, documentation
- Project sponsor submits CE documentation
- The Department Delegate will make the environmental decision and will sign determination form
- Complete AR and maintain file retention schedule

## Who is the Department Delegate?

- c-list CE: anyone with signing authority, including **Environmental Specialists**
- d-list CE: District Engineer or District Administrator

# 3. Project Class of Action

## **What is an Environmental Assessment?**

An **Environmental Assessment (EA)** is prepared when an action may or may not have a significant impact on resources. An EA is used when an EIS is not required, but the action is not eligible to be processed as a CE.

EAs can have two outcomes. If a project's impacts on resources is limited, TxDOT will issue a "Finding of No Significant Impact" or a FONSI. The project may then proceed to letting. However, if a significant impact is found that cannot be resolved, an EIS must be prepared for the project.

Under NEPA assignment, EAs will now be approved by the Director of Environmental Affairs Division (ENV).

# 3. Project Class of Action

## **What are the main components of an Environmental Assessment?**

The Technical Reports that document the studies on resource impacts are similar for both CEs and EAs. However, due to their increased complexity, EAs have more project milestones:

- Complete scope development
- Hold kickoff meeting
- Research, prepare, and submit draft Technical Reports
- Undertake agency coordination, resolve issues
- Review and publish draft EA
- Offer opportunity for public involvement
- Prepare final EA and FONSI
- Approve FONSI or proceed as an EIS
- Complete AR and maintain file retention schedule

TxDOT's Environmental Affairs Division Director has the signature authority for FONSI.

# 3. Project Class of Action

## **What is an Environmental Impact Statement?**

An **Environmental Impact Statement (EIS)** is prepared for major actions that would have a significant impact on the human or natural environment. These may be large projects, highly controversial, largely on new location, or located in a sensitive resource area (such as an endangered species habitat).

The U.S. Code of Federal Regulations provides examples of projects typically requiring an EIS:

- Controlled access freeway
- Highway with four or more lanes in a new location
- New construction or extension of a separate roadway for buses or high occupancy vehicles

# 3. Project Class of Action

## **Main components of an Environmental Impact Statement**

EISs require the most extensive documentation and public input. They are completed in a draft EIS (DEIS) phase and a final EIS (FEIS) phase. Milestones of the EIS process are:

- Letter of initiation
- Publish Notice of Intent (NOI)
- Invitation of other agencies, scoping, and kickoff meeting
- Two public meetings (typically)
- DEIS preparation assessing multiple alternatives, review, and publication
- Public hearing
- FEIS preparation (including preferred alternative and No Build)
- Publish Notice of Availability (NOA) and Record of Decision (ROD)

TxDOT's Environmental Affairs Division Director has the sole authority to issue a ROD for an EIS.

# 4. Other Environmental Regulatory Processes

NEPA is an **umbrella regulation** under which other environmental regulatory processes may be required:

| Regulation                                                 | Resource                                                              |
|------------------------------------------------------------|-----------------------------------------------------------------------|
| Section 4(f) of the Department of Transportation Act       | Publicly-owned Parks and Recreation Facilities;<br>Historic Resources |
| Section 106 of the National Historic Preservation Act      | Historic and Archeological Resources                                  |
| Section 7 of the Endangered Species Act                    | Threatened and Endangered Species                                     |
| Section 404 of the Clean Water Act                         | Waters and Wetlands                                                   |
| Executive Order 12898; E.O. 13166                          | Environmental Justice; Limited English Proficiency                    |
| Several Other Regulations affecting a variety of resources | See TxDOT Environmental Specialist Toolkit for complete list          |

As an Environmental Specialist, you are expected to have a strong working knowledge of each of these federal resource laws. The TxDOT website has extensive reference material within its Environmental Compliance Toolkits to help you.

# 5. Implementing the NEPA Process

## **Communication Is Essential!**

It is absolutely essential that all members of the project team (i.e., project sponsor, project engineers, consultants, TxDOT ENV staff, etc.) communicate regularly and openly throughout the entire length of the project.

A lack of communication among team members is often the source of substantial delay. As an Environmental Specialist, you are a critical member of the team. Communicate regularly with other team members and seek out those individuals who are not communicating with you.

It is especially critical to communicate with project's engineering team and the project sponsor to ensure that there have not been design and funding changes that (for example) would affect the environmental process chosen for the project (e.g., a need to shift documentation from a CE to an EA).

# 5. Implementing the NEPA Process

## **Project Initiation and Scope Development**

TxDOT's Scope Development Tool (within the ENV toolkit) will be used at the start of the project to identify issues. The tool's output is part of the administrative record.

The Scope Development Tool documents the following:

- **Project Description:** sponsor, type of project, anticipated federal permits, ROW and easements, relocations, tolling, major resource impacts, etc.
- **Anticipated Environmental Classification:** How will the project be classified—(c)-list CE, (d)-list CE, EA, or EIS—and is this classification justified? Remember that proper project classification is key to avoiding project delays and having to redo work.
- **Major Resource Issues:** air quality, cultural, community impact, water resources, biological resources, hazardous materials, noise, parklands, indirect and cumulative impacts, public involvement, etc.

Use TxDOT's *Instructions for Using the Scope Development Tool* (SDT) to assist you with completing the form. The key is to understand the need and purpose of the project and how the proposed design will address them. Note that the SDT can be updated as the project proceeds.

# 5. Implementing the NEPA Process

## **Kickoff Meetings**

Under TxDOT's new documentation processes, kickoff meetings are required for EAs and EISs and the project documentation needs to be uploaded to ECOS (TxDOT's environmental compliance oversight system).

Project status meetings are recommended so that engineering design staff and environmental staff have a continuous conversation. Make sure the project documentation stays up to date.

Kickoff meetings may also need to include representatives from resource agencies. If the project has known issues, include the relevant resource agencies in the discussion as early as possible.

# 5. Implementing the NEPA Process

## Scope Amendments

If the project has been changed, it is necessary to fill out a project Scope Amendment. The Scope Amendment form is where the changes to the project are described. Some important questions to ask, when a project is amended, include:

- Has the source of funding changed? Is the project now funded using state or federal funds or both? Does this affect the environmental process you use (i.e., Texas versus NEPA) or the project classification?
- Has the amount of federal funding changed? In the case of some CEs, the amount of federal funding can determine which classification of CE is appropriate.
- Does the project change create new impacts or additional impacts that change the project's classification as a CE or EA? Should you be coordinating with additional resource agencies?

# 5. Implementing the NEPA Process

## **Conducting Research and Analysis**

TxDOT has developed a number of technical toolkits that itemize all steps that have to be taken for each environmental consideration.

- Follow these steps closely.
- In audits, the FHWA will be looking for consistent documentation in terms of methods and formats that show well-supported decisions.
- Technical reports need to be prepared by qualified professionals, often with expertise in a particular discipline. Drafts of these reports also need to be reviewed by qualified professionals (including outside consultants and TxDOT staff).
- You must adequately document your results.

# 5. Implementing the NEPA Process

## QA/QC Process

As an Environmental Specialist, your work will be reviewed and approved through TxDOT's QA/QC process. It's important to know what this process is, and where your role will be influenced by the process.

TxDOT integrates quality assurance (QA) and quality control (QC) considerations into its environmental decisions to achieve compliance with applicable laws, regulations, and standards. **QA is devoted to preventing problems, and QC is devoted to identifying and correcting problems.**

The QA/QC processes are in place to prevent possible errors that could become the basis for litigation.

Be sure the participants in the technical review have appropriate technical understanding and experience to provide QA/QC approval (editorial as well as substantive).

# 5. Implementing the NEPA Process

## QA/QC Process

Each QA/QC measure will evaluate the project-level documentation to date, looking for thoroughness, accuracy, errors, and omissions. Project-level documentation can be evidence of communications and meetings, TxDOT checklists, and more. Once each document is reviewed, it officially becomes a part of the project file and administrative record.

Another key requirement is the approval and signature for milestones during project development. Never proceed to a new step without the proper signature.

**For example: For an EA or EIS, the supporting Technical Reports for the project will be reviewed by the core team prior to preparing the Draft Environmental Document. Your draft Environmental Document (EA or EIS), public involvement documentation, and final Environmental Document will also be reviewed.**

Make sure you have identified the **correct person** to sign off on your work.

# 5. Implementing the NEPA Process

## **Coordinating with Resource Agencies**

Under NEPA assignment, you can no longer call the FHWA to ask environmental questions at the project level.

- TxDOT will be penalized during its audits, if you do so.
- In addition to understanding the NEPA process, you must also understand other environmental regulatory processes and their agency coordination requirements.
- The newest Technical Report templates now include coordination triggers.
- Identify additional coordination requirements as early as possible (e.g., if the project triggers TPWD or THC coordination, it will take time, which should be accounted for in the project schedule).

# 5. Implementing the NEPA Process

## Public Involvement

The environmental toolkits indicate what types of public involvement are typically necessary:

- An EIS requires public meetings and a public hearing.
- An EA requires a public meeting and the opportunity for a hearing—or an actual hearing, depending on project details.
- A CE leaves public involvement to the discretion of the team; public involvement is always encouraged to be sure the project team understands issues and concerns of the impacted population.
- The public meeting summary and analysis is part of the public record and can be challenged. For example, were public comments actually addressed? Was there ample notification to appropriate neighborhoods and in languages other than English where necessary?

What's different under NEPA assignment?

- TxDOT now determines whether a “significant level of public controversy” should elevate a project from an EA to an EIS

# 6. The Administrative Record

## Tools and Toolkits

Due to the changes that have come with NEPA assignment, more documentation is now expected in some steps of the NEPA process, and have decreased in other steps. To assist you, TxDOT has developed new tools and guidance for your use in preparing and reviewing environmental documents.

Always go to the TxDOT ENV website and download the most recent version of the following:

### TOOLKITS

- ✓ Archeological Resources
- ✓ Historic Resources
- ✓ Ecological Resources
- ✓ Coastal Barrier Resources
- ✓ Farmland Protection
- ✓ Endangered Species Act
- ✓ TPWD Chapter 26
- ✓ LWCF Section 6(f)
- ✓ USDOT Section 4(f)
- ✓ Water Resources
- ✓ Community Impacts, EJ, and Title VI

### HANDBOOKS

- ✓ Environmental Project Development Overview
- ✓ CE
- ✓ EA
- ✓ EIS
- ✓ Public Involvement
- ✓ Indirect & Cumulative Impacts
- ✓ Bicycle and Pedestrian Considerations
- ✓ Air Quality
- ✓ Traffic Noise
- ✓ Hazardous Materials

# 6. The Administrative Record

## **Resource Agencies and Consultants**

Under assignment, Environmental Specialists are in charge of identifying which Federal Agencies TxDOT must consult and coordinate with. It is important to identify the need to contact agencies **early** in the scoping phase to provide realistic timelines for receiving permits, and to carefully document these decisions and interactions as part of the Administrative Record.

A table on the following slide lists some consultation changes before and after assignment, but is not inclusive of all outside agencies. Always refer to toolkits and handbooks on the TxDOT Environmental Toolkit page for up-to-date information.

# 6. The Administrative Record

## Resource Agencies and Consultants

Examples of changes to interagency consultation before and after NEPA assignment:

| Federal Agency                     | Process before full NEPA Assignment                                                                                                                                                                                    | Process after full NEPA Assignment                                                                                                   |
|------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------|
| Army Corps of Engineers            | Districts coordinate permits, etc., (with ENV assistance as needed).                                                                                                                                                   | New agreement became effective April 1, 2016.                                                                                        |
| Fish and Wildlife Services         | <u>Informal Coordination:</u> Districts coordinate with ENV and ENV submits consultation.<br><u>Formal Consultation:</u> Districts coordinate with ENV, and ENV coordinates with FHWA for submission.                  | <u>Informal Coordination:</u> No Change.<br><u>Formal Consultation:</u> Districts coordinate with ENV and ENV submits consultation.  |
| Coast Guard                        | Districts coordinate permits, etc., (with ENV assistance as needed).                                                                                                                                                   | No Change                                                                                                                            |
| National Marine Fisheries Services | <u>Informal Coordination:</u> Districts coordinate with ENV and ENV submits consultation (since May 2014).<br><u>Formal Consultation:</u> Districts coordinate with ENV, and ENV coordinates with FHWA for submission. | <u>Informal Coordination:</u> No Change.<br><u>Formal Consultation:</u> Districts coordinate with ENV, and ENV submits consultation. |
| Tribal                             | Districts coordinate with ENV, and ENV coordinates with Tribal.                                                                                                                                                        | No change.                                                                                                                           |
| Texas Historical Commission        | Districts coordinate with ENV, and ENV coordinates with THC.                                                                                                                                                           | No Change.                                                                                                                           |

# 6. The Administrative Record

## Meetings and Communication

NEPA assignment is a team effort, so clear and frequent communication is essential. Those involved will vary on project classification.

Start each project off with 1) a site visit to gain a basic understanding of existing environmental conditions and the study area; 2) hold a kickoff meeting with the project team, especially for EAs and EISs; 3) work with your leadership to determine if a formal kickoff meeting is needed for a CE. Here you and your team can set expectations for future communications and milestones.

The team will also need to establish a strong Purpose and Need for the project. The Purpose and Need will anchor the environmental document process. Especially for EAs and EISs, an opportunity for stakeholder involvement in defining the Purpose and Need should be provided (and is required for an EIS).

Any **communication and decision made** will need to be recorded in the Administrative Record, including decisions made over email.

# 7. Common NEPA Challenges

This section includes scenarios that illustrate common NEPA challenges faced by TxDOT Environmental Specialists. Each presents a situation and asks you to think about how you would respond.

1. Change in funding source
2. Change in project design
3. Miscommunications

# 7. Common NEPA Challenges

## **Change in funding source**

A roadway improvement project in your district is classified as a (c)(23) CE, because it was to receive less than \$5 million in total federal funds. After completing the appropriate documentation as a CE and receiving approval, your district was about to issue a construction bid on the project. However, at the last minute, additional federal funds became available for “shovel-ready” projects. A request for additional funding was submitted and the project was selected to receive additional federal funds. With the additional money, the project will now receiving more than \$5 million in total federal funds. How should you proceed?

# 7. Common NEPA Challenges

## **Change in funding source**

If a change in funding (or a change to other constraints) causes the project to no longer meet the requirements of a certain CE, the project just be reclassified and cleared under a new CE classification or as an EA.

If construction on the project has already started, construction will have to stop until the project completes the re-classification process.

For any major project change, always consult the guidelines for choosing the correct CE on the TxDOT Environmental Toolkit website.

# 7. Common NEPA Challenges

## **Change in project design**

Your project is at 30% design from the engineers and your core team is moving forward with the environmental document process as an EA. The drainage report becomes available, leading to a determination that some of the project is now within a newly delineated floodplain. To address drainage issues, a new detention pond is designed that would impact wetlands. In addition, an important archeological site is identified where the pond is proposed and the public is now opposed to the project, bringing the project classification up to an EIS.

Can resource documentation completed earlier in the project still be used or will the environmental experts need to begin again? Are the public participation inputs collected so far still valid?

# 7. Common NEPA Challenges

## **Change in project design**

All documentation completed up to this point now has to be updated and revised to include consideration of these issues, but it may not be necessary to start fresh.

The public involvement aspect of project development must now be restarted, so that the public has an opportunity to express their opinions on the newly discovered impacts.

Always consult with the handbooks and toolkits prepared by TxDOT to confirm the requirements of each classification.

# 7. Common NEPA Challenges

## **Miscommunication: Identifying Resources**

At the request of your supervisor, you have completed a Scope Development Tool form assuming there are no historic structures that would be affected. Later, while preparing the Technical Report, a consultant identifies a historic resource that was not identified during your scoping preparation. Due to design constraints on the opposite side of the road (there is a public school that is also historic), the design team opts to prepare an intensive investigation into the importance of the historic structure that cannot be avoided.

A Section 106 coordination process is required due to adverse effect, and a costly and time-consuming Section 4(f) documentation process is required. **Better coordination** with the historian may have helped prevent that situation if discussed at the kickoff meeting.

# 7. Common NEPA Challenges

## **Miscommunication: Design Changes**

A bridge replacement project is underway as a c-list CE. When the water resources specialist performs the jurisdictional determination and wetland delineation, the specialist initially determines that impacts to waters off the U.S. could be processed under a Nationwide Permit with Pre-Construction Notification to the U.S. Army Corps of Engineers (USACE). However, a design change (that had not been provided to you) requires that the bridge be supported with additional bents, which necessitates placing more than a half acre of fill in U.S. waters—now requiring an Individual Permit with USACE. The project is now disqualified from being processed as a c-list CE. What is the next step?

# 7. Common NEPA Challenges

## **Miscommunication: Design Changes**

Determine the appropriate timeline for the Individual Permit. If no other substantial environmental impacts are required, coordinate with the TxDOT Environmental Affairs Division to find out if the project can be processed as a d-list CE with peer review and District-level approval. If not, it is possible that an EA may be required.

At the beginning of each project, it is critical to establish communication expectations with the entire team, including consultants, engineers, local government staff, and others. There should be a clear expectation that changes will be communicated immediately.

# Wrap Up

- Assignment of responsibility for environmental decision-making from the FHWA to TxDOT can result in faster project delivery, but TxDOT will need more detailed information along the way to ensure defensible decisions.
- Under NEPA assignment, you are responsible for identifying and consulting with resource agencies for numerous protected resources. This can have a significant impact on project timelines.
- As the grease that keeps the NEPA process moving, you play a key role in facilitating communication and gathering information about the project and any changes.

# Wrap Up

- Remember that if any environmental document (CE, EA, or EIS) is challenged, all decisions along the way could be challenged, including your role in the project!
- During a lawsuit, a judge will typically rely solely on the administrative record developed throughout the project. The AR must be accurate and detailed.
- Always refer to the TxDOT Environmental Compliance Toolkits to ensure that your projects are completely correctly and efficiently.

# NEPA Assignment

Local Governments

# Purpose of this Training Module

**Purpose:** The purpose of this training is to provide an overview of recent changes to TxDOT's responsibilities under the National Environmental Policy Act of 1969 (NEPA). This training module has been tailored to emphasize how these changes impact the role of local governments and their daily responsibilities on the job.

**Outline:**

1. Understanding NEPA
2. NEPA Assignment
3. Project Class of Action
4. Implementing the NEPA Process

**Quiz:** Your understanding of this training module will be assessed with a short quiz.

# 1. Understanding NEPA

NEPA is the National Environmental Policy Act of 1969.

“In enacting NEPA, Congress recognized that nearly all Federal activities affect the environment in some way and mandated that before Federal agencies make decisions, they must consider the effects of their actions on the quality of the human environment. Under NEPA, CEQ works to balance environmental, economic, and social objectives in pursuit of NEPA’s goal of ‘productive harmony’ between humans and the human environment.”

*U.S. Council on Environmental Quality*

NEPA is a U.S. environmental law that requires practitioners to consider the effects of their actions on the quality of the human and natural environment.

# 1. Understanding NEPA

## **When is NEPA compliance required?**

- NEPA compliance is required when an action uses any amount of federal funding.
- State-funded projects or those in the state's right-of-way follow a similar State of Texas environmental process. Be aware that the environmental process is a critical path for any transportation project, regardless of whether federal funding is being used.
- A project cannot proceed to letting or right-of-way acquisition prior to NEPA clearance.

## **What are the requirements of NEPA?**

- NEPA is a procedural law that regulates how and whether impacts on the human and natural environment are assessed and mitigated.
- Challenges to NEPA decisions are brought under the Administrative Procedures Act.
- Assuming the project meets a legitimate public purpose, NEPA does not require that the final action preserve the natural environment at all costs; depending on the resource, mitigation of impacts may be permissible.
- Permitting or mitigation measures required by other regulations are also part of the NEPA process.

# 1. Understanding NEPA

## **What are the products of the NEPA process?**

Due diligence under NEPA requires that you document the **impacts of the project** and **maintain an Administrative Record**.

- 1. Document** - Depending on the *project class of action*, this decisional document can vary in size and analytical depth, identifying all potential environmental impacts of the project. The three *class of actions* will be discussed shortly. It is your responsibility to know which type of study is appropriate for any given project.
- 2. Administrative Record** - an electronic filing system that holds formal and informal documents showing that the correct process was followed in support of an environmental decision. The administrative record is reviewed for annual audits and is relied upon in the event of litigation. (Note: historically, the AR was literally a physical project file).

# 1. Understanding NEPA

Other regulations and Executive Orders can be a part of the NEPA process, if a resource covered by another regulation is affected.

| Regulation                                                 | Resource                                                              |
|------------------------------------------------------------|-----------------------------------------------------------------------|
| Section 4(f) of the Department of Transportation Act       | Publicly owned Parks and Recreation Facilities;<br>Historic Resources |
| Section 106 of the National Historic Preservation Act      | Historic and Archeological Resources                                  |
| Section 7 of the Endangered Species Act                    | Threatened and Endangered Species                                     |
| Section 404 of the Clean Water Act                         | Waters and Wetlands                                                   |
| Executive Order 12898; E.O. 13166                          | Environmental Justice; Limited English Proficiency                    |
| Several Other Regulations affecting a variety of resources | See TxDOT Environmental Specialist Toolkit for complete list          |

- Some parallel regulations exist at the state level for most of these resources and they would apply for state-funded projects.
- You should be familiar with these regulations and be prepared to work with TxDOT and the respective authorities to meet their environmental procedures.
- To learn more about these regulations, see TxDOT's **Environmental Compliance Toolkit**.

# 1. Understanding NEPA

## Key Responsibilities

Local governments play a key role in the NEPA process by

- Pursuing projects that are consistent with their formal planning processes, such as the Transportation Improvement Plan (TIP) or the Metropolitan Transportation Plan (MTP)
- Ensuring a collaborative effort with the TxDOT District and the TxDOT Environmental Affairs (ENV) Division
- Communicating any changes to the project—you may be the liaison between consultants and TxDOT
- Acting as the public face of your agency and supporting TxDOT partners
- Informing local elected officials of key aspects of project
- Ensuring your involvement in any public outreach. Public outreach is an opportunity to collect information from the public that can be helpful to the project, as well as address any misunderstandings about the project.
- TxDOT has a Local Government Projects toolkit:  
<http://www.txdot.gov/government/processes-procedures/lgp-toolkit.html>

## 2. NEPA Assignment

**Moving Ahead for Progress in the 21<sup>st</sup> Century (MAP-21)** is a federal transportation law (2012) that allows the FHWA to “assign” or delegate the review and approval NEPA documents to state Departments of Transportation (DOTs). Under NEPA assignment, DOTs assume the FHWA’s authority and make independent environmental determinations.

Texas was the second state to assume this responsibility in December 2014. TxDOT sought NEPA assignment because it is hoped that it will shorten project review periods, allow TxDOT to develop a more robust review process, and cut project costs where possible.

Another important note about the NEPA assignment is that the **State of Texas has waived sovereign immunity**, meaning the TxDOT can be sued over an environmental decision. Unlike the past, the State of Texas must provide its own legal defense in federal court including the costs of any judgments against it. **NEPA assignment means that any decision made by a local government can be examined in court and TxDOT (not the FHWA) will be responsible for defending it.**

## 2. NEPA Assignment

### **New Responsibilities under Assignment**

The basic roles and responsibilities of local government have not changed before and after TxDOT's assignment of federal NEPA responsibilities.

Since TxDOT now has the final authority over environmental decisions, you should expect a more thorough collaboration with TxDOT's District personnel and work to support their need for robust documentation.

You may also be asked to demonstrate justification for your role in decisions made during the project development process, the "NEPA phase." Close coordination among local government staff, TxDOT, and any supporting consultants is necessary throughout project development.

# 3. Project Class of Action

## **What is meant by a “NEPA project Class of Action”?**

Depending upon the project’s scope, location, amount of federal funding, and environmental impacts, a project can be classified as either a Categorical Exclusion (CE), an Environmental Assessment (EA), or an Environment Impact Statement (EIS) for environmental review.

Within the last two classifications (EA & EIS), additional processes can arise, depending upon the project.

Most TxDOT projects are classified as CEs. However, when an EA or an EIS is undertaken, it will increase the commitment of time and energy expended.

TxDOT and the local governments must be prepared for all types of environmental regulatory compliance. Under NEPA assignment, TxDOT may or may not have the authority to approve all decisions that fall under the NEPA umbrella.

# 3. Project Class of Action

## What is a Categorical Exclusion?

Categorical exclusions (CEs) apply to non-controversial actions that are known to have negligible impacts. Actions that can be categorically excluded are listed in the code of federal regulations.

When classifying a project as a CE, know that each classification has certain **constraints** associated with it. Be sure to reference TxDOT's *Guidance for Choosing a Categorical Exclusion* in the Environmental Compliance Toolkit.

There are two categories:

- c-list: The c-list CEs fall into explicitly defined categories. With proper technical documentation, a c-list CE project can be cleared by the Environmental Specialist at the District level.
- d-list: These projects may be designated as CEs after technical documentation that the project does not result in environmental impacts that elevate it to an EA level (requires peer review at the district level).

# 3. Project Class of Action

## **Classification as a CE**

CEs must not have unusual circumstances leading to:

- Significant environmental impacts
- Substantial controversy on environmental grounds
- Significant impact on properties protected under Section 4(f) or under Section 106 of the National Historic Preservation Act
- Inconsistencies with any federal, state, or local law, requirement or administrative determination relating to the environmental aspects of the action

The project file must demonstrate the following:

- The project fits within the selected CE category
- The project does not have unusual circumstances
- The project has independent utility
- The project has logical termini (for linear facilities)
- The determination does not restrict consideration of alternatives for other reasonably foreseeable projects

# 3. Project Class of Action

## **Determining the correct type of Categorical Exclusion**

There are 30 “c-list” CE types, plus the “open-ended d-list CE”. A d-list CE does not have sufficient impacts to elevate the project to an EA. A d-list CE requires a District-Engineer-level peer review.

It is critical for a project to be properly classified, if a Categorical Exclusion is being used for environmental compliance. Refer to TxDOT’s manual entitled *Guidance: Choosing a Categorical Exclusion* to help you better understand where your project falls.

TxDOT’s *CE Determination Form* will also need to be completed. The TxDOT website has documentation that will help staff identify the best fit for a categorical exclusion.

# 3. Project Class of Action

## What are the main components of a Categorical Exclusion?

CEs require the least complex documentation process. Milestones for preparing a CE include:

- Project scoping
- Complete studies, reports, documentation
- The Department Delegate will make the environmental decision and will sign determination form
- Project sponsor submits CE documentation

## Who is the TxDOT Department Delegate?

- c-list CE: anyone with signing authority, including **Environmental Specialists**
- d-list CE: District Engineer or District Administrator

# 3. Project Class of Action

## **What is an Environmental Assessment?**

An **Environmental Assessment (EA)** is prepared when an action may or may not have a significant impact on resources. An EA is used when an EIS is not required, but the action is not eligible to be processed as a CE.

EAs can have two outcomes. If a project's impacts on resources is limited, TxDOT will issue a "Finding of No Significant Impact" or a FONSI. The project may then proceed to letting. However, if a significant impact is found that cannot be resolved, an EIS must be prepared for the project.

Under NEPA assignment, EAs will now be approved by the Director of Environmental Affairs Division (ENV).

# 3. Project Class of Action

## **What are the main components of an Environmental Assessment?**

The Technical Reports that document the studies on resource impacts are similar for both CEs and EAs. However, due to their increased complexity, EAs have more project milestones:

- Complete scope development
- Hold kickoff meeting
- Research, prepare, and submit draft Technical Reports
- Undertake agency coordination, resolve issues
- Review and publish draft EA
- Offer opportunity for public involvement
- Prepare final EA and FONSI
- Approve FONSI or proceed as an EIS

TxDOT's Environmental Affairs Division Director has the signature authority for FONSI.

# 3. Project Class of Action

## **What is an Environmental Impact Statement?**

An **Environmental Impact Statement (EIS)** is prepared for major actions that would have a significant impact on the human or natural environment. These may either be large projects, highly controversial, largely on new location, or located in a sensitive resource area (such as an endangered species habitat).

The U.S. Code of Federal Regulations provides examples of projects typically requiring an EIS:

- Controlled access freeway
- Highway with four or more lanes in a new location
- New construction or extension of a separate roadway for buses or high occupancy vehicles

# 3. Project Class of Action

## **Main components of an Environmental Impact Statement**

EISs require the most extensive documentation and public input. They are completed in a draft EIS (DEIS) phase and a final EIS (FEIS) phase. Milestones of the EIS process are:

- Letter of initiation
- Publish Notice of Intent (NOI)
- Invitation of other agencies, scoping, and kickoff meeting
- Two public meetings (typically)
- DEIS preparation assessing multiple alternatives, review, and publication
- Public hearing
- FEIS preparation (including preferred alternative and No Build)
- Publish Notice of Availability (NOA) and Record of Decision (ROD)

TxDOT's Environmental Affairs Division Director has the sole authority to issue a ROD for an EIS.

# 4. Implementing the NEPA Process

## **Project Sponsor**

Local governments can opt to be the project sponsor or not. This will be decided when entering into the Advanced Funding Agreement with TxDOT (which is the first step to initiating the project and receive project funding). Being the project sponsor means your office will complete all environmental processes, and then work with the District to receive approval. Some local governments do not have the staffing power to take on the project sponsor role, so the District is prepared to fill the project sponsor role if you are unable. Often, experienced consultants work to support Local Governments through the environmental documentation process.

## **Formal Planning Process**

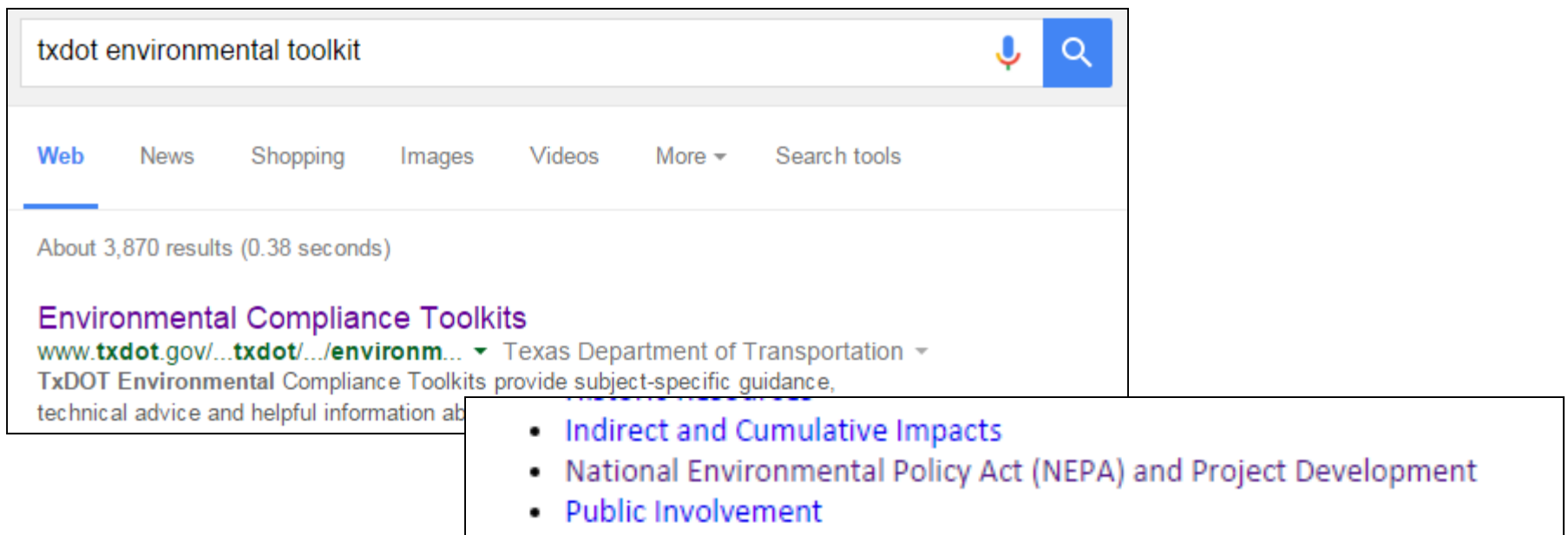
State and federal regulations require that a project be included in the regional TIP and the MTP to receive funding. You should begin coordination with your local MPO immediately after becoming the local sponsor of a project to determine if your project meets the above requirements.

# 4. Implementing the NEPA Process

## Tools and toolkits

Due to the changes that have come with NEPA assignment, more documentation is now expected in some steps of the NEPA process, and have decreased in other steps. To assist you, TxDOT has developed new tools and guidance for your use in preparing and reviewing environmental documents.

Always go to the TxDOT ENV website and download the most recent version.



The screenshot shows a Google search interface with the query "txdot environmental toolkit". The search results are filtered to the "Web" tab. The top result is titled "Environmental Compliance Toolkits" and is from the website "www.txdot.gov/...txdot/.../environm...". The snippet below the title reads: "Texas Department of Transportation ▾ TxDOT Environmental Compliance Toolkits provide subject-specific guidance, technical advice and helpful information ab". A callout box on the right side of the image contains a bulleted list of topics covered by the toolkits:

- Indirect and Cumulative Impacts
- National Environmental Policy Act (NEPA) and Project Development
- Public Involvement

# 4. Implementing the NEPA Process

## Meetings and Communication

NEPA assignment is a team effort, so clear and frequent communication is essential. Those involved will vary on project classification.

Start each project off with 1) early communication with TxDOT's Environmental Coordinator in your District; and 2) a kickoff meeting to set expectations for future communication and landmarks.

Local Governments should help identify a project's known environmental issues during the early stages of coordination.

Any **communication and decision made** will need to be recorded in the administrative record, including decisions made over email.

Local governments can choose whether their consultants attend TxDOT meetings. It is advisable to get everyone the same page, and experienced consultants can provide constructive support if involved from the beginning.

# 4. Implementing the NEPA Process

## **Project Initiation and Scope Development**

Scope Development is a collaborative effort between the local government and the TxDOT District personnel. Be sure to utilize TxDOT's Scope Development Toolkit as an early deliverable.

The Scope Development Tool documents the following:

- Project Description: sponsor, type of project, anticipated federal permits, ROW and easements, relocations, tolling, major resource impacts, etc.
- Anticipated Environmental Classification: How will the project be classified—(c)-list CE, (d)-list CE, EA, or EIS—and is this classification justified? Remember that proper project classification is key to avoiding project delays and having to redo work.
- Major Resource Issues: air quality, cultural, community impact, water resources, biological resources, hazardous materials, noise, parklands, indirect and cumulative impacts, public involvement, etc.

Use TxDOT's *Instructions for Using the Scope Development Tool* to assist you with completing the form. The key is to understand the need and purpose of the project and how the proposed design will address them. Note that this tool can be updated as the project proceeds.

# 4. Implementing the NEPA Process

## QA/QC Process

Your work will be reviewed and approved through TxDOT's QA/QC process. It's important to know what this process is, and where your role will be influenced by the process.

TxDOT integrates quality assurance (QA) and quality control (QC) considerations into its environmental decisions to achieve compliance with applicable laws, regulations, and standards. **QA is devoted to preventing problems, and QC is devoted to identifying and correcting problems.**

The QA/QC processes are in place to prevent possible errors that could be brought up during litigation.

# 4. Implementing the NEPA Process

## **QA/QC Process**

Each QA/QC measure will evaluate the project-level documentation to date, looking for thoroughness, accuracy, errors, and omissions. Project-level documentation can be evidence of communications and meetings, TxDOT checklists, and more. Once each document is reviewed, it officially becomes a part of the project file and administrative record.

Another key requirement is the approval and signature of each procedure. These are required before the environmental document can progress onto the next step, review, or documentation.

An EA or EIS project's Technical Report will be reviewed by the core team before the you can start preparing the Draft Environmental Document. The draft Environmental Document, public hearing documents, and final environmental document will also be reviewed.

# 4. Implementing the NEPA Process

Other things to remember:

- If the design changes, initiate a re-evaluation because it may affect project classification (see Re-Evaluation Toolkit).
- As a project sponsor, you can perform environmental studies and technical reports on your own, or with a consultant, but submit everything to the District for approval.
- Perform your own QC and QA over any documents.

# Wrap Up

Remember the specific role changes if a local government agency is the project sponsor:

- Follow the TxDOT handbooks for local government project sponsors.
- Project sponsors accept responsibility for preparing the environmental review document and performing any related tasks.
- Prepare a legally sufficient project file. If you're not the project sponsor, you must provide all documentation to the district.

# Wrap Up

- The NEPA process looks at how infrastructure development can occur while minimizing adverse impacts on the natural, cultural, and human environment.
- NEPA is required when any federal money is spent, and state-funded projects have a similar process.
- Assignment of environmental decision-making responsibility from the FHWA to TxDOT can result in faster project delivery, but TxDOT will need more detailed information along the way to ensure defensible decisions
- Your basic role in developing projects that meet public need and purpose and steering locally-important projects through clearance to letting has not changed under NEPA assignment; however, your responsibility to accurately and thoroughly ensure all decisions are clearly documented in the administrative record has increased.
- You and your team's decisions can be challenged in court, so be ready!



# NEPA Assignment

TxDOT Management

# Training

**Purpose:** The purpose of this training is to provide an overview of recent changes to TxDOT's responsibilities under NEPA. This training module has been tailored to emphasize how these changes impact the role of TxDOT's management and their daily responsibilities on the job.

**Outline:**

1. Understanding NEPA
2. NEPA Assignment
3. Project Class of Action
4. Implementing NEPA
5. Common NEPA Challenges

# 1. Understanding NEPA

NEPA is the National Environmental Policy Act of 1969.

“In enacting NEPA, Congress recognized that nearly all Federal activities affect the environment in some way and mandated that before Federal agencies make decisions, they must consider the effects of their actions on the quality of the human environment. Under NEPA, CEQ works to balance environmental, economic, and social objectives in pursuit of NEPA’s goal of ‘productive harmony’ between humans and the human environment.”

*U.S. Council on Environmental Quality*

# 1. Understanding NEPA

## **When is NEPA compliance required?**

- NEPA compliance is required when an action uses **any amount** of federal funding.
- State-funded projects or those in the state's right-of-way follow a similar State of Texas environmental process. Be aware that the environmental process is a critical path for any transportation project, regardless of whether federal funding is being used.
- A project cannot proceed to letting or right-of-way acquisition prior to NEPA clearance.

## **What are the requirements of NEPA?**

- NEPA is a procedural law that regulates how and whether impacts on the human and natural environment are assessed.
- Challenges to NEPA decisions are brought under the Administrative Procedures Act.
- Assuming the project meets a legitimate public purpose, NEPA does not require that the final action preserve the natural environment at all costs; depending on the resource, mitigation of impacts may be permissible.
- Permitting or mitigation measures required by other regulations are also part of the NEPA process.
- See NEPA Case Law Technical Memo for more information.

# 1. Understanding NEPA

## What are the products of the NEPA process?

1. An **administrative record** demonstrating that the NEPA process was followed to the letter and intent of the law and the decision-making process would withstand the “hard look” test.
2. An **environmental decision** that includes documentation of environmental resources that may be affected by the action; descriptions of the anticipated impacts of various proposed alternatives, including a no-build alternative; and identification of a preferred alternative, along with any mitigation actions.

Documentation can vary in size and depth of analysis depending on the class of action. Three classes of action, from least to most complex, are:

- Categorical Exclusion (CE)
- Environmental Assessment (EA)
- Environmental Impact Statement (EIS)

These classes will be discussed in more detail in Section 3.

# 1. Understanding NEPA

Other regulations and executive orders can be a part of the NEPA process if a resource covered by another regulation is affected.

Parallel regulations exist at the state level for most of these resources and they would apply for state-funded projects. For example, historic and archeological resources are regulated nationally through the National Historic Preservation Act and are managed at the state level through the Antiquities Code of Texas.

| Regulation                                                 | Resource                                                           |
|------------------------------------------------------------|--------------------------------------------------------------------|
| Section 4(f) of the Department of Transportation Act       | Publicly Owned Parks and Recreation Facilities; Historic Resources |
| Section 106 of the National Historic Preservation Act      | Historic and Archeological Resources                               |
| Section 7 of the Endangered Species Act                    | Threatened and Endangered Species                                  |
| Section 404 of the Clean Water Act                         | Waters and Wetlands                                                |
| Executive Order 12898; E.O. 13166                          | Environmental Justice; Limited English Proficiency                 |
| Several other regulations affecting a variety of resources | See TxDOT Environmental Toolkit for complete list                  |

# 1. Understanding NEPA

## **Management's Role Under NEPA**

TxDOT management has a key role during the NEPA process by

- ensuring that staff correctly follow NEPA and other processes,
- approving environmental documents, and
- acting as the public face of TxDOT representing FHWA.

## 2. NEPA Assignment

**Moving Ahead for Progress in the 21<sup>st</sup> Century (MAP-21)** is a federal transportation law (2012) that allows the FHWA to “assign” or delegate the review and approval NEPA documents to state Departments of Transportation (DOTs). Under NEPA assignment, DOTs assume the FHWA’s authority and make independent environmental determinations.

In December 2014 Texas became the second state (following California) to assume this responsibility. TxDOT sought NEPA assignment because it is hoped that it will shorten project review periods, allow TxDOT to develop a more robust review process, and cut project costs where possible.

## 2. NEPA Assignment

In this role, TxDOT is now the **lead agency** for document preparation and **review**. Under this arrangement, TxDOT:

- Cannot ask the FHWA for project-level help on NEPA issues
- Must manage interagency coordination without federal intervention
- Has waived sovereign immunity; TxDOT can now be sued for environmental decisions made in the NEPA process. TxDOT is now solely responsible for any decisions against the agency and the State of Texas must pay its own legal expenses and the costs of any judgments or mitigation.

Under NEPA assignment, the FHWA retains three responsibilities:

1. Air quality conformity determinations
2. Government-to-government consultation with Native American Tribes
3. USDOT responsibilities for statewide and metropolitan planning

Transit-related NEPA studies that involve TxDOT will continue to fall under the overview of the Federal Transit Agency (FTA) and are not eligible for NEPA assignment

## 2. NEPA Assignment

| Responsibility                                                  | Prior to NEPA Assignment | Under NEPA Assignment |
|-----------------------------------------------------------------|--------------------------|-----------------------|
| Determining class of action (CE, EA, or EIS)                    | FHWA                     | TxDOT                 |
| Preparing supporting technical studies                          | TxDOT                    | TxDOT                 |
| Preparing NEPA Environmental Review document                    | TxDOT                    | TxDOT                 |
| Responsible for state and federal resource agency consultations | FHWA                     | TxDOT                 |
| Approves and files NEPA document                                | FHWA                     | TxDOT                 |
| Defends NEPA document in federal court, in case of lawsuit      | FHWA/DOJ                 | TxDOT/<br>TXOAG       |

## 2. NEPA Assignment

The Memorandum of Understanding (MOU) between TxDOT and the FHWA defines the terms of the assignment of responsibilities for NEPA. There are fourteen sections, each listed below.

Part 1: Purpose of Memorandum

Part 3: Assignment and Assumption of  
Responsibilities

Part 5: Applicability of Federal Law

Part 7: Involvement with Other Agencies

Part 9: Withdrawal of Assigned  
Responsibilities

Part 11: Audits

Part 13: Term, Termination, and Renewal

Part 2: [Blank, Reserved for Future Use]

Part 4: Certifications and Acceptance of  
Jurisdiction

Part 6: Litigation

Part 8: Involvement with FHWA

Part 10: Performance Measures

Part 12: Training

Part 14: Amendments

## 2. NEPA Assignment

The MOU specifies that:

- TxDOT has assumed federal responsibility for NEPA and compliance with other federal environmental regulations.
- TxDOT's sovereign immunity has been waived for NEPA decisions—TxDOT can be sued and will have to defend itself.
- TxDOT acts as the lead federal agency. The FHWA will not intervene in interagency conflicts or provide project-level environmental assistance.
- The FHWA will conduct audits based on performance measures listed in the MOU. These are also supported by TxDOT self-audits.
- Federal funding can be retracted, if a project is not being executed per the correct environmental processes.

## 2. NEPA Assignment

Under NEPA assignment, some management roles will have signature authority for environmental documents.

You should always be aware of what you are signing and be certain that you have the correct signature authority for the document. Your signature indicates that the environmental document was prepared correctly.

In the event of a lawsuit, a federal court will be assessing whether you exercised this authority appropriately.

## 2. NEPA Assignment

| Document Classification        | TxDOT Employee with Signature Authority                                                                                                                                            |
|--------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| c-list Categorical Exclusion   | <ul style="list-style-type: none"><li>• Environmental Specialist</li><li>• District Engineer or District Administrator</li><li>• Director Environmental Affairs Division</li></ul> |
| d-list Categorical Exclusion   | <ul style="list-style-type: none"><li>• District Engineer or District Administrator</li><li>• Director Environmental Affairs Division</li></ul>                                    |
| Environmental Assessment       | <ul style="list-style-type: none"><li>• Director Environmental Affairs Division</li></ul>                                                                                          |
| Environmental Impact Statement | <ul style="list-style-type: none"><li>• Director Environmental Affairs Division and Cooperating Agencies</li></ul>                                                                 |

If there is uncertainty about who has signature authority, contact the Environmental Affairs Division for guidance. Improper signatures will delay projects and be documented on FHWA audits of TxDOT.

# 3. Project Class of Action

The required environmental process to follow depends on the project's funding source and the affected resources. For federally funded projects, there are three possible classifications of an action:

- Categorical Exclusion (CE)
- Environmental Assessment (EA)
- Environmental Impact Statement (EIS)

The project design may determine its effects on different resources. For example, the selected design may introduce or remove a threat to wetlands, wildlife, or vulnerable populations.

Because a design change or other changes to the project can impact the timeline of the environmental process or even the type of documentation that is required, it is critical that TxDOT staff, resource agency staff, consultants, and **local government staff and elected officials communicate regularly and effectively. Management needs to support and promote this coordination.**

# 3. Project Class of Action

Categorical Exclusions (CE) apply to projects that do not individually or cumulatively have a significant effect on the environment. Most projects will be classified as CEs, and the environment documentation process will be straightforward. However, even within CEs there can be challenges.

To be processed as a CE, the project cannot result in significant:

- Relocation of people
- Impact on natural, cultural, recreational, historic, or other resources
- Impact on air, noise, or water quality
- Individual or cumulative impacts

Unusual circumstances that preclude a CE include:

- Controversy on environmental grounds, or opposition from the public
- Properties protected by other regulations, such as endangered species
- Inconsistencies with local, state, or federal requirements or procedures

# 3. Project Class of Action

There are 30 transportation activities that comprise CEs listed in 23 CFR 771.117, called “c-list” CEs. For example:

- c(1): Activities which do not involve or lead to construction
- c(3): Construction of bicycle and pedestrian lanes, paths, and facilities
- c(18) Track and railbed maintenance within existing right-of-way

When a CE is applied to a project, know that each classification has certain **constraints** associated with it. Some examples of limitations are below:

- c(22) must take place entirely within existing right-of-way
- C(26, 27, 28) cannot be used if one of several “section (e)” constraints (environmental or cultural impacts) exist

Because of these constraints, it is critical to communicate any design changes to the environmental specialist coordinating the project **as soon as possible, since it may result in a reclassification of the project to another type of CE.**

Actions that are not c-listed, but may meet the requirements of a CE, can be documented as a “d-list” CE. These CEs will require a more rigorous justification to receive approval and to be processed as a CE project.

# 3. Project Class of Action

CEs should require the least complex documentation process. See TxDOT Environmental Toolkits for detailed guidance. Milestones for CEs include:

- Project scoping
- Complete studies, reports, documentation
  - ❑ Note that all environmental resource categories have to be considered—if a Technical Report is not required, this should be documented within the project file; a “negative declaration” is proof that a particular resource would not be adversely affected.
- Submit CE documentation
- The TxDOT-ENV delegate makes the environmental decision and signs determination form
- *Kickoff meetings may or may not be necessary, depending on the complexity of the CE. During the meeting, design benchmarks for future meetings should be determined.*

Who can sign CEs?

- c-list: Anyone with signing authority at the District level; including an Environmental Specialist
- d-list: District Engineer or Administrator

# 3. Project Class of Action

For projects with substantial impacts or potential for controversy, an environmental assessment (EA) or an environmental impact statement (EIS) is prepared. **The purpose of an EA is to determine if an EIS is necessary.** Many projects have too many impacts to be processed as a CE, but by demonstrating an in-depth “hard look” within the EA analysis, the document can be cleared without an EIS.

An analysis of alternatives is a key component of an EA or an EIS, so multiple designs will be proposed as a part of the process.

EAs can have two outcomes:

- If minimal impacts to resources are expected, and the documentation demonstrates that impacts have been avoided, minimized, or mitigated, TxDOT may issue a “finding of no significant impact” or FONSI. The project may then proceed to letting.
- If a significant impact is found, an EIS may need to be prepared for the project. An EIS requires that multiple feasible options are analyzed to an equivalent level of detail in the Draft EIS. The preferred alternative is typically documented in the Final EIS.

# 3. Project Class of Action

EAs have more project milestones than CEs due to the public involvement process and evaluation of alternatives, including:

- Complete scope development and hold kickoff meeting
- Research, prepare, and submit draft Technical Reports on Alternatives
- Undertake agency coordination and resolve issues
- Review and publish draft EA addressing preferred alternative versus No Build
- Offer opportunity for public involvement
- Respond to public and agency comments and prepare final EA and FONSI
- TxDOT approves FONSI or proceeds with preparing an EIS

The TxDOT Environmental Affairs Division Director has signature authority for the final environmental documents.

# 3. Project Class of Action

EISs are typically prepared for major actions that would have a significant impact on the human or natural environment. These may either be large projects, highly controversial, largely on new location, or located in a sensitive resource area (such as an endangered species habitat).

Several potential alternative designs, including the “no build” option, are documented to an equivalent level of detail to help identify a project that best meets the purpose and need while minimizing impacts on the human and natural environment.

U.S. Code of Federal Regulations provides examples of projects requiring an EIS:

- Controlled-access freeway
- Highway with four or more lanes in new location
- New fixed guideway systems, such as rail or bus rapid transit
- New construction or extension of a separate roadway for buses or high occupancy vehicles

Remember that if any environmental document (CE, EA, or EIS) is challenged, all decisions along the way could be challenged!

# 3. Project Class of Action

An EIS requires more detailed documentation and a significant public participation process. It is initially completed as a Draft EIS (DEIS) and, upon approval, as a Final EIS (FEIS). Milestones of the EIS process are:

- Letter of initiation
- Published Notice of Intent (NOI)
- Invitation to identify Participating and Cooperating agencies
- Invitation to other agencies to participate in scoping and kickoff meeting
- Two public meetings (typically)
- DEIS preparation, review, and publication
- Public hearing
- Response to comments, revision and resubmittal process
- FEIS preparation on Preferred Alternative versus No Build
- Published Notice of Availability (NOA) and Record of Decision (ROD)

The TxDOT Environmental Affairs Division Director has the approval authority for an EIS. There may be co-signatories, if other agencies are cooperating agencies.

# 4. Implementing NEPA

## **Project Initiation and Scope Development**

TxDOT's Scope Development Tool (within the ENV toolkit) will be used at the start of the project to identify issues. The tool's output is part of the administrative record.

The Scope Development Tool documents the following:

- Project Description: sponsor, type of project, anticipated federal permits, ROW and easements, relocations, tolling, major resource impacts, etc.
- Anticipated Environmental Classification: How will the project be classified—(c)-list CE, (d)-list CE, EA, or EIS—and is this classification justified? Remember that proper project classification is key to avoiding project delays and having to redo work.
- Major Resource Issues: air quality, cultural, community impact, water resources, biological resources, hazardous materials, noise, parklands, indirect and cumulative impacts, public involvement, etc.

Use TxDOT's *Instructions for Using the Scope Development Tool* to assist you with completing the form. The key is to understand the need and purpose of the project and how the proposed design will address them. Note that this tool can be updated as the project proceeds.

# 4. Implementing NEPA

## **Coordinating with Resource Agencies**

Under NEPA assignment, you can no longer call the FHWA to ask environmental questions at the project level.

- TxDOT will be penalized during its audits if you do so
- In addition to understanding the NEPA process, you must also understand other environmental regulatory processes and their agency coordination requirements
- The newest Technical Report templates now include coordination triggers
- Identify additional coordination requirements as early as possible (e.g., if the project triggers TPWD or THC coordination, it will take time, which should be accounted for in the project schedule)

# 4. Implementing NEPA

## **Working with Other Entities**

For all project classifications, TxDOT may be working with outside entities. Local government sponsors, environmental and engineering consultants, and state and federal resource agencies are all involved in the NEPA process.

At the management level, you play a critical role in facilitating this communication and establishing relationships across entities.

# 4. Implementing NEPA

## Coordinating with Resource Agencies

This table compares interagency coordination before and after NEPA assignment for some resource agencies, but it is not inclusive of every entity TxDOT works with.

| Federal Agency                     | Process before full NEPA Assignment                                                                                                                                                                                    | Process after full NEPA Assignment                                                                                                   |
|------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------|
| Army Corps of Engineers            | Districts coordinate permits, etc., (with ENV assistance as needed).                                                                                                                                                   | New agreement became effective April 1, 2016.                                                                                        |
| Fish and Wildlife Services         | <u>Informal Coordination:</u> Districts coordinate with ENV and ENV submits consultation.<br><u>Formal Consultation:</u> Districts coordinate with ENV, and ENV coordinates with FHWA for submission.                  | <u>Informal Coordination:</u> No Change.<br><u>Formal Consultation:</u> Districts coordinate with ENV and ENV submits consultation.  |
| Coast Guard                        | Districts coordinate permits, etc., (with ENV assistance as needed).                                                                                                                                                   | No Change                                                                                                                            |
| National Marine Fisheries Services | <u>Informal Coordination:</u> Districts coordinate with ENV and ENV submits consultation (since May 2014).<br><u>Formal Consultation:</u> Districts coordinate with ENV, and ENV coordinates with FHWA for submission. | <u>Informal Coordination:</u> No Change.<br><u>Formal Consultation:</u> Districts coordinate with ENV, and ENV submits consultation. |
| Tribal                             | Districts coordinate with ENV, and ENV coordinates with Tribal.                                                                                                                                                        | No change.                                                                                                                           |
| Texas Historical Commission        | Districts coordinate with ENV, and ENV coordinates with THC.                                                                                                                                                           | No Change.                                                                                                                           |

# 4. Implementing NEPA

## **Quality Assurance and Quality Control**

Every form or approval step is a benchmark in the quality assurance (QA) and quality control (QC) process which may be audited by the FHWA per the MOU.

For a guide to TxDOT's QA/QC program, see the TxDOT Environmental Affairs Division website.

**Your signature is a major step in the QA/QC process** – Your review and approval indicates that the document was created according to the correct and legally defensible procedure.

# 4. Implementing NEPA

TxDOT management acts as the final gatekeeper of NEPA documents under NEPA assignment.

- Always know what you are signing and whether you have signature authority for the specific type of document requiring signature
- Facilitate and require frequent communication among all involved parties
- Be aware of the potential impacts of changing a project and related impacts on the NEPA process
  - Design, funding source, funding amount, regulations, etc.
- Identify program-level improvements for TxDOT
  - Aim to improve performance measures adopted in the MOU
  - Leverage the self-audit process and QA/QC for continued improvement

# 5. Common NEPA Challenges

This section includes scenarios that illustrate common NEPA challenges faced by TxDOT management. Each presents a situation and asks you to think about how you would respond.

1. Project-level disruptions
2. Program-level disruptions
3. Not following NEPA to the letter

# 5. Common NEPA Challenges

## Project-level disruptions

When you check in on the status of a project, the design engineer tells you that everything is going smoothly. She shows you her latest draft of a bridge at a creek crossing. Once she realized that the creek was often dry, she decided to change the bridge bent arrangement from one on each side of the creek to only one in the center of the bed. She is happy to report that this will lower the cost of construction materials without impacting any water resources.

Do you think the change in design will have an impact on the time to complete the NEPA process? When should the engineer notify environmental staff of the change?



*Shoal Creek in Austin, Texas (KUT)*

# 5. Common NEPA Challenges

## Project-level disruptions

This change could introduce an impact to waters and potential wetlands and consequently require permitting. The creek and banks could include archeological resources or important wildlife habitat. Affecting additional resources (or exacerbating existing impacts) may prolong the NEPA process, i.e., impacts to <0.1 acres of jurisdictional waters may be processed under a Nationwide Permit #14 while more than one acre would require a time-consuming Individual Permit. Always notify the environmental coordinator and project team immediately when a design change occurs. Even if a meeting is scheduled in the near future, environmental specialists, consultants, and local government staff are proceeding with their work on a daily basis, so any work on an out-of-date design burdens the scope and schedule.



*Shoal Creek in Austin, Texas (KUT)*

# 5. Common NEPA Challenges

## **Program-level disruptions**

An environmental specialist in your district is retiring after many years as the only staff person with an expertise in biological evaluations. You have hired a new specialist who is very knowledgeable about ecological issues, but s/he has never worked in the infrastructure or NEPA realm before.

How will you ensure that s/he knows how to follow process and documentation requirements? What resources does TxDOT provide for continuous improvement?

# 5. Common NEPA Challenges

## **Program-level disruptions**

Under NEPA assignment, TxDOT is legally responsible for all decisions and documentation made related to the NEPA process. It is essential that staff at every level and tenure can find resources applicable to their responsibilities, and that new staff are provided with quality assistance.

TxDOT provides many tools for training and reference, and all staff should be directed to consult the Environmental Compliance Toolkits for proper project development and evaluation.

If possible, an experienced staff member could be appointed to guide this individual through the NEPA documentation processes. NEPA chats and cross-district coordination can also support new staff as they come to understand the stringent requirements of the NEPA process.

# 5. Common NEPA Challenges

## **Not following NEPA to the letter**

You are preparing to go on a well-deserved month-long vacation. However, you are concerned that an important project will not be ready for your signature before you leave tomorrow. Last week, you reviewed the project's technical memoranda and requested changes to the cultural resources section. You have worked with the cultural resources specialist for many years, and she always produces high quality work. Knowing you are leaving, she and the environmental coordinator have requested your conditional approval of the NEPA document (pending the changes you requested).

Is it okay to give conditional approval when you have provided clear instructions on the needed changes? What else could you do to make sure the project stays on track while you are gone?

# 5. Common NEPA Challenges

## **Not following NEPA to the letter**

Your signature assures approval that the environmental process was done correctly, and the buck stops with you under assignment. Therefore, it is never advisable to grant conditional approval in the NEPA process. Doing so would open TxDOT up to audit findings by the FHWA or discovery during a lawsuit.

If you will be unable to approve and sign the document remotely, identify a person with proper signature authority for the document and communicate the situation to him or her. This person should have the same or higher signature authority than you, such as the ENV Director.

# Wrap Up

- The NEPA process looks at how infrastructure development can occur while minimizing adverse impacts on the natural, cultural, and human environment.
- NEPA is required when any federal money is spent on a project, and state-funded projects have a similar process.
- Assignment of responsibility for environmental decision-making from the FHWA to TxDOT can result in faster project delivery, but TxDOT will need more detailed information along the way to ensure defensible decisions.
- Your role in championing projects and communicating priorities has not changed under NEPA assignment.
- However, your responsibility to accurately and thoroughly ensure all decisions are clearly documented in the administrative record has increased.

# Wrap Up

TxDOT management sets the tone for NEPA compliance under assignment.

- Management should emphasize the shared responsibility for all internal and external stakeholders to ensure legally defensible environmental decision-making so TxDOT can continue to be a ‘best in class’ agency.
- At the beginning of every project, set milestones for project staff to meet.
- Encourage and facilitate continuous communication throughout the project; don’t allow staff to wait until the next project checkpoint to discuss changes.
- Collaboration among environmental, engineering, consulting, and local government team members leads to “hard look” documentation that is consistent with TxDOT’s format requirements and a strong, legally defensible administrative record.



# Consultants Quiz

## Questions

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**1. True or False:**

*Under NEPA Assignment, TxDOT has increased expectations for the analysis and documentation performed for all project types.*

- A. True—federal agencies have noted that TxDOT’s documentation needed substantial improvement.
- B. True—TxDOT must have legally sufficient files to defend against a legal challenge.
- C. False—NEPA Assignment is supposed to shorten the review process.
- D. False—TxDOT wants to streamline the process.

**2. Which of the following are included in the administrative record?**

- A. The draft decisional document
- B. An e-mail between yourself and the Environmental Coordinator regarding the project
- C. Any internal TxDOT Checklists
- D. Public meeting comments about your technical studies
- E. A and C
- F. All of the above

**3. TxDOT’s engineers have just informed the Environmental Coordinators that they will be making a design change to a project that you are working on, but the changes should not affect any key aspects of the environmental analysis. What is the Environmental Coordinator’s responsibility in this situation?**

- A. Take no additional action. They should respect that the engineers know what they’re talking about and direct you to continue your preparation of the draft EA.
- B. Inform you (the consultant) about the design change.
- C. Inform you and any local government representatives.
- D. Inform you, any local government representatives, and (if public involvement has taken place) any elected official in their jurisdiction.

**4. Which of the following consultant roles have changed due to NEPA Assignment?**

- A. Staying informed and in communication with your clients
- B. Preparing the technical reports
- C. Choosing whether or not to have subcontractors
- D. None of the above

**5. You find a previously unidentified constraint after you've already started your environmental analysis as a CE. To determine whether you should change the project class of action from a CE to an EIS, which of the following factors should you consider?**

- A. If the constraint is an archeological site, remember that it will be difficult to avoid, given the typical extent of such sites.
- B. If the constraint is a previously unknown endangered species and the impact could result in a Jeopardy determination.
- C. Even if you would typically transition from a CE to an EA before reaching an EIS, if this constraint is accompanied by significant public controversy, it merits an EIS.
- D. If you've already started the project as a CE, you must finish the CE process before moving up to either an EA or EIS.
- E. A, B, and C
- F. All of the above

**6. True or False:**

*TxDOT's toolkits and handbooks on the ENV website should be downloaded and saved in a library on my computer's desktop or our company server.*

- A. True—doing so will make you more efficient and the information on the website rarely changes.
- B. True—doing so would allow me to keep working if TxDOT's website goes down.
- C. False—the most recent documentation in the toolkits and handbooks should always be obtained from the ENV website.
- D. False—it is against TxDOT's rules for consultants to store copies of ENV materials without permission.

**7. True or False:**

*Your technical memorandum was reviewed for quality control by TxDOT, and they had a couple of suggestions for you to consider. After you made improvements, TxDOT approved the document and submitted it into the administrative record. Your original draft technical memorandum could be examined in court, if a suit is filed.*

- A. True—any work I complete can be examined in court.
- B. True—TxDOT found issues in the draft document.
- C. True—only documents in the administrative record are examined in court.
- D. False—working drafts do not have to be included in the administrative record, which are the only documents examined in court.

**8. True or False.**

*Consultants are urged to attend the project kick-off meeting or the scoping meeting to establish project timelines.*

- A. True—consultants are responsible for meeting schedule deadlines established to support engineering goals for project letting.
- B. True—consultants often create the project timelines for the project team.
- C. False—TxDOT establishes the timelines for the team beforehand and the timelines cannot be changed.
- D. False—timelines are better discussed after the scoping is complete.

**9. The Environmental Coordinator informs you that the project design has changed. When considering the changes, your role is to consider all of the following, except:**

- A. Additional impacts on natural, cultural, recreational, historic, or other resources
- B. The changes to team member vacation schedules.
- C. Additional impacts on air quality, noise levels, or water quality
- D. Whether the size of the study area has increased or decreased
- E. Whether the change affects the project class of action

**10. Your federally funded project crosses through a golden-cheeked warbler habitat. Which of the following regulatory permitting processes applies?**

- A. Section 4(f)
- B. Section 404
- C. Section 106
- D. Section 7

**ADDITIONAL OR ALTERNATIVE QUESTION**

**11. For the past four years, you have been working on a controversial project for TxDOT. Upon TxDOT's issuance of a FONSI, an environmental group sues TxDOT to stop the project. You hear the news from a colleague in your office but have not yet been contacted by TxDOT. You should:**

- A. Start throwing away as many files related to the project as you can find.
- B. Delete all draft and working files related to the project from your company server.
- C. Begin looking for files that should have gone into the administrative record.
- D. Do not discard or delete any files or paperwork. Wait for TxDOT's notification and instructions.

## Answers

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**1. Answer: B**

**True or False:**

*Under NEPA Assignment, TxDOT has increased expectations for the analysis and documentation performed for all project types.*

- A. True—federal agencies have noted that TxDOT’s documentation needed substantial improvement.
- B. True—TxDOT must have legally sufficient files to defend against a legal challenge.**
- C. False—NEPA Assignment is supposed to shorten the review process.
- D. False—TxDOT wants to streamline the process.

**2. Answer: F**

**Which of the following are included in the administrative record?**

- A. The draft decisional document
- B. An e-mail between yourself and the Environmental Coordinator regarding the project
- C. Any internal TxDOT Checklists
- D. Public meeting comments about your technical studies
- E. A and C
- F. All of the above**

**3. Answer: D**

**TxDOT’s engineers have just informed the Environmental Coordinators that they will be making a design change to a project that you are working on, but the changes should not affect any key aspects of the environmental analysis. What is the Environmental Coordinator’s responsibility in this situation?**

- A. Take no additional action. They should respect that the engineers know what they’re talking about and direct you to continue your preparation of the draft EA.
- B. Inform you (the consultant) about the design change.
- C. Inform you and any local government representatives.
- D. Inform you, any local government representatives, and (if public involvement has taken place) any elected official in their jurisdiction.**

**4. Answer: D**

**Which of the following consultant roles have changed due to NEPA Assignment?**

- A. Staying informed and in communication with your clients
- B. Preparing the technical reports
- C. Choosing whether or not to have subcontractors
- D. None of the above**

5. Answer: E

**You find a previously unidentified constraint after you've already started your environmental analysis as a CE. To determine whether you should change the project class of action from a CE to an EIS, which of the following factors should you consider?**

- A. If the constraint is an archeological site, remember that it will be difficult to avoid, given the typical extent of such sites.
- B. If the constraint is a previously unknown endangered species and the impact could result in a Jeopardy determination.
- C. Even if you would typically transition from a CE to an EA before reaching an EIS, if this constraint is accompanied by significant public controversy, it merits an EIS.
- D. If you've already started the project as a CE, you must finish the CE process before moving up to either an EA or EIS.
- E. A, B, and C**
- F. All of the above

6. Answer: C

**True or False:**

*TxDOT's toolkits and handbooks on the ENV website should be downloaded and saved in a library on my computer's desktop or our company server.*

- A. True—doing so will make you more efficient and the information on the website rarely changes.
- B. True—doing so would allow me to keep working if TxDOT's website goes down.
- C. False—the most recent documentation in the toolkits and handbooks should always be obtained from the ENV website.**
- D. False—it is against TxDOT's rules for consultants to store copies of ENV materials without permission.

7. Answer: D

**True or False:**

*Your technical memorandum was reviewed for quality control by TxDOT, and they had a couple of suggestions for you to consider. After you made improvements, TxDOT approved the document and submitted it into the administrative record. Your original draft technical memorandum could be examined in court, if a suit is filed.*

- A. True—any work I complete can be examined in court.
- B. True—TxDOT found issues in the draft document.
- C. True—only documents in the administrative record are examined in court.
- D. False—working drafts do not have to be included in the administrative record, which are the only documents examined in court.**

**8. Answer: A**

**True or False.**

*Consultants are urged to attend the project kick-off meeting or the scoping meeting to establish project timelines.*

- A. True—consultants are responsible for meeting schedule deadlines established to support engineering goals for project letting.
- B. True—consultants often create the project timelines for the project team.
- C. False—TxDOT establishes the timelines for the team beforehand and the timelines cannot be changed.
- D. False—timelines are better discussed after the scoping is complete.

**9. Answer: B**

**The Environmental Coordinator informs you that the project design has changed. When considering the changes, your role is to consider all of the following, except:**

- A. Additional impacts on natural, cultural, recreational, historic, or other resources
- B. The changes to team member vacation schedules.
- C. Additional impacts on air quality, noise levels, or water quality
- D. Whether the size of the study area has increased or decreased
- E. Whether the change affects the project class of action

**10. Answer: D**

**Your federally funded project crosses through a golden-cheeked warbler habitat. Which of the following regulatory permitting processes applies?**

- A. Section 4(f)
- B. Section 404
- C. Section 106
- D. Section 7

**ADDITIONAL OR ALTERNATIVE QUESTION**

**11. Answer: D**

**For the past four years, you have been working on a controversial project for TxDOT. Upon TxDOT's issuance of a FONSI, an environmental group sues TxDOT to stop the project. You hear the news from a colleague in your office but have not yet been contacted by TxDOT. You should:**

- A. Start throwing away as many files related to the project as you can find.
- B. Delete all draft and working files related to the project from your company server.
- C. Begin looking for files that should have gone into the administrative record.
- D. Do not discard or delete any files or paperwork. Wait for TxDOT's notification and instructions.

# Engineers Quiz

## Questions

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**1. True or False:**

*The NEPA process is only required when federal money is being used.*

- A. False—NEPA applies when any public funding is used.
- B. True—environmental documentation is not necessary for state-funded projects.
- C. True—however, Texas statutes require an environmental process similar to NEPA if state funds are used.
- D. False—the NEPA process is required for every TxDOT project and it is not related to the source of project funding.

**2. Which of these is a product of the NEPA process?**

- A. A record of personal notes on the project
- B. An administrative record showing that decisions were made according to the NEPA process
- C. An environmental decision, such as a CE determination, FONSI, or ROD
- D. A & C
- E. B & C
- F. A, B & C

**3. True or False:**

*As an engineer, I do not need to be concerned about the source of a project's funding.*

- A. True—funding sources are managed and handled by the Finance Division within TxDOT. The Finance Division will coordinate with the Environmental Affairs Division on funding and NEPA-related issues.
- B. True—it is the Environmental Coordinators' responsibility to track project funding. Although I may provide information to the Environmental Coordinator about a project's funding, I can do so at my discretion.
- C. False—the amount or source of funding can change a project's environmental classification under NEPA, as well as its timeline to completion.
- D. False—I am responsible for procuring funding for my projects. It is the Environmental Coordinator's job to keep a record of what I am doing.

**4. Is the following statement true or false: "It would be helpful to download the toolkits and handbooks on the ENV website and have my own library on my computer's desktop."**

- A. False—the most up-to-date information in the toolkits and handbooks should always be freshly downloaded from TxDOT ENV's website.
- B. True—doing so makes me more efficient and changes to the information on the website are always announced.
- C. True—doing so would allow me to keep working, if TxDOT's website ever goes down.
- D. False—it is against TxDOT rules to download this information and keep it on my desktop.

5. **You are working on a project that is being processed as a CE. For which of these changes should you alert the Environmental Coordinator?**
- A. A change in the location of bridge bents across a creek
  - B. The addition of an edge clip to a project previously sited in the existing right-of-way
  - C. Identification of the need for a new drainage easement
  - D. B & C only
  - E. All of the above
  - F. None of the above
6. **Which is NOT part of conducting an EA?**
- A. Analysis of alternatives
  - B. Determining whether an EIS is required
  - C. Determining whether a CE is required
  - D. Determining a FONSI
  - E. None of the above
7. **A new roadway facility is planned through a land parcel that is undeveloped. Upon conducting a windshield review of the site, you realize that kids are playing baseball on a parcel of land that will become future right-of-way. Based upon the ground conditions, this activity appears to be a common occurrence. What should you do?**
- A. Ignore it. Only a park with an official sign or that shows up on a map is protected by Section 4(f).
  - B. Consult with the project's Environmental Coordinator before continuing with plan development
  - C. Continue with the project design, since the residents and local officials strongly support the project and are unlikely to protest the parcel's acquisition for right-of-way
  - D. Realize that you might be facing a Section 4(f) issue, if the alignment impacts this site. Begin design work on the next best alternative. You will inform the Environmental Coordinator of the switch at a project meeting scheduled in a couple of months.
8. **True or False:**
- In the event of litigation, you will have an opportunity to support and defend your decision-making process.*
- A. True—there will be a hearing in front of a jury and you will have an opportunity to explain to them the logic behind your decisions.
  - B. False—engineers are not responsible for decision-making under NEPA, but you should offer to support the Environmental Coordinators who created the problem.
  - C. True—you will be required to submit a new brief outlining your decision-making process once the litigation has begun. This brief will give you the opportunity to better explain and clarify what you did and the reasons why you did it.
  - D. False—a judge will rely solely on the existing administrative record.

**9. What should the team do at the beginning of every EA or EIS?**

- A. Identify the alignment of the technically preferred alternative.
- B. Hold a kick-off meeting.
- C. Establish communication protocols between TxDOT staff (environmental coordinators, engineers, District Engineers or Administrators, and ENV), consultants, and local government (staff and election officials).
- D. Collect preliminary information and visit the proposed site.
- E. All of the above
- F. Only B, C, and D

**10. Which of these is NOT true about establishing Purpose and Need (P&N) for a project?**

- A. The P&N is the basis upon which alternatives are proposed for analysis.
- B. A very narrow P&N will speed up project delivery.
- C. A very broad P&N will protect you in almost any contingency.
- D. All of the above are true.
- E. None of the above is true.

**11. Whose responsibility is it to build a sound administrative record that will withstand legal challenge under NEPA Assignment?**

- A. The environmental specialist
- B. The engineering team
- C. The public involvement specialist
- D. Outside consultants
- E. All of the above

## Answers

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### 1. Answer: C

#### True or False:

*The NEPA process is only required when federal money is being used.*

- A. False—NEPA applies when any public funding is used.
- B. True—environmental documentation is not necessary for state-funded projects.
- C. True—however, Texas statutes require an environmental process similar to NEPA if state funds are used.
- D. False—the NEPA process is required for every TxDOT project and it is not related to the source of project funding.

### 2. Answer: E

#### Which of these is a product of the NEPA process?

- A. A record of personal notes on the project
- B. An administrative record showing that decisions were made according to the NEPA process
- C. An environmental decision, such as a CE determination, FONSI, or ROD
- D. A & C
- E. B & C
- F. A, B & C

### 3. Answer: C

#### True or False:

*As an engineer, I do not need to be concerned about the source of a project's funding.*

- A. True—funding sources are managed and handled by the Finance Division within TxDOT. The Finance Division will coordinate with the Environmental Affairs Division on funding and NEPA-related issues.
- B. True—it is the Environmental Coordinators' responsibility to track project funding. Although I may provide information to the Environmental Coordinator about a project's funding, I can do so at my discretion.
- C. False—the amount or source of funding can change a project's environmental classification under NEPA, as well as its timeline to completion.
- D. False—I am responsible for procuring funding for my projects. It is the Environmental Coordinator's job to keep a record of what I am doing.

**4. Answer: A**

**Is the following statement true or false: "It would be helpful to download the toolkits and handbooks on the ENV website and have my own library on my computer's desktop."**

- A. False—the most up-to-date information in the toolkits and handbooks should always be freshly downloaded from TxDOT ENV's website.**
- B. True—doing so makes me more efficient and changes to the information on the website are always announced.
- C. True—doing so would allow me to keep working, if TxDOT's website ever goes down.
- D. False—it is against TxDOT rules to download this information and keep it on my desktop.

**5. Answer: E**

**You are working on a project that is being processed as a CE. For which of these changes should you alert the Environmental Coordinator?**

- A. A change in the location of bridge bents across a creek
- B. The addition of an edge clip to a project previously sited in the existing right-of-way
- C. Identification of the need for a new drainage easement
- D. B & C only
- E. All of the above**
- F. None of the above

**6. Answer: C**

**Which is NOT part of conducting an EA?**

- A. Analysis of alternatives
- B. Determining whether an EIS is required
- C. Determining whether a CE is required**
- D. Determining a FONSI
- E. None of the above

**7. Answer: B**

**A new roadway facility is planned through a land parcel that is undeveloped. Upon conducting a windshield review of the site, you realize that kids are playing baseball on a parcel of land that will become future right-of-way. Based upon the ground conditions, this activity appears to be a common occurrence. What should you do?**

- A. Ignore it. Only a park with an official sign or that shows up on a map is protected by Section 4(f).
- B. Consult with the project's Environmental Coordinator before continuing with plan development**
- C. Continue with the project design, since the residents and local officials strongly support the project and are unlikely to protest the parcel's acquisition for right-of-way
- D. Realize that you might be facing a Section 4(f) issue, if the alignment impacts this site. Begin design work on the next best alternative. You will inform the Environmental Coordinator of the switch at a project meeting scheduled in a couple of months.

**8. Answer: D**

**True or False:**

*In the event of litigation, you will have an opportunity to support and defend your decision-making process.*

- A. True—there will be a hearing in front of a jury and you will have an opportunity to explain to them the logic behind your decisions.
- B. False—engineers are not responsible for decision-making under NEPA, but you should offer to support the Environmental Coordinators who created the problem.
- C. True—you will be required to submit a new brief outlining your decision-making process once the litigation has begun. This brief will give you the opportunity to better explain and clarify what you did and the reasons why you did it.
- D. False—a judge will rely solely on the existing administrative record.**

**9. Answer: F**

**What should the team do at the beginning of every EA or EIS?**

- A. Identify the alignment of the technically preferred alternative.
- B. Hold a kick-off meeting.
- C. Establish communication protocols between TxDOT staff (environmental coordinators, engineers, District Engineers or Administrators, and ENV), consultants, and local government (staff and election officials).
- D. Collect preliminary information and visit the proposed site.
- E. All of the above
- F. Only B, C, and D**

**10. Answer: B**

**Which of these is NOT true about establishing Purpose and Need (P&N) for a project?**

- A. The P&N is the basis upon which alternatives are proposed for analysis.
- B. A very narrow P&N will speed up project delivery.
- C. A very broad P&N will protect you in almost any contingency.
- D. All of the above are true.
- E. None of the above is true.

**11. Answer: E**

**Whose responsibility is it to build a sound administrative record that will withstand legal challenge under NEPA Assignment?**

- A. The environmental specialist
- B. The engineering team
- C. The public involvement specialist
- D. Outside consultants
- E. All of the above



# Environmental Specialists Quiz

## Questions

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**1. True or False:**

*An upcoming project is in the regional Transportation Improvement Plan (TIP), but receives only \$10,000 of federal funding, despite having a \$2 million price tag. This project will need to undergo the NEPA process.*

- A. True—any project in the TIP must undergo the NEPA process.
- B. True—any project with federal funding must undergo the NEPA process.
- C. False—all projects in the Metropolitan Transportation Plan need to undergo the NEPA process.
- D. False—only projects that receive more than \$10,000 need to undergo the NEPA process.

**2. Which of the following are included in the administrative record?**

- A. The draft decisional document
- B. An e-mail between yourself and a consultant regarding the project
- C. The QA/QC Administrative Review Checklist
- D. Public meeting comments about your technical studies
- E. A and C
- F. All of the above
- G. None of the above

**3. True or False:**

*If the resource agencies (like USACE) feel TxDOT is not working well with the NEPA Assignment, the FHWA can pull the responsibilities away from TxDOT.*

**4. Which of the following Environmental Specialists roles have changed due to NEPA Assignment?**

- A. Determining class of action
- B. Performing project scoping
- C. Consulting with resource agencies
- D. Approving CEs
- E. A and C
- F. None of the above

**5. True or False:**

*If you are uncertain whether or not your project scope needs to involve U.S. Fish and Wildlife to obtain a Section 7 permit, you can call the FHWA for guidance.*

**6. True or False:**

*TxDOT's toolkits and handbooks on the ENV website should be downloaded and saved in a library on my computer's desktop or a TxDOT server.*

- A. True—doing so will make you more efficient and the information on the website rarely changes without notice.
- B. True—doing so would allow me to keep working, if TxDOT's website goes down.
- C. False—the most recent versions of documentation formats in the toolkits and handbooks are available on the ENV website and any new changes may not be announced.
- D. False—it is against TxDOT's rules to download the information onto my desktop.

**7. True or False:**

*Your draft environmental document was reviewed for quality control by the core team, and they had a couple of suggestions for you to consider. After you made improvements, the core team signed off on the Environmental Document Review Checklist and submitted it into the administrative record. The original draft environmental document will be examined in court, if a suit is filed.*

- A. True—any completed work can be examined in court.
- B. True—the core team found issues in the draft document.
- C. False—working drafts do not have to be included in the administrative record, and only documents included in the administrative record are examined in court.
- D. False—only the FONSI or the ROD will be examined.

**8. Which rank has signing authority for each type of environmental document classification?**

| Who has signing authority for this document? | Answers |
|----------------------------------------------|---------|
| c-list Categorical Exclusion                 |         |
| d-list Categorical Exclusion                 |         |
| Environmental Assessment                     |         |
| Environmental Impact Statement               |         |

**9. Your project has changed, so you need to fill out the Project Scope Amendment Form. When considering the changes, you should consider all of the following, except:**

- A. Whether the source of funding has changed, which can change the need to undergo the NEPA process.
- B. Whether the amount of state funding has decreased, which can change the type of CE required.
- C. Whether the amount of federal funding has changed, which can change the CE classifications.
- D. Whether there are now more or fewer impacts, which can change the project class of action.

**10. Your federally funded project crosses through a golden-cheeked warbler habitat. Which of the following regulatory permitting processes applies?**

- A. Section 4(f)
- B. Section 404
- C. Section 106
- D. Section 7

## Answers

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**1. Answer: B**

**True or False:**

*An upcoming project is in the regional Transportation Improvement Plan (TIP), but receives only \$10,000 of federal funding, despite having a \$2 million price tag. This project will need to undergo the NEPA process.*

- A. True—any project in the TIP must undergo the NEPA process.
- B. True—any project with federal funding must undergo the NEPA process.**
- C. False—all projects in the Metropolitan Transportation Plan need to undergo the NEPA process.
- D. False—only projects that receive more than \$10,000 need to undergo the NEPA process.

**2. Answer: F**

**Which of the following are included in the administrative record?**

- A. The draft decisional document
- B. An e-mail between yourself and a consultant regarding the project
- C. The QA/QC Administrative Review Checklist
- D. Public meeting comments about your technical studies
- E. A and C
- F. All of the above**
- G. None of the above

**3. Answer: True**

**True or False:**

*If the resource agencies (like USACE) feel TxDOT is not working well with the NEPA Assignment, the FHWA can pull the responsibilities away from TxDOT.*

**4. Answer: E**

**Which of the following Environmental Specialists roles have changed due to NEPA Assignment?**

- A. Determining class of action
- B. Performing project scoping
- C. Consulting with resource agencies
- D. Approving CEs
- E. A and C**
- F. None of the above

5. Answer: False

**True or False:**

*If you are uncertain whether or not your project scope needs to involve U.S. Fish and Wildlife to obtain a Section 7 permit, you can call the FHWA for guidance.*

6. Answer: C

**True or False:**

*TxDOT's toolkits and handbooks on the ENV website should be downloaded and saved in a library on my computer's desktop or a TxDOT server.*

- A. True—doing so will make you more efficient and the information on the website rarely changes without notice.
- B. True—doing so would allow me to keep working, if TxDOT's website goes down.
- C. False—the most recent versions of documentation formats in the toolkits and handbooks are available on the ENV website and any new changes may not be announced.
- D. False—it is against TxDOT's rules to download the information onto my desktop.

7. Answer: C

**True or False:**

*Your draft environmental document was reviewed for quality control by the core team, and they had a couple of suggestions for you to consider. After you made improvements, the core team signed off on the Environmental Document Review Checklist and submitted it into the administrative record. The original draft environmental document will be examined in court, if a suit is filed.*

- A. True—any completed work can be examined in court.
- B. True—the core team found issues in the draft document.
- C. False—working drafts do not have to be included in the administrative record, and only documents included in the administrative record are examined in court.
- D. False—only the FONSI or the ROD will be examined.

8. Which rank has signing authority for each type of environmental document classification?

| Who has signing authority for this document? | Answers                                                                 |
|----------------------------------------------|-------------------------------------------------------------------------|
| c-list Categorical Exclusion                 | Environmental Specialist                                                |
| d-list Categorical Exclusion                 | District Engineer or District Administrator                             |
| Environmental Assessment                     | Director Environmental Affairs Division                                 |
| Environmental Impact Statement               | Director of Environmental Affairs Division and any Cooperating Agencies |

**9. Answer: B**

**Your project has changed, so you need to fill out the Project Scope Amendment Form. When considering the changes, you should consider all of the following, except:**

- A. Whether the source of funding has changed, which can change the need to undergo the NEPA process.
- B. Whether the amount of state funding has decreased, which can change the type of CE required.**
- C. Whether the amount of federal funding has changed, which can change the CE classifications.
- D. Whether there are now more or fewer impacts, which can change the project class of action.

**10. Answer: D**

**Your federally funded project crosses through a golden-cheeked warbler habitat. Which of the following regulatory permitting processes applies?**

- A. Section 4(f)
- B. Section 404
- C. Section 106
- D. Section 7**

# Local Government Quiz

## Questions

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**1. True or False:**

*An upcoming project is in the regional Transportation Improvement Plan (TIP), but receives only \$10,000 of federal funding, despite having a \$2 million price tag. This project will need to undergo the NEPA process.*

- A. True—any project in the TIP must undergo the NEPA process.
- B. True—any project with federal funding must undergo the NEPA process.
- C. False—all projects in the Metropolitan Transportation Plan need to undergo the NEPA process.
- D. False—only projects that receive more than \$10,000 need to undergo the NEPA process.

**2. Which of the following are included in the administrative record?**

- A. The draft decisional document
- B. An e-mail between yourself and a consultant regarding the project
- C. Any QA/QC Checklists
- D. Public meeting comments about your technical studies
- E. A and C
- F. All of the above
- G. None of the above

**3. Your agency has agreed to be the project sponsor for a proposed roadway improvement. The engineers tell you that they must make a design change, but this change should not affect any key aspects of the environmental analysis. Other than determining if the change will alter the NEPA process, what is your responsibility in this situation?**

- A. Take no additional action. Respect that the engineers understand the process and continue with the preparation of your draft EA.
- B. Inform the District Environmental Coordinator about the design change.
- C. Inform the District Environmental Coordinator and any consultants you've contracted.
- D. Inform the District Environmental Coordinator, any consultants you've contracted, and (if public involvement has taken place) any elected official in your jurisdiction.

**4. Which of the following local government roles have changed due to NEPA Assignment?**

- A. Determining class of action
- B. Project scoping
- C. The process of becoming a project sponsor
- D. Approving CEs
- E. A and C
- F. None of the above
- G. All of the above

**5. True or False:**

*TxDOT's toolkits and handbooks on the ENV website should be downloaded and saved in a library on my computer's desktop or our company server.*

- A. True—doing so will make you more efficient and the information on the website rarely changes without notice.
- B. True—doing so would allow me to keep working if TxDOT's website goes down.
- C. False—the most recent versions of documentation formats in the toolkits and handbooks are available on the ENV website and any new changes may not be announced.
- D. False—it is against TxDOT rules to download the information onto my desktop.

**6. True or False:**

*Your agency has become the project sponsor for an EA. Your draft environmental document was reviewed for quality control by the District, and they had a couple of suggestions for you to consider. After you made improvements, the District approved the document and submitted it into the administrative record. The original draft environmental document could be examined in court, if a suit is filed.*

- A. True—any completed work can be examined in court.
- B. True—the core team found issues in the draft document.
- C. False— working drafts do not have to be included in the administrative record, and only documents included in the administrative record are examined in court.
- D. False—TxDOT issued the FONSI, so the litigation is their problem.

**7. Which rank has signing authority for each type of environmental document?**

| Who has signing authority for this document? | Answers |
|----------------------------------------------|---------|
| c-list Categorical Exclusion                 |         |
| d-list Categorical Exclusion                 |         |
| Environmental Assessment                     |         |
| Environmental Impact Statement               |         |

**8. Your federally funded project crosses through a golden-cheeked warbler habitat. Which of the following regulatory permitting processes applies?**

- A. Section 4(f) of the Department of Transportation Act
- B. Section 404 of the Clean Water Act
- C. Section 106 of the National Historic Preservation Act
- D. Section 7 of the Endangered Species Act

9. For the past four years, you have been working on a controversial project with TxDOT. Upon TxDOT's issuance of a FONSI, an environmental group sues TxDOT to stop the project. You hear the news from a colleague in your office but have not yet been contacted by TxDOT. You should:
- A. Start throwing away as many files related to the project as you can find.
  - B. Delete all draft and working files related to the project from your agency server.
  - C. Begin looking for files that should have gone into the administrative record.
  - D. Do not discard or delete any files or paperwork. Wait for TxDOT's notification and instructions.

## Answers

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**1. Answer: B**

**True or False:**

*An upcoming project is in the regional Transportation Improvement Plan (TIP), but receives only \$10,000 of federal funding, despite having a \$2 million price tag. This project will need to undergo the NEPA process.*

- A. True—any project in the TIP must undergo the NEPA process.
- B. True—any project with federal funding must undergo the NEPA process.**
- C. False—all projects in the Metropolitan Transportation Plan need to undergo the NEPA process.
- D. False—only projects that receive more than \$10,000 need to undergo the NEPA process.

**2. Answer: F**

**Which of the following are included in the administrative record?**

- A. The draft decisional document
- B. An e-mail between yourself and a consultant regarding the project
- C. Any QA/QC Checklists
- D. Public meeting comments about your technical studies
- E. A and C
- F. All of the above**
- G. None of the above

**3. Answer: D**

**Your agency has agreed to be the project sponsor for a proposed roadway improvement. The engineers tell you that they must make a design change, but this change should not affect any key aspects of the environmental analysis. Other than determining if the change will alter the NEPA process, what is your responsibility in this situation?**

- A. Take no additional action. Respect that the engineers understand the process and continue with the preparation of your draft EA.
- B. Inform the District Environmental Coordinator about the design change.
- C. Inform the District Environmental Coordinator and any consultants you've contracted.
- D. Inform the District Environmental Coordinator, any consultants you've contracted, and (if public involvement has taken place) any elected official in your jurisdiction.**

4. Answer: F

**Which of the following local government roles have changed due to NEPA Assignment?**

- A. Determining class of action
- B. Project scoping
- C. The process of becoming a project sponsor
- D. Approving CEs
- E. A and C
- F. None of the above
- G. All of the above

5. Answer: C

**True or False:**

*TxDOT's toolkits and handbooks on the ENV website should be downloaded and saved in a library on my computer's desktop or our company server.*

- A. True—doing so will make you more efficient and the information on the website rarely changes without notice.
- B. True—doing so would allow me to keep working if TxDOT's website goes down.
- C. False—the most recent versions of documentation formats in the toolkits and handbooks are available on the ENV website and any new changes may not be announced.
- D. False—it is against TxDOT rules to download the information onto my desktop.

6. Answer: C

**True or False:**

*Your agency has become the project sponsor for an EA. Your draft environmental document was reviewed for quality control by the District, and they had a couple of suggestions for you to consider. After you made improvements, the District approved the document and submitted it into the administrative record. The original draft environmental document could be examined in court, if a suit is filed.*

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- D. False—TxDOT issued the FONSI, so the litigation is their problem.

**7. Which rank has signing authority for each type of environmental document?**

| Who has signing authority for this document? | Answers                                                        |
|----------------------------------------------|----------------------------------------------------------------|
| c-list Categorical Exclusion                 | TxDOT Environmental Affairs Division Director                  |
| d-list Categorical Exclusion                 | District Engineer or District Administrator                    |
| Environmental Assessment                     | District Environmental Specialist                              |
| Environmental Impact Statement               | Director of Environmental Affairs and any Cooperating Agencies |

**8. Answer: D**

**Your federally funded project crosses through a golden-cheeked warbler habitat. Which of the following regulatory permitting processes applies?**

- A. Section 4(f) of the Department of Transportation Act
- B. Section 404 of the Clean Water Act
- C. Section 106 of the National Historic Preservation Act
- D. Section 7 of the Endangered Species Act**

**9. Answer: D**

**For the past four years, you have been working on a controversial project with TxDOT. Upon TxDOT's issuance of a FONSI, an environmental group sues TxDOT to stop the project. You hear the news from a colleague in your office but have not yet been contacted by TxDOT. You should:**

- A. Start throwing away as many files related to the project as you can find.
- B. Delete all draft and working files related to the project from your agency server.
- C. Begin looking for files that should have gone into the administrative record.
- D. Do not discard or delete any files or paperwork. Wait for TxDOT's notification and instructions.**

# Management Quiz

## Questions

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**1. True or False:**

*The NEPA process is only required when federal money is being used.*

- A. False—NEPA applies when any public funding is used.
- B. True—environmental documentation is not necessary for state-funded projects.
- C. True—however, Texas statutes require an environmental process similar to NEPA if state funds are used.
- D. False—the NEPA process is required for every TxDOT project and it is not related to the source of project funding.

**2. Which of these is a product of the NEPA process?**

- A. A record of personal notes on the project
- B. An administrative record showing that decisions were made according to the NEPA process
- C. An environmental decision, such as a CE determination, FONSI, or ROD
- D. A & C
- E. B & C
- F. A, B & C

**3. Which of these is NOT true under NEPA assignment?**

- A. TxDOT cannot ask for help from the FHWA regarding project-level decisions and documentation.
- B. TxDOT is now responsible for government-to-government consultations, including those with Native American tribes.
- C. TxDOT must manage interagency coordination without federal intervention or assistance.
- D. TxDOT can now be sued for NEPA decisions made under Assignment and FHWA will not act on TxDOT's behalf.

**4. Your staff is working on a project that is being processed as a CE. For which of these changes should you require the team to confirm or reassess the project's classification?**

- A. A change in the location of bridge bents across a creek
- B. The addition of an edge clip to a project previously sited in the existing right-of-way
- C. Identification of the need for a new drainage easement
- D. B & C only
- E. All of the above
- F. None of the above

5. Which rank has signing authority for c-list categorical exclusions?
- A. Environmental Specialist
  - B. District Engineer or District Administrator
  - C. Director of Environmental Affairs Division
  - D. B and C
  - E. All of the above
  - F. None of the above
6. Which is the lowest rank with signing authority for d-list categorical exclusions?
- A. Environmental Specialist
  - B. District Engineer or District Administrator
  - C. Director of Environmental Affairs Division
  - D. None of the above
7. Which rank(s) has/have signing authority for environmental assessments?
- A. Environmental Specialist
  - B. District Engineer or District Administrator
  - C. Director of Environmental Affairs Division
  - D. All of the above
  - E. B and C
  - F. None of the above
8. Which rank(s) has/have signing authority for environmental impact statements?
- A. Environmental Specialist
  - B. District Engineer or District Administrator
  - C. Director of Environmental Affairs Division and any cooperating agencies
  - D. All of the above
  - E. B and C
  - F. None of the above
9. True or False: In the event of litigation, you will have an opportunity to support and defend your decision-making process.
- A. True—there will be a hearing in front of a jury and you will have an opportunity to explain to them the logic behind your decisions.
  - B. False—engineers and TxDOT management are not responsible for decision-making under NEPA, but you should offer to support the Environmental Coordinators who created the problem.
  - C. True—you will be required to submit a new brief outlining your decision-making process once the litigation has begun. This brief will give you the opportunity to better explain and clarify what you did and the reasons why you did it.
  - D. False—a judge will rely solely on the existing administrative record.

**10. What should the team do at the beginning of every EA or EIS?**

- A. Hold a kick-off meeting.
- B. Establish communication protocols between TxDOT staff (environmental coordinators, engineers, District Engineers or Administrators, and ENV), consultants, and local governments (staff and election officials).
- C. Collect preliminary information and visit the proposed site.
- D. All of the above
- E. Only A & C

**11. Which of these is NOT true about establishing Purpose and Need (P&N) for a project?**

- A. The P&N is the basis upon which alternatives are proposed for analysis.
- B. A very narrow P&N will speed up project delivery.
- C. A very broad P&N will protect you in almost any contingency.
- D. All of the above are true.
- E. None of the above is true.

**12. Whose responsibility is it to build a sound administrative record that will withstand legal challenge under NEPA Assignment?**

- A. The environmental specialist
- B. The engineering team
- C. The public involvement specialist
- D. Outside consultants
- E. All of the above

## Answers

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**1. Answer: C**

**True or False:**

*The NEPA process is only required when federal money is being used.*

- A. False—NEPA applies when any public funding is used.
- B. True—environmental documentation is not necessary for state-funded projects.
- C. True—however, Texas statutes require an environmental process similar to NEPA if state funds are used.
- D. False—the NEPA process is required for every TxDOT project and it is not related to the source of project funding.

**2. Answer: E**

**Which of these is a product of the NEPA process?**

- A. A record of personal notes on the project
- B. An administrative record showing that decisions were made according to the NEPA process
- C. An environmental decision, such as a CE determination, FONSI, or ROD
- D. A & C
- E. B & C
- F. A, B & C

**3. Answer: B**

**Which of these is NOT true under NEPA assignment?**

- A. TxDOT cannot ask for help from the FHWA regarding project-level decisions and documentation.
- B. TxDOT is now responsible for government-to-government consultations, including those with Native American tribes.
- C. TxDOT must manage interagency coordination without federal intervention or assistance.
- D. TxDOT can now be sued for NEPA decisions made under Assignment and FHWA will not act on TxDOT's behalf.

**4. Answer: E**

**Your staff is working on a project that is being processed as a CE. For which of these changes should you require the team to confirm or reassess the project's classification?**

- A. A change in the location of bridge bents across a creek
- B. The addition of an edge clip to a project previously sited in the existing right-of-way
- C. Identification of the need for a new drainage easement
- D. B & C only
- E. All of the above
- F. None of the above

5. Answer: E

**Which rank has signing authority for c-list categorical exclusions?**

- A. Environmental Specialist
- B. District Engineer or District Administrator
- C. Direct of Environmental Affairs Division
- D. B and C
- E. All of the above
- F. None of the above

6. Answer: B

**Which is the lowest rank with signing authority for d-list categorical exclusions?**

- A. Environmental Specialist
- B. District Engineer or District Administrator
- C. Director of Environmental Affairs Division
- D. None of the above

7. Answer: C

**Which rank(s) has/have signing authority for environmental assessments?**

- A. Environmental Specialist
- B. District Engineer or District Administrator
- C. Director of Environmental Affairs Division
- D. All of the above
- E. B and C
- F. None of the above

8. Answer: C

**Which rank(s) has/have signing authority for environmental impact statements?**

- A. Environmental Specialist
- B. District Engineer or District Administrator
- C. Director of Environmental Affairs Division and any cooperating agencies
- D. All of the above
- E. B and C
- F. None of the above

**9. Answer: D**

**True or False: In the event of litigation, you will have an opportunity to support and defend your decision-making process.**

- A. True—there will be a hearing in front of a jury and you will have an opportunity to explain to them the logic behind your decisions.
- B. False—engineers and TxDOT management are not responsible for decision-making under NEPA, but you should offer to support the Environmental Coordinators who created the problem.
- C. True—you will be required to submit a new brief outlining your decision-making process once the litigation has begun. This brief will give you the opportunity to better explain and clarify what you did and the reasons why you did it.
- D. False—a judge will rely solely on the existing administrative record.

**10. Answer: D**

**What should the team do at the beginning of every EA or EIS?**

- A. Hold a kick-off meeting.
- B. Establish communication protocols between TxDOT staff (environmental coordinators, engineers, District Engineers or Administrators, and ENV), consultants, and local governments (staff and election officials).
- C. Collect preliminary information and visit the proposed site.
- D. All of the above
- E. Only A & C

**11. Answer: B**

**Which of these is NOT true about establishing Purpose and Need (P&N) for a project?**

- A. The P&N is the basis upon which alternatives are proposed for analysis.
- B. A very narrow P&N will speed up project delivery.
- C. A very broad P&N will protect you in almost any contingency.
- D. All of the above are true.
- E. None of the above is true.

**12. Answer: E**

**Whose responsibility is it to build a sound administrative record that will withstand legal challenge under NEPA Assignment?**

- A. The environmental specialist
- B. The engineering team
- C. The public involvement specialist
- D. Outside consultants
- E. All of the above